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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 02–032–3]

RIN 0579–AB48

Importation of Wood Packaging Material

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations for the importation of unmanufactured wood articles to adopt an international standard entitled "Guidelines for Regulating Wood Packaging Material in International Trade" that was approved by the Interim Commission on Phytosanitary Measures of the International Plant Protection Convention on March 15, 2002. The standard calls for wood packaging material to be either heat treated or fumigated with methyl bromide, in accordance with the Guidelines, and marked with an approved international mark certifying treatment. This change will affect all persons using wood packaging material in connection with importing goods into the United States.

EFFECTIVE DATE: September 16, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. William Aley, Senior Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–5057.

SUPPLEMENTARY INFORMATION:

Background

Logs, lumber, and other unmanufactured wood articles imported into the United States pose a significant hazard of introducing plant pests, including pathogens, detrimental to agriculture and to natural, cultivated, and urban forest resources. The regulations in 7 CFR 319.40–1 through 319.40–11 (referred to below as the regulations) contain provisions to mitigate plant pest risk presented by the importation of logs, lumber, or other unmanufactured wood articles.

The regulations restrict the importation of many types of wood articles, including wooden packaging material such as pallets, crates, boxes, and pieces of wood used to support or brace cargo. The regulations currently refer to these types of wood packaging material as solid wood packing material (SWPM), defined as "[w]ood packing materials other than loose wood packing materials, used or for use with cargo to prevent damage, including, but not limited to, dunnage, crating, pallets, packing blocks, drums, cases, and skids." Introductions into the United States of exotic plant pests such as the pine shoot beetle *Tomicus piniperda* (Scolytidae) and the Asian longhorned beetle *Anaplophora glabripennis* (Cerambycidae) have been linked to the importation of SWPM. These and other plant pests that are carried by some imported SWPM pose a serious threat to U.S. agriculture and to natural, cultivated, and urban forests.

Beyond the threat to the United States, the introduction of pests associated with SWPM is a worldwide problem. Because SWPM is very often reused, recycled or remanufactured, the true origin of any piece of SWPM is difficult to determine and thus its phytosanitary status cannot be ascertained. This often precludes national plant protection organizations from conducting useful specific risk analyses focused on the pests associated with SWPM of a particular type or place of origin, and imposing particular mitigation measures based on the results of such analysis. For this reason, there is a need to develop globally accepted measures that may be applied to SWPM by all countries to practically eliminate the risk for most quarantine pests and significantly reduce the risk from other pests that may be associated with the SWPM. In the case of phytosanitary standards, the international standard-setting organization is the International Plant Protection Convention (IPPC).

In a proposed rule published in the **Federal Register** on May 20, 2003 (68 FR 27480–27491; Docket No. 02–032–2), the Animal and Plant Health Inspection Service (APHIS) proposed to amend the regulations to decrease the risk of SWPM introducing plant pests into the United States by adopting the international phytosanitary standard [1] for wood packaging material (referred to below as the IPPC Guidelines) that was approved by the IPPC on March 15, 2002. We proposed to apply the standard to wood packaging material from all places, including China, and to remove the special provisions for wood packaging material from China in 7 CFR 319.40–5(g) through (k).

The IPPC Guidelines were developed after the IPPC determined that worldwide, the movement of SWPM made of unprocessed raw wood is a pathway for the introduction and spread of a variety of pests (IPPC Guidelines, p. 5). The IPPC Guidelines list the major categories of these pests, and establish a heat treatment and a fumigation treatment determined to be effective against them (IPPC Guidelines, p. 10). We proposed to adopt the IPPC Guidelines because they represent the current international standard determined in 2002 to be necessary and effective for controlling pests in SWPM. The need to adopt the IPPC Guidelines is further supported by analysis of pest interceptions at U.S. ports that show an increase in dangerous pests associated with certain SWPM. This increase in pests was found in SWPM that does not meet the IPPC Guidelines (*e.g.*, SWPM from everywhere except China). There has been a decrease in pests associated with SWPM material from China since we began requiring that material be treated prior to importation.

Another reason to adopt the IPPC Guidelines at this time is that adopting them would simplify and standardize trade requirements. China, Canada, the European Union, and many other countries are preparing to implement the IPPC Guidelines requirements. Given the difficulty of identifying the source of SWPM and the recycling of SWPM in trade, successful reduction of the pest risk posed by SWPM requires

[1] "International Standards for Phytosanitary Measures: Guidelines for Regulating Wood Packaging Material in International Trade," Secretariat of the International Plant Protection Convention, Food and Agriculture Organization of the United Nations, Rome: 2002.

all trading partners to take action on a similar timeline.

Furthermore, adopting a uniform international standard means that U.S. companies will not need to comply with one set of SWPM requirements for goods exported from the United States and another set of requirements for goods imported into the United States. Companies engaged in both import and export would have particular difficulties in ensuring that their SWPM supply chain is sorted and routed to comply with differing requirements for different destinations. After this final rule takes effect, these companies will be able to use SWPM that complies with the Guidelines for both import and export purposes, leveling the trade playing field with regard to SWPM. Using SWPM that has been treated and marked in accordance with the Guidelines will also reduce the practice, common in trade today, of re-treating SWPM immediately prior to its reuse to assure the receiving country that treated SWPM is used with a shipment. This reduction in re-treatment will reduce costs to importers and procedural burdens for national plant protection agencies, and will also reduce unnecessary emissions of methyl bromide associated with such unnecessary re-treatment.

We accepted comments on the proposed rule for 60 days, ending July 21, 2003. We also accepted comments at three public hearings held in Seattle, WA, on June 23, 2003; in Long Beach, CA, on June 25, 2003; and in Washington, DC, on June 27, 2003. During the comment period we received approximately 970 comments on the proposal, including approximately 905 slight variants of a single e-mail form letter. The issues raised in these comments are discussed below.

As a result of our review of comments, we have decided to make the following changes from the proposal in this final rule:

- We are changing the term "solid wood packing material" to "wood packaging material" throughout the regulations; and
- We are excluding from the definition of wood packaging material, and thereby excluding from treatment requirements, pieces of wood that are less than 6 mm (0.24 in) in any dimension, because pieces of wood of this size are too thin to present any significant pest risk.

Comments have also led APHIS to make some changes in our plans and schedule for implementing the final rule. No changes to the text of the rule were necessary in response to these comments. Changes we made to the rule and to our implementation plans are discussed below in detail.

Summary and Analysis of Comments

More than 95 percent of the comments applauded the intent of APHIS to protect United States forest and agricultural resources against the danger represented by pests associated with wood packaging material. However, the same commenters were concerned that the proposed rule would not adequately protect our forests from plant pests like the Asian longhorned beetle and were concerned that the proposal would cause other harm to the environment, namely increased depletion of the ozone layer due to use of methyl bromide as a fumigant. These commenters urged APHIS not to adopt the proposed rule, but to look for alternatives that will fully protect the United States from wood-borne invasive species while not sacrificing the ozone layer. These commenters suggested that one option would be to phase out the use of wood packaging material and replace it with manufactured wood and plastic crates and pallets, which the commenters suggested would be free of pest dangers and could be reused for a long time.

A number of commenters supported adoption of the IPPC Guidelines, but suggested a variety of exemptions for particular articles, or modifications of import clearance procedures, in order to minimize adverse effects of implementing the IPPC Guidelines. Several commenters also suggested that the regulation should be implemented on a delayed basis, or on a scheduled phase-in with several incremental levels, in order to give importers and other businesses time to adjust to the new requirements.

Several commenters made comments about the effectiveness or availability of the fumigation and heat treatments contained in the IPPC Guidelines, or suggested alternative treatments.

Several commenters addressed the international standard mark that we proposed should be placed on every piece of wood packaging material that has been treated in accordance with the regulations. Some of these commenters suggested that it was not practical to apply the mark to all packaging materials, especially materials such as dunnage that are specially cut to support cargo.

APHIS has carefully considered all the comments, suggestions, requests for clarification, and concerns raised by commenters. Several modifications have been made in this final rule in response to the comments. In the next section we provide detailed responses to the issues raised by commenters, and explain the modifications made in response to these comments.

Terminology

Comment: APHIS regulations refer to the materials being regulated as solid wood packing materials (SWPM), but the IPPC Guidelines uses the term wood packaging material (WPM). It would be less confusing if APHIS used the term wood packaging material, since this is the preferred term in international commerce and in the IPPC Guidelines that many other countries are adopting.

Response: We agree, and throughout our regulations we are changing the term solid wood packing materials (SWPM) to wood packaging material (WPM).

In the proposal, APHIS did not use the term "wood packaging material" for two reasons. Our existing regulations have used the alternate term "solid wood packing materials" for more than 8 years, and persons applying our regulations are familiar with the term. Also, in the IPPC Guidelines the term wood packaging material is defined as "Wood or wood products (excluding paper products) used in supporting, protecting or carrying a commodity (includes dunnage)." This definition is broader than the APHIS term solid wood packing material. WPM as defined by the IPPC includes manufactured wood such as plywood, veneer, and fiberboard, as well as loose wood materials such as shavings and excelsior. The IPPC Guidelines then distinguish between types of WPM that should be regulated because they present a risk (*e.g.*, raw wood pallets and dunnage), and types that should not be regulated because they present little risk (*e.g.*, manufactured wood and shavings).

We thought this approach was ungainly when used in regulations, and that it would be better to use a different term (SWPM) that applied only to the types of wooden materials used in packing that we wanted to regulate. Upon further consideration, we agree that the benefits of using the term WPM outweigh the advantages of using the term SWPM. However, while the definition of WPM in our regulations will match the definition used in the IPPC Guidelines, we will also add a definition of *regulated wood packaging material*. The definition of this new term includes only the types of WPM we consider to be regulated articles. The new definition of regulated WPM closely resembles our current definition of SWPM, and reads as follows: "Wood packing materials other than manufactured wood materials, loose

wood packing materials, and wood pieces less than 6 mm (0.24 in) thick in any dimension, that are used or that are for use with cargo to prevent damage, including, but not limited to, dunnage, crating, pallets, packing blocks, drums, cases, and skids." Therefore, in our regulations WPM refers to the type of articles covered by the IPPC Guidelines definition of WPM, and regulated WPM refers to the type of articles that the IPPC Guidelines refer to in their section on "Regulated Wood Packaging Material."

This definition of regulated WPM differs from the existing definition of SWPM in that it explicitly excludes manufactured wood materials, such as fiber board, plywood, whisky and wine barrels, and veneer. APHIS has never regulated such materials, but the definition of SWPM did not make that clear. The definition of regulated WPM also excludes pieces of wood that are less than 6 mm in any dimension. Pieces of wood of this size are excluded because they are too thin to present any significant pest risk, and because the IPPC Guidelines suggest the 6 mm threshold for excluding wood pieces from regulation. This exclusion will exempt from regulation many types of small boxes used to ship fruit or other articles.

Phasing Out WPM in Favor of Manufactured Materials

Comment: APHIS should look for alternatives that will fully protect the United States from wood-borne invasive species while not sacrificing the ozone layer by encouraging methyl bromide fumigation. One such option would be to phase out the use of WPM and replace it with manufactured wood and plastic crates and pallets, which would be free of pest dangers and could be re-used for a long time.

Response: APHIS has considered many alternatives to diminish pest risk from WPM. Many commenters have suggested that APHIS reduce worldwide methyl bromide emissions by relying instead on one of two pest reduction alternatives, either requiring heat treatment of WPM, or banning use of unmanufactured WPM and requiring use of manufactured wood, plastic, metal, or other alternative packing materials.

In keeping with our commitments to the objectives of the Montreal Protocol, APHIS actively cooperates with other agencies and institutions to identify and validate technically and economically feasible alternatives to methyl bromide. Also, as the agency responsible for representing the United States to the International Plant Protection Convention with respect to the international phytosanitary standards established by the IPPC, APHIS will work closely with current initiatives within the IPPC to develop alternative treatments to methyl bromide and will strive to have any validated treatments incorporated into future revisions of the IPPC Guidelines. APHIS will also be working independently to evaluate and consider treatment alternatives to methyl bromide, and communicate this information through the proper channels in IPPC for technical review and approval. Whenever either APHIS independent evaluations or revisions to IPPC Guidelines make such validated alternatives available, APHIS will make the necessary changes to its quarantine regulations and procedures to provide for their use.

A comprehensive review of the IPPC Guidelines is due to be initiated under the IPPC by 2007. The United States intends to participate in, and bring to bear our technical and research expertise on, this review within the IPPC to ensure alternatives are continually examined and given due consideration. The IPPC Guidelines itself recognizes that phosphine and CPI methods are particularly worth revisiting with respect to the availability of data related to the efficacy of these methods in treating target pests for wood packaging material.

Methyl bromide as a class I ozone-depleting substance has been found to cause or contribute significantly to harmful effects on the stratospheric ozone layer and has adverse atmospheric effects substantially greater than those associated with the alternatives of heat treatment of WPM or use of alternative packing materials. Whenever APHIS advises on treatment alternatives, we encourage use of heat treatment or alternative packing materials in preference to methyl bromide fumigation. At present, it appears that manufacturers in many countries, including the European Union and the United States, prefer to use only heat treatment for the WPM they produce. Trends suggest substitution of heat treatment for methyl bromide will continue to grow. However, during development of the IPPC Guidelines some developing nations advised against allowing only heat treatment and not methyl bromide as an allowed treatment on the grounds that the higher cost of heat treatment makes it economically unfeasible for these countries at this time.

Regarding alternative packing materials, the final environmental impact statement (FEIS) concluded (pp. 79–80) that these would achieve the greatest possible reduction in risk from the introduction of pests and pathogens associated with WPM. While heat treating or fumigating WPM are also both highly efficacious in controlling risk, use of alternative packing materials reduces risk even more. The manufacture and use of alternative packing materials also generates only minimal amounts of ozone-depleting chemicals. However, fumigation of WPM with methyl bromide and heat treatment of WPM are currently the most economical means of producing safe packing materials. Alternative packing materials cost much more. In addition to a cost that is currently beyond the reach of exporters in many developing countries, recovery and reuse of alternative packing materials requires a more complex infrastructure than is required by reuse of WPM. Finally, there are some costs associated with the durability of alternative materials. While many metal, plastic, and manufactured wood alternatives are very durable and can be used for more shipments than typical WPM, some alternative packing materials, such as particle board, are limited in their ability to withstand the conditions that routinely occur during transport.

It is difficult to quantitatively compare the costs of requiring alternative packing materials to the benefits that would accrue from their use. The FEIS and the economic analysis for this rule do estimate costs to exporters of using substitute packing materials and compare these to the cost of heat treatment or methyl bromide fumigation. However, we are unable to realistically estimate the benefits that could result using substitute materials. None of the commenters suggested methods or provided data to do such analysis.

APHIS will continue to encourage use of alternative packing materials by exporters for whom they are economically feasible. There is incentive for the shipping industry to contain costs of packing material, and by requiring treatment of WPM, this rule will slightly increase the average cost of WPM. This increase in the cost of WPM may actually provide incentive to some exporters to seek cost-effective alternatives such as corrugated board, veneer, oriented strand board, and plywood.

In choosing among alternatives, APHIS looks for choices that are both technically and economically feasible. Since treated WPM does provide an acceptable level of protection against pests, we believe that it is not necessary to exclude unmanufactured wood from use as packaging material for imported

cargo. Properly treated WPM is a safe packaging material that can be reused many times and that causes minimal environmental impacts when disposed of or recycled.

On the other hand, prohibiting the use of unmanufactured wood as a packaging material would have significant negative consequences in economic and environmental arenas. Wood is often the only packaging material readily and cheaply available (either through domestic production or importation) in developing countries that export basic products without elaborate packaging. The major alternative materials for packaging are processed wood, plastic, and metal. Pallets or crates made from these materials cost from two to four times more than WPM.

Comment: The APHIS proposal is of uncertain effectiveness and will result in damage to the stratospheric ozone layer, and APHIS therefore should adopt a regulation that specifies a deadline by which all incoming packaging must be made from materials other than solid wood or boards. These commenters stated that this strategy would achieve all three national goals at stake in this rule: Accommodating rising trade volumes, protecting forests from exotic pests, and protecting the stratospheric ozone layer.

Several commenters also stated that APHIS should require use of manufactured alternatives to WPM because the cost of these alternative materials is easily offset by the reduction of inspection costs and speeding the movement of cargo through our ports. They stated this would also reduce the necessity for expensive government programs to control invasive species that come in as hitchhikers in solid wood built crates and containers.

A commenter who disagreed with those advocating that APHIS require manufactured alternatives stated that a preference for using these alternate materials is based on flawed and inaccurate arguments that assume that the IPPC Guidelines will result in an increased demand for wood products and thus translate into negative environmental effects. This commenter stated that overall life-cycle impacts show far greater negative environmental impacts from using nonwood substitute materials. Also, the commenter stated that an outright ban on the use of WPM, in favor of substitute materials, without credible and proven scientific justification would be inconsistent with the World Trade Organization agreements.

Response: Please also see the above response. This rule allows, but does not require, methyl bromide use, and also allows use of untreated alternative (manufactured) packing materials, and also offers heat treatment as an alternative to fumigation with methyl bromide. Heat treatment does not generate gases that could cause damage to the stratospheric ozone layer.

The commenters who suggested that the cost of using alternative materials would be offset by the reduction of inspection costs and speeding the movement of cargo did not offer data to support that theory. While inspectors do spend somewhat less time clearing manufactured packing materials compared to clearing WPM, APHIS doubts that the savings would come close to offsetting the costs, because many articles besides WPM must be inspected at ports (such as the regulated articles often packed in WPM). While faster cargo clearance would benefit importers, the value of this benefit is uncertain, and in any event, importers are free to use alternative packing materials if they perceive a benefit in doing so. We also note that importers can also achieve faster cargo clearance and fewer inspections by establishing a history of compliance for their shipments; if their WPM is consistently properly treated and marked, and free from pests of concern, their shipments may be cleared faster.

Regarding the commenter who stated that the rule will not result in an increase in the use of WPM versus alternative materials, we agree. As discussed above, the rule may actually act to increase the number of exporters choosing alternative materials, since the additional cost of treating WPM will bring its total cost closer to the cost of some alternative materials. We also agree with the commenter that overall life-cycle impacts show negative environmental impacts from using nonwood substitute materials, but we do not agree that these would be "far greater" than the environmental impacts from using treated WPM. We have not seen any quantitative data that supports the position that the environmental costs of using nonwood substitutes would likely be greater than those for using WPM. We agree that mandating use of alternative materials would not represent the least restrictive necessary action, and would have adverse effects throughout the international trade economy.

Comment: An adequate assessment of any adverse environmental impacts associated with use of WPM must include a comparison of substitute materials that would take the place of wood-based packaging material. On those terms, the results are crystal clear. By any water quality, air pollution, or energy use environmental measure, wood products are clearly environmental performance leaders. It takes between 33 and 47 percent less energy to produce a wood product than to produce a similar product made from competing materials such as concrete and steel, and producing WPM results in less carbon dioxide emissions.

Response: Alternative packaging materials do have higher production costs than WPM, including greater energy costs. When harvested under careful management, trees can be a replenishable resource, unlike petroleum or metal ores. When WPM has exhausted its useful life, it can be recycled into products like particle board at a lower fiscal and environmental cost than plastic or metal can be recycled. However, the need to treat WPM must be taken into account when assessing the environmental impacts associated with it. While we believe authorizing use of treated WPM is a reasonable balance among pest risk, economic, and environmental concerns, we do not conclude that WPM is the "clear environmental performance leader." For further discussion of this issue, see the section of this document titled "National Environmental Policy Act," and section IV(A)(5) of the FEIS, which states "Wood has certain advantages from the environmental perspective. Renewability gives wood a large advantage over other materials. The manufacture of wood products requires substantially less energy than the production of substitute products. Wood product manufacture results in less greenhouse gas and other air pollutant emissions."

Comment: If WPM were banned in favor of alternative materials, it would not only destroy an industry, it would significantly increase costs to shippers, which would be passed on to consumers. Metal pallets are too expensive and heavy. Plastic pallets, unlike WPM, are not biodegradable, and are a major and toxic fire hazard. More goods are coming into this country than are going out. Most of them are on pallets. Wooden pallets can be disassembled and recycled, if not as pallets then as landscape mulch or wood stove pellets. Pallets made of plastic or metal will begin to pile up in landfills across America. Landfills could expect to realize exponential growth of nonbiodegradable pallets.

Response: We partly agree with this comment, as discussed above. However, a minority of shippers already choose to use alternative pallet materials, which shows that the choice must be economically viable in some

circumstances. We also note that because this rule applies only to articles imported into the United States, neither the rule nor the alternative of requiring alternative materials would destroy the market for WPM produced in the United States. Untreated WPM could still be used in domestic commerce, or in exports to any country that has not implemented the IPPC Guidelines or a similar treatment requirements.

In addition, selection of the available alternate packaging materials does include the continuing use of processed wood. This includes plywood, corrugated packaging materials, etc. These are products of the wood industry that pose comparable disposal and recycling capability to that of WPM. Some are cost-competitive with WPM, and required treatment costs under adoption of the IPPC Guidelines could make the selection of some of these alternate packing materials more favorable to the shipping industry.

Treatment Effectiveness

Comment: The proposed treatment measures, especially methyl bromide fumigation, have not been proven effective against pathogens. While APHIS says that few pathogens are detected on wood packaging, the agency concedes in its draft environmental impact statement (DEIS) and other publications that inspectors have great difficulty detecting pathogens; therefore, it has not been proved that pathogens represent as minor a threat as APHIS now implies. Furthermore, the DEIS associated with this rulemaking states that some deep wood-borers also might not be killed by the proposed treatments. Our concerns about efficacy are heightened by the fact that the IPPC standard does not require debarking the wood before further treatment. Debarking is key to improving the already questionable ability of methyl bromide to penetrate the wood to kill deep wood pests.

Response: The basis for international acceptance of the efficacy provided by the IPPC Guidelines is the review by IPPC member countries of certain reference documents that are now posted in a link from the APHIS Web page at *http://www.aphis.usda.gov/ppq/swp/approved_guideline.html.* Historically, the pest risks of WPM were manageable by inspection when international trade was more limited. All commenters have acknowledged the need for increased protection of wood resources, but there are differences of opinion about the level of protection needed to mitigate pest risks.

Although some may contend that the regulations are overly protective, others are not satisfied with this level of protection. The approach taken by APHIS is to regulate according to demonstrated risk level. The adoption of the IPPC Guidelines would dramatically decrease the pest risk of concern to APHIS posed by importation of WPM. Selection of this regulatory approach does not prevent APHIS from further deliberation on more intensive regulation if the protection measures are determined to be inadequate for specific risks from pests of concern. Enforcement of the IPPC Guidelines could provide a baseline for determining any need for further protective measures.

Comment: The two treatment options allowed under the rule—heat treatment and methyl bromide fumigation—have an unacceptably high rate of failure to stop invasive pests traveling in solid wood packaging. In the DEIS, APHIS itself has questioned the efficacy of heat and methyl bromide treatments.

Response: There are differences of opinion among commenters regarding the effectiveness of treatments in the IPPC Guidelines to eliminate invasive pests in WPM. The DEIS does not question the efficacy of these treatment methods per se, but it does indicate the advantages and limitations of each treatment method to eliminate pest risks. The DEIS does not take a position as to whether the treatments in the IPPC Guidelines will be the ultimate solution or part of the ultimate solution, but the development of additional data about efficacy and pest exclusion for all potential pests and pathogens may lead to further consideration of these phytosanitary regulations by APHIS.

Comment: Instead of the proposed treatments, APHIS should require WPM to be subject to the documented effective treatment for wood products, heat treatment with or without moisture reduction as specified under the APHIS universal treatment option: 71 °C at the center of the material for 75 minutes. This treatment would substantially minimize the threat of introduction of injurious organisms. Until other efficacious wood treatments are sufficiently documented, this heat treatment provides the broadest and safest approach to the wood importation issue.

Response: The proposed treatment requirements for WPM would provide much more protection against pest risk than the current requirement of debarking and apparent freedom from pests. The 71.1 °C treatment was not established with SWPM in mind, but rather as a universal treatment option that would be certain to eliminate pests in all wood materials regardless of their risk level. As the 1995 final rule (60 FR 27666, May 25, 1995) that first established the regulations said, "These universal options employ heat treatment and other conditions for importing logs and lumber not otherwise enterable. These universal options are relatively stringent, because they must eliminate the spectrum of potential plant pests and address risks that have not been characterized. The universal options are designed to give importers a way to import articles that would otherwise be prohibited until detailed plant pest risk assessments are completed. Whenever feasible, importers may choose to employ universal options while plant pest risk assessments and rulemaking are underway to establish less stringent requirements for the articles they wish to import."

Also, as stated in the August 2000, "Pest Risk Assessment for Importation of Solid Wood Packing Materials into the United States," APHIS is preparing a pest risk reduction analysis that will evaluate the effectiveness of various available treatments and potential mitigation alternatives for WPM. If information gathered during development of the pest risk reduction analysis suggests that the stringency of existing WPM treatment requirements should be either strengthened or lessened, APHIS will undertake rulemaking to do so.

Comment: Methyl bromide is ineffective against many deep-wood pathogens and pests because it does not penetrate to the center of thick boards or timbers. Its use cannot be verified at a later date, and it does not prevent reinfestation.

Response: While methyl bromide is ineffective against some deep wood pathogens, and a few deep wood pests, these pathogens and pests usually are not significant pests associated with the WPM pathway. Many treatments cannot be verified at a later date by physical analysis or examination at ports. That is one reason this rule requires marking of treated materials. The marking system, coupled with registration and monitoring/auditing of treatment facilities by national governments, is the means for ensuring treatment has occurred. Finally, while reinfestation of fumigated WPM is possible, the risk is low (beyond the level of hitchhiking pests that might attach to any kind of packaging).

Canada and Mexico

Comment: The current exemptions from the regulations for wood articles from Canada and from Mexican border states should be extended to include WPM that is imported into the United

States from the balance of Mexico. This action would be consistent with the North American Free Trade Agreement (NAFTA) and the North America Plant Protection Organization announcement dated April 25, 2003. It would avoid administrative complexities and the cost of a partial exemption from border States only, as well as avoid the production of additional export pallets from Mexico to the United States.

Response: APHIS took final action on this issue in a final rule titled "Importation of Unmanufactured Wood Articles From Mexico" that was published in the **Federal Register** on August 26, 2004 (69 FR 52409–52419, Docket No. 98–054–3). In that final rule, APHIS amended the regulations to remove the exemption for most unmanufactured wood, including WPM, imported into the United States from Mexican States adjacent to the United States/Mexico border. The only exemption that continues for Mexican border States covers firewood, mesquite wood for cooking, and small, noncommercial packages of unmanufactured wood for personal cooking or personal medicinal purposes. The effect of that change was that all WPM from Mexico will be subject to the same requirements in § 319.40–3(b) that apply to WPM from any place except Canada.

Comment: The United States and Canada must work together to curtail the disproportionate numbers of introductions of forest pests that are occurring in the Great Lakes region. They are far out of proportion to the volume of foreign shipping in that region or to the volume of interceptions by Federal inspectors. It is equally important that APHIS quickly complete the separate rulemaking to close the loophole that allows untreated WPM to enter the country from northern Mexican states.

Response: Please see the response above. APHIS is actively working with the Canadian Food Inspection Agency to curtail pest introductions. Most of these introductions are pests not of Canadian origin that arrive via transshipped materials. We expect their level to decrease as Canada implements its own regulations requiring WPM imported into Canada to be treated in accordance with the IPPC Guidelines. Also, APHIS is currently developing a pest risk assessment for wood from Canada, and if we identify any significant risks that have not been addressed by current regulations, we will take appropriate rulemaking action.

Methyl Bromide—Montreal Protocol

Comment: The proposed use of methyl bromide would violate the spirit and intent of the Montreal Protocol. It would exceed the intent of the quarantine exemption. It is inconsistent with Protocol Decisions that were adopted by the Montreal Protocol parties with the consent of the United States. Decision VI/11 of the Meeting of the Parties to the Montreal Protocol, for instance, states that developed country parties "are urged to refrain from use of methyl bromide and to use non-ozone depleting technologies wherever possible." The U.S. Environmental Protection Agency (EPA) wrote in its comment on the proposed rule regarding wood imports from Mexico (June 11, 1999, 64 FR 31512–31518) that because of the need to honor the Montreal Protocol and protect the ozone layer, "allowing the use of methyl bromide in quarantine treatment of Mexican wood articles where other effective treatments exist would be inconsistent" with Protocol Decisions.

Response: APHIS is committed to finding environmentally acceptable alternative treatments to methyl bromide fumigation. At the current time, methyl bromide is an efficacious and economically feasible quarantine treatment to control pests in WPM, and we have determined that allowing it as an alternative treatment for WPM in the context of this rule will provide the necessary level of pest protection while minimizing impact on the environment given the absence, in many cases, of technically and economically feasible alternatives. This determination is supported by the FEIS, as discussed below in the section titled "National Environmental Policy Act."

As discussed above, APHIS actively cooperates with other agencies and to identify and validate technically and economically feasible alternatives to methyl bromide. APHIS will continue to work cooperatively with the IPPC as APHIS explores alternative treatments to methyl bromide and incorporates validated, economically feasible alternatives into our quarantine regulations.

Comment: The U.S. Department of Agriculture (USDA) estimate that methyl bromide emissions will increase by 5,145 metric tons, increasing total world usage by more than 10 percent, is a vast underestimate because it was based on the assumption that WPM would be fumigated before use. From experience in China, fumigation occurs at port facilities, after goods are packed in raw wood materials. USDA even states in the proposal that most wood packaging fumigation consist of about 35 percent WPM and 65 percent cargo. The USDA FEIS on wood from Mexico predicts a massive increase in methyl bromide use of more than 102,000 tons per year. That would increase current world use for quarantine purposes by 10 times. It would triple total world use of methyl bromide for all purposes. Under these circumstances, USDA has not complied with its obligations to present a rational basis for its proposed action under the National Environmental Policy Act (NEPA), the Plant Protection Act, or the Administrative Procedure Act.

Response: The draft and final EIS projections are based upon ongoing review of actual usage data and observations of activities at Chinese ports by APHIS personnel. The initial usage analyses were based upon the limited available time for exporters and shippers to prepare to treat WPM as required by APHIS in an interim rule published on September 18, 1998 (63 FR 50099–50111, Docket No. 98–087–1). These analyses considered the fumigation of WPM with already loaded cargo rather than fumigation of WPM before loading. Although there was primarily fumigation of WPM with loaded cargo by the exporters and shippers in China initially, this approach to WPM treatments did not continue. Many shippers and exporters from China began fumigating WPM prior to loading, for at least three reasons. The cost savings to the shippers and exporters from less use of methyl bromide in fumigations of WPM prior to loading were substantial. Also, many agricultural commodities lack a tolerance for the bromine residues imparted by fumigation with methyl bromide. Finally, fumigation after loading could make food commodities illegal for human consumption in the United States and could damage certain other commodities (*e.g.*, leather goods and some electronic parts).

Unlike the limited time exporters and shippers in China had to prepare for the September 18, 1998, interim rule, shippers and exporters throughout the world are aware of the IPPC Guidelines and have had time to prepare for these regulations. In addition, the IPPC Guidelines require marking the wood used in WPM, and it is easier and less expensive to treat and mark prior to loading than to unload after treatment to place markings on the treated WPM and then reload. Based upon this, it is reasonable to expect most exporters and shippers to fumigate WPM before loading. The fact that the projection in the FEIS assumes fumigation as the method of treatment for all WPM

indicates that it is actually a high estimate because we know that many developed nations will actually use heat treatment rather than fumigation for compliance with IPPC Guidelines.

We expect fumigation of WPM to decline over time as shippers build a stockpile of treated pallets, which normally can be used for up to 3 years. We also expect heat treatment to substitute for fumigation in some additional locations as more facilities are built.

Comment: The final rule should explain more about the EPA's plans to phase out methyl bromide, particularly its intent to publish a plan and timeline in the **Federal Register** about December 2003.

Response: Since the EPA is continuing to develop its plans and timeline for this issue, APHIS cannot provide conclusive information about them. We suggest that readers interested in the EPA's actions concerning methyl bromide follow EPA publications in the **Federal Register**.

Methyl Bromide—Other Issues

Comment: Methyl bromide fumigation and heat treatment facilities are generally unavailable in many parts of Africa and Indonesia. Rubber exports from these areas have been shipped without risk using WPM treated with Borax as per the Rubber Research Institute of Malaysia No. 122 method, or with a fungicide and insecticide called Xylolit B4.

Response: Neither of these are approved treatments for WPM under APHIS regulations, and neither has been documented to be as effective as methyl bromide and heat treatment against target pests. APHIS is willing to review any scientific data regarding other treatments, and to consider adding treatments that are proven effective. However, when this rule goes into effect we will only accept WPM treated according to the new regulations, which do not authorize borax or insecticide/fungicide treatments. We recognize that some importers may have to make substantial adjustments to their business practices and packing material suppliers to comply with the regulations, but we believe the pest risk associated with WPM justifies the new requirements.

Exempt Certain Articles From Regulation

Comment: The treatment requirements of the proposal should not apply to the WPM containers of imported fresh fruits and vegetables. Specifically, APHIS should exempt typical small fruit and vegetable crates in common use. These crates are made of mixed plywood and natural wood, and are about 12″ × 7″ × 4″ high, with 1.1″ × 1.1″ × 4″ high natural wood corner supports. WPM used in the international trade of regulated goods, such as fresh fruits and vegetables that are documented by an official phytosanitary certificate of the country of origin, presents a phytosanitary risk significantly lower than WPM in general. Phytosanitary certificates apply to both the commodity being exported and the WPM used in their transportation.

Response: APHIS interceptions records from 1996–2001 show an increasing number of pests associated with WPM, including in containers for fresh fruits and vegetables. Based on interceptions at ports, WPM used for the shipment of fruits and vegetables can pose a significant risk. Importers of these products may be able to avoid having their containers considered to be regulated articles by redesigning them to eliminate the thicker pieces of raw wood often used as corner supports. Containers that use pieces of raw wood less than 6 mm (0.24 in) thick and containers made wholly of manufactured wood would be exempt from regulation. For the specific crates to be exempted, the corner supports would have to be replaced with exempt materials (plywood, particle board, veneer, etc.) or with bundled pieces of raw wood each of which is no more than 6 mm (0.24 in) thick.

Comment: We request that APHIS address compliance requirements for WPM originating in the United States, shipped to a foreign location and then exported back to this country. It seems unlikely that WPM exported from the United States will be marked according to the IPPC Guidelines until all other countries have adopted those Guidelines. Consequently WPM originating in the United States that is exported and then returned would not satisfy the IPPC Guidelines unless an interim marking mechanism is established and used. Will APHIS allow U.S.-origin WPM that is exported and reimported into the United States to be marked according to requirements established by relevant foreign jurisdictions on an interim basis until all other countries adopt the IPPC Guidelines?

Response: We are not adopting the suggested approach because using additional markings to indicate that WPM originated in the United States would require a major regulatory program to ensure the validity of such markings. It would be expensive, inconvenient, and a drain on APHIS resources that can be employed more usefully elsewhere. It would also be confusing to foreign governments that are just getting used to the markings in the IPPC Guidelines. There are already many sources of treated WPM in the United States, and APHIS, as the national plant protection organization of the United States, is currently developing procedures to meet its responsibilities under the IPPC Guidelines to inspect, monitor, accredit, and audit commercial companies that treat WPM and apply the official mark to it that indicates treatment. There are also many foreign sources of WPM treated in accordance with the regulations, and many U.S. shippers doing business with Canada already obtain their WPM from foreign sources.

Dunnage and Small Wood Pieces

Comment: Does the proposed marking requirement mean that every piece of the 40 to 80 tons of dunnage that may be carried on board a steel transport ship could be subject to inspection prior to discharge? This is a serious problem because dunnage is used under the steel since it is intended to prevent movement of the cargo during the voyage. Long steel products are carried stowed in a fore-and-aft direction in ships' holds. Dunnage is used athwartship. In such a correctly stowed hold there should be little or no dunnage showing on completion of loading, so that marking may not make a difference as far as inspection prior to discharge is concerned. Also, sometimes ships meet with such bad weather during their sea voyage that part of the dunnage is crushed or broken. As a result, there will then be pieces of dunnage unmarked. What measures are then intended?

Response: We recognize the difficulty in ensuring that required treatment marks are present on some dunnage that is custom cut to brace or fill gaps in a particular load. However, dunnage is frequently made from the type of low quality wood that poses the greatest pest risk, and it is therefore necessary that dunnage be treated and marked the same way as any other regulated WPM. The fact that the nature of some cargoes makes it impossible to inspect the associated dunnage aboard ship is not particularly relevant because dunnage inspection is normally done following cargo discharge.

Alternatives to Marking WPM

Comment: To speed port clearance and aid enforcement, we support using very simple self-declarations of compliance to accompany any and all international shipments, even those totally free of solid wood packaging.

The self-declaration would affirm that all packaging in the shipment complies with the provisions of the IPPC Guidelines. This is vital information and therefore should be repeated in key shipping documents such as bills of lading, invoices, and so on.

Response: We welcome the use of electronic records for many port operations purposes, and we are working with the U.S. Department of Homeland Security (DHS) on projects in that area. However, APHIS has decided that the system of authorized WPM markings applied by facilities operating under the supervision of national governments is more reliable than a system where individual invoices and shipping documents affirm compliance. Affirmations in shipping documents about whether or not cargoes contain WPM, and whether or not the WPM has been treated, are frequently unreliable. Our experience clearing shipments from China showed frequent incidents where shipping documents contained an affirmation that no WPM was in the cargo, despite its presence. Under this final rule, inspectors can tell directly from observation of the WPM whether or not it is in compliance (barring fraudulent misuse of the mark, which will be addressed by auditing and monitoring). This process does not need to be significantly slower than using shipping documents. Importers that establish a record of compliance over a number of shipments generally will be subject to less inspection. Clearance time will also decrease as importers and exporting countries gain experience with the new requirements and acquire a history of moving shipments without inspectors finding pests of concern associated with them.

Comment: Clearing WPM at ports based on physical inspection to see if it is marked will cause significant delays in the clearance of imports without commensurate benefits. Containers and air cargo will have to be unloaded individually and each pallet, crate, or other regulated item inspected. This is highly burdensome and costly for both importers and the government, and will cause major disruptions to importers' supply chains, many of which are part of just-in-time inventory management systems. For the government these inspections will divert inspectors of the U.S. Bureau of Customs and Border Protection (CBP), DHS, from their primary cargo security mission.

We urge APHIS to offer an alternative that would be consistent with the best practices being implemented throughout the regulatory realm, which allow for electronic filing of compliance information. In an electronic system, importers would be allowed to transmit a compliance code to the CBP, by which code they would certify that the WPM is compliant or that there is no WPM contained in the shipment. This is how compliance certifications are presented to other government agencies such as the Federal Communications Commission and the Food and Drug Administration. A paper alternative, such as a stamped statement on a bill of lading or invoice, should be available for situations in which electronic certification is not practical.

Additionally, we recommend that APHIS consider providing for a blanket certification for importers who can assure to the satisfaction of APHIS that their WPM is routinely compliant. In the electronic environment, this would consist of importer information established as part of its CBP account profile. CBP is developing these profiles as part of its Automated Commercial Environment architecture. We urge APHIS to work closely with CBP to implement the necessary interfaces between CBP's system and APHIS. In the interim, we request that APHIS accept blanket paper certificates of compliance by which importers certify that for a designated period of time all imports of WPM into the United States are compliant.

Response: See the response to the previous comment.

Inspection Procedures

Comment: Because not all WPM poses equal risks, APHIS should use risk management to avoid unnecessary shipment delays caused by ineffective random inspections. Take advantage of data from existing importers quality control procedures and compliance programs. Highly compliant importers, as verified by valid statistical sampling of imports, should be subject to a lower rate of physical inspections than unknown or noncompliant importers.

Response: APHIS intends to use risk management techniques and data from a variety of sources to target its inspection activities and its monitoring and auditing activities for facilities conducting treatments.

Delayed Effective Date and Noncompliant Shipments

Comment: Instead of immediately starting to order the reexport of unmarked WPM, we request a 2-year transitional period to phase out old WPM with previously acceptable marking (for example, "HT" without the IPPC symbol) provided the treatment requirements prescribed by the proposed rule are satisfied.

Response: APHIS received a number of comments stating that exporting countries and shippers would need time to adapt to the new requirements of the rule and to change some of their business practices and WPM sources. We agree, and in response we have set the effective date for this final rule at a date 1 year after its publication date. We believe affected parties will be able to prepare for the new requirements during this period. APHIS will also conduct a very active information campaign during this period to ensure that affected parties are aware of the new regulatory requirements. Consistent with parties' commitments under the Montreal Protocol, this campaign will also stress to affected parties that use of alternate packing materials or heat treatment of WPM are environmentally preferable alternatives for meeting the requirements, as documented by the FEIS. As part of this campaign, APHIS inspectors at ports will focus on imported WPM shipments that do not meet the new requirements, and will give the importers official notice explaining what they must do for future shipments (*i.e.*, those arriving after the effective date of this final rule) to comply with the new requirements.

Comment: In case of noncompliance, the proposal would require reexport after separating the cargo, if possible. Why not allow the other measures explained in item 6.1 of the IPPC Guidelines, such as incineration, processing or treatment, etc.?

Response: Reexportation is necessary because we need to achieve compliance (treatment and marking of WPM before arrival) in order to fully protect against the introduction of plant pests. In recent years, several destructive plant pests, including the Asian longhorned beetle and the emerald ash borer, have been introduced into the United States. We believe that these pests have entered the United States in WPM at ports of entry. Therefore, we believe that proper treatment of WPM, prior to importation into the United States, is essential to safeguard our agricultural resources from further pest introductions. We believe requiring the reexportation of noncompliant WPM is the only option that will ensure that WPM is properly treated prior to its arrival in the United States. Also, allowing post-entry treatment is not feasible because space and services at ports are limited and ports cannot be burdened with vast quantities of noncompliant materials awaiting treatment or incineration. Further, allowing post-entry treatment would place an additional burden on already scarce port resources since it would be necessary to track shipments

to ensure proper treatment. Finally, the reexportation requirement is consistent with the approach adopted by other IPPC member countries, such as Canada.

Comment: The requirement to reexport noncompliant imports is too stringent. Some WPM might not be stamped due to simple error. In cases where marking is absent but no pests have been intercepted, the cargo should be accepted. Even if pests are found WPM could be fumigated or treated appropriately at the expense of the importer in the routine manner for other noncompliant goods. Equivalent measures should be explored. The national plant protection organization (NPPO) of the exporting country could then be informed about the non-compliance with the details of the exporter so that the NPPO could monitor that exporter.

Response: Please see the above responses about the 1-year delay in the effective date of this rule, which will give affected parties time to comply with the new requirements. We intend to inform the NPPO's of exporting countries about noncompliance in shipments from their countries, but this is in addition to, not a substitute for, enforcement action by APHIS.

Comment: When imported WPM is not in compliance, APHIS should require both the WPM and cargo to be treated at the port of entry. Separating the cargo from the WPM without treatment could result in the introduction of wood borers into the environment. Similarly, any properly marked WPM that proves infested should be required to be treated at the port of arrival. Fumigators at the ports of entries have years of experience treating cargo upon arrival and have the expertise to ensure that any destructive pests are destroyed and that the free flow of trade is not impeded. Requiring the reexport of WPM and associated cargo will impede international trade and hurt the U.S. economy.

Response: As discussed above, the reexport option will be necessary to achieve compliance (treatment and marking of WPM before arrival), and also because space and services at ports are limited. In some cases, APHIS inspectors at a port of entry may discover signs of pests in a shipment that is apparently in compliance and order treatment in accordance with § 319.40–9. APHIS is committed to protecting U.S. agricultural resources and will ensure that any treatment after arrival is done under safeguards adequate to prevent the spread of pests. Sometimes this will involve treating cargo along with WPM, and sometimes it will not, based on the type of cargo and the nature of any pests that are identified.

Economic Impacts on WPM Producers

Comment: Forty percent of all hardwood lumber manufactured in the United States, and a goodly portion of the softwood as well, go into the manufacture of WPM like dunnage, crating, pallets, packing blocks, drums, cases, and skids. It is absolutely essential for the hardwood industry and very important to the softwood industry to preserve this huge market for their lowest quality lumber. Also, unloading containers in transit to verify whether the packing material has really been treated would greatly endanger certain products being transported (*e.g.*, fragile wood veneers), in addition to adding more time to the transportation.

Response: The problem is that the use of low grade, untreated wood in international WPM is exactly the practice that must be ended to protect U.S. resources against foreign plant pests. We do not see any alternative that would allow continued use of untreated WPM and also protect against these risks. With regard to unloading cargoes for inspection purposes, CBP inspectors at ports are experienced and well trained and deal professionally with any shipments. APHIS is developing new operational procedures to minimize delays caused by WPM inspections at ports. We also expect that the need for substantial unloading and inspection will decline over time as shippers and exporting countries become familiar with the new requirements and develop a history in which no pests of concern are found associated with their shipments.

Comment: Nearly 7,000 U.S. facilities produce pallets nationwide and are a vital utilizer for low grade wood which would otherwise have to be burned at high temperature for lack of other use. This, in turn, would considerably increase the cost of marketing high quality wood products like veneer, lumber, flooring, plywood, and particle board as well as other engineered wood products.

Response: We recognize that this rule will have some adverse economic effects, as discussed below in the section "Executive Order 12866 and Regulatory Flexibility Act." Such effects are sometimes unavoidable when APHIS takes steps to protect agricultural resources against plant pest risk. There will still be a market for domestically produced pallets because untreated WPM could still be used in domestic commerce or in exports to any country that has not implemented the IPPC Guidelines or similar treatment requirements.

Economic Impacts on U.S. Fumigators at Ports

Comment: The rule would reduce fumigation at ports of arrival, financially hurting quarantine fumigators that often are small family-owned businesses. These economic losses would be on top of significant revenue losses that fumigators incurred when APHIS implemented its interim rule on WPM from China.

Response: APHIS' main goal is protecting against any possible infestation that might be associated with imported WPM. There is a general trend throughout the world to reduce methyl bromide usage. While this final rule may result in reduced fumigation of wood products at U.S. ports of arrival, the 1-year delay in the effective date should give fumigation businesses time to adjust business plans. Also, as discussed above, APHIS may discover signs of pests in a shipment that is properly marked and may order treatment of either the WPM, the cargo, or both, as appropriate.

Implementation Schedule

Comment: The effective date of the final rule should be at least 1 year after publication, to allow developing countries to implement the necessary means and conditions, including national systems of treatment, inspection, registration or accreditation, and auditing of WPM to be shipped to the United States, thus avoiding an obstacle to international trade.

Response: We agree, as discussed above, and have delayed the effective date for 1 year. In general, APHIS has communicated very well with its trading partners, which should allow them to implement the needed systems within 1 year. After the effective date, we will enforce compliance with the new requirements.

Comment: We seriously doubt that any country outside of North America will be prepared to fully implement the standard by January 2004. We encourage the USDA to adopt the standard but also apply a generous grace period to allow importing countries to get up to speed on the marking systems and underlying audit programs. Otherwise, we will end up seeing a lot of "IPPC symbols" on pallets which may not have been treated to the same degree of quality and control as we would expect in the United States, thereby casting doubt on the efficacy of the whole program.

Response: Please see the responses above about the 1-year delay in the effective date. CBP will audit all

material shipped, as well as records for facilities treating WPM and applying the mark. Shipments from countries with high levels of noncompliance will face higher levels of inspection.

Miscellaneous Comments

Comment: The IPPC Guidelines do not specifically require that WPM be free of bark. Does APHIS intend to specify a bark-free requirement for WPM in the final rule?

Response: No, APHIS will not require the wood to be bark free, as long as it has been properly treated. Currently available data shows that treatment alone will adequately kill the pests of concern.

Comment: There is no provision in the proposed rule describing what mark should be used by non-IPPC member countries. There will be trademark registration on the IPPC mark so non-IPPC member countries may not be entitled to use this marking.

Response: APHIS is not responsible for any country's decision on whether or not to join the IPPC, or for how any country addresses trademark issues. We do note that the IPPC is in the process of registering the mark in many countries at this time for use on materials treated in accordance with the IPPC Guidelines. We also note that, even if a country cannot establish treatment facilities authorized to apply the mark in their own country, they can readily obtain treated and marked WPM from other countries, or they can use alternative materials to WPM.

Miscellaneous Editorial Changes

In addition to the changes discussed above, we are making some minor changes for clarity and consistency. We are removing the definitions of *exporter statement*, *importer statement*, and *solid wood packing material* because these terms are no longer used in the regulations. We are slightly editing the table in § 319.40–3(b)(1)(ii) that provides the methyl bromide treatment schedule so that it provides concentrations in lbs./1,000 c.f., as well as in g/m^3. We are also adding a graphic and description of the approved IPPC mark to § 319.40–3(b)(2).

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

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

Below is a summary of the economic analysis for the changes in WPM import requirements in this document. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866 and an analysis of the potential economic effects on small entities as required by the Regulatory Flexibility Act. A copy of the full economic analysis is available for review at the location listed in the **ADDRESSES** section at the beginning of this document, or on the Internet at *http://www.aphis.usda.gov/ppq/swp/*.

In accordance with 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is set out below, regarding the effects of this rule on small entities. The initial regulatory flexibility analysis in our proposed rule stated that we did not have all the data necessary for a comprehensive analysis of the potential effects of this rule on small entities. Therefore, we invited comments concerning potential economic effects, particularly the number and kind of small entities that might incur benefits or costs. We did not receive any comments providing the specific data we requested, but we did receive several comments stating that some small business will be adversely affected by the rule, including importers with substantial inventories of WPM on hand in foreign countries, which they would no longer be able to use for shipments to the United States, and fumigators at U.S. ports that currently treat large volumes of WPM upon arrival and expect to lose much of this business after the rule is implemented. Several commenters also suggested that domestic WPM manufacturers faced indirect effects that could result when other countries adopt the IPPC Guidelines, reducing the demand for untreated WPM.

Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, and other articles to prevent the introduction of injurious plant pests.

This analysis evaluates a final rule adopting the IPPC standards on wood packaging material, the International Standard for Phytosanitary Measures No. 15. This standard contains globally accepted measures that may be applied to WPM to reduce the entry of pests via this pathway. The IPPC Guidelines require WPM to be heat treated at 56 °C for 30 minutes, or fumigated with methyl bromide.

Alternatives considered and rejected included the alternative of taking no action. This alternative was rejected because recent interceptions of pests at ports of entry show a steady increase in serious pests associated with WPM from everywhere except China, whose WPM must already be treated due to past pest interceptions. If left unchecked, pests introduced by imported WPM have the potential to cause significant economic damage to the agricultural and forest resources of the United States.

We also rejected the alternative of extending the China interim rule to all WPM worldwide, because that would not ensure long-term exclusion of some wood pests of quarantine concern, such as certain deep wood-borers, fungi, rots, and wilts. The adoption of the IPPC treatment standards for all importing countries will address pest threats posed not only by Cerambycidae, which was the primary target of the China interim rule, but nine other pest families as well. Additionally, adoption of the China interim rule requirements would result in the greatest additional use of methyl bromide of all the alternatives.

Another alternative not adopted was a comprehensive risk reduction program allowing differing, circumstance-dependent risk mitigation strategies that include various options for complying with United States import requirements. A comprehensive risk reduction program would consist of an array of mitigation methods (*e.g.*, inspection, various heat treatments, various fumigants and other chemical treatments, irradiation, etc.) that is more extensive than that contained in either the China Interim Rule or the IPPC Guidelines. Many of the treatment methods being considered as components of a comprehensive risk reduction program require more research and development to demonstrate that they could be used effectively and economically to treat the required range of WPM products. Some of the remaining issues include inadequate control, incomplete efficacy data, safety issues, and lack of adequate facilities or supplies. Therefore, while comprehensive risk reduction is still considered a possible future approach for WPM import requirements, it is not practical to adopt it at this time.

Another alternative, substitution of other packing materials, was rejected because it requires use of materials the cost of which exceed the likely costs of SWPM that is either heat treated or fumigated with methyl bromide.

We believe it is appropriate and necessary to adopt the IPPC Guidelines because they were developed as an international standard to control pests associated with WPM. The types of pests the IPPC Guidelines were developed to control have been

intercepted at U.S. ports for many years and pose significant risks to U.S. resources. The damage they cause could be similar in magnitude to the recent introduction of the Asian longhorned beetle (ALB) *Anaplophora glabripennis* (Coleoptera: Cerambycidae). Our regulations have already been changed to prevent further introductions of ALB from China, but adopting the IPPC guidelines could prevent the introduction of ALB or similar wood borers from other parts of the world, as well as prevent the introduction of other types of pests such as woodwasps and bark beetles. Imposing the IPPC Guidelines' treatment and other requirements to prevent these introductions will yield net benefits. The benefits (avoided losses) that can be gained by preventing introduction of these pest types are discussed below. The actual magnitude of the benefits cannot be definitively ascertained, but they are likely to be much larger than the associated costs.

As an indicator of the damage ALB or similar wood borers could cause if introduced again in the future, consider the costs of the ALB introduction from China. The ALB, first discovered in New York, NY, in 1996 and in Chicago, IL, in 1998, was most likely introduced on wood packing material from China. The present value of urban trees at risk in the two affected cities is estimated at $59 million over some 50 years. About $6 million of urban trees have been destroyed due to pest infestation and eradication efforts since the introduction of ALB. So far, APHIS and State and local governments have spent over $59 million in eradicating the pest in the two localities. If only New York City and Chicago were considered, it would appear that the current eradication program has spent an amount equal to the value of the resource being protected. However, the eradication and quarantine activities have slowed the spread within New York and Chicago. Without these activities, the faster spread in these cities would increase the net present value because the resources would be lost in a much shorter amount of time. The eradication and quarantine activities are also the reason the pest has been confined to the two cities where it was initially detected. The potential damages from ALB spread to other areas can be gleaned from the Nowak *et al.* study that estimated losses to seven other cities. The present value of damage to urban trees in Baltimore, MD, alone, not allowing for intervention, was estimated to be $399 million. Additionally, without governmental intervention, forest resources would also be at risk.

Wood borers such as ALB could cause the most damage of all types of pests associated with WPM, but we have also projected that other types of pests could cause substantial damage. These include the Sirex woodwasp (Family: Siricidae) and the Eurasian spruce bark beetle *Ips typographus* (Family: Scolytidae). Projections of physical damages that can be caused by these types of pests range up to $48–$607 million and $208 million, respectively. Perhaps the greatest devastation posed by these pests that cannot be fully captured monetarily is their potential to cause irreversible loss to native tree species and consequential alterations to the environment and ecosystem.

The recent introduction of the emerald ash borer (EAB), *Agrilus planipennis* (Coleoptera: Buprestidae), a pest of ash trees, in Michigan and parts of Canada in June 2002 is a reminder of this threat. It is not known how the pest arrived in North America but, as with other exotic beetles, infested WPM from Asia is suspected. The pest may have arrived some 6 years ago, before the interim rule on China was implemented in September 1998 (63 FR 50099–50111, Docket No. 98–087–1). Ironically, many of the large ash trees favored by the pest were originally planted to replace elm trees killed by Dutch elm disease caused by yet another exotic pathogen. A preliminary assessment of the potential impact of the EAB on urban and timberland ash trees in the six counties originally quarantined by Michigan comes to about $11 billion in replacement costs alone. The nursery stock industry in the affected counties reported a loss in sales so far of $2 million. These estimates serve to highlight the potential magnitude of damage that could be caused by one outbreak alone of a pest on the targeted list.

The adoption of the IPPC treatment standards for all importing countries will address pest threats posed not only by Cerambycidae, which was the primary target of the China interim rule, but nine other pest families as well. Approximately 95 percent of pests intercepted by APHIS inspectors in shipments worldwide are pests on the IPPC target pest list.

The treatment requirements in this rule are not expected to completely eliminate all pest interceptions related to WPM. As evident from data reported between 2000 and 2001, 2 years following the implementation of the China rule, 7 percent of pest interceptions was still associated with China imports. To the extent that pest interceptions will be reduced, the risk of an outbreak will also be lower than in the absence of the rule. However, because pests continue to be intercepted albeit at a lower rate, benefits need to be correspondingly adjusted to reflect the risk.

In discussing the costs that might result from adopting this rule, it is essential to recognize that to some degree these costs will accrue when other countries adopt the IPPC Guidelines, whether or not the United States also adopts them. As other countries impose IPPC treatment requirements on imports containing WPM the global WPM market will be greatly affected, likely causing a broader impact on the domestic wood packaging industry than the provisions of this rule.

Adopting this rule may also cause general societal costs due to human health issues (increases in skin cancer, cataracts, and other conditions) and reduction in crop yields that may result if increased use of methyl bromide as a result of this rule delays recovery of the ozone layer. It is impossible to confirm or estimate such costs at the present time.

The effects of this rule will fall largely on foreign manufacturers of pallets. The increased treatment cost may add to the cost of packaging and transporting of goods which, in turn, will affect importers of commodities transported on pallets and final consumers of those goods are potentially affected by this rule. The required treatments will add to the cost of packaging and transport of goods. Due to the very large number of pallets that are used to assist imported cargo, the overall cost may be substantial. The extent of the impact on U.S. consumers will depend on the ability of importers to pass on the additional costs to respective buyers. It is expected that most of the cost of treating pallets will be borne by foreign pallet manufacturers. Furthermore, given the small value of pallets as compared to the value of trade, increases in pallet prices are not expected to have a measurable effect on domestic consumers or on trade.

We also expect this rule to affect U.S. purchasers of imported pallets, crates and boxes. Between 1999 and 2001, an average of 38 million pallets was imported into the United States, over 80 percent of which came from Canada. Imported WPM was valued at $150 million during this time period. At approximately $3.95 per piece, imported pallets are less expensive than domestic pallets where the average price ranges between $8 and $12 per pallet. Canadian pallets are primarily used by industries close to the U.S. and

Canadian border. The wood pallet market is highly competitive, and the demand for imported pallets can be characterized as elastic. While pallets made of alternative materials such as plastic, corrugated fiberboard, or processed wood are imperfect substitutes for wood, one wood pallet can easily substitute for another wood pallet.

Assuming a perfectly elastic supply and perfectly inelastic demand for imported pallets, and assuming a treatment cost that adds about $2 on average to a pallet, U.S. purchasers of imported pallets could lose an estimated $76 million in higher costs. The true extent of the impact, however, will be lower than this amount because demand is likely to be elastic and foreign importers are expected to share a greater burden of the cost increase. We do not know treatment costs for foreign pallet producers, but given the availability of substitutable domestic wood pallets, we do not expect U.S. purchasers of imported pallets to be significantly affected.

Recent and forthcoming decisions by other countries to adopt the IPPC standard, while not an effect of this rule, represent an associated issue that will indirectly affect manufacturers who sell pallets, crates, and boxes to foreign buyers. There are an estimated 3,000 manufacturers of pallets and containers in the United States. The primary importers of these items are Canada and Mexico. As these two countries prepare to implement the IPPC standard, only treated wood packaging material will likely be in demand for export. The extent of the impact on pallet and container manufacturers will depend on the ability of individual firms to put in place the necessary infrastructure for conducting treatments as required by the international standard. The number of U.S. firms that export WPM and will therefore be affected is unknown. Regardless, the impact on the overall WPM industry is expected to be small as the quantity of total pallets exported, estimated at about 10 million units, comprises only 2.5 percent of the 400 to 500 million pallets in production in the United States each year.

Domestic manufacturers of wood pallets may be indirectly affected in one other way. Because of the increasing trend in recycling of pallets for cost-cutting purposes, manufacturers may be faced with new demands for treated WPM from domestic exporters who reuse pallets and wood containers to ship goods back from foreign countries.

Effects on Small Businesses

The provisions of this rule are not expected to directly affect U.S. manufacturers of wood packaging material. There may be some decrease in the demand for pallets if some exporters decide to use alternate packing materials rather than WPM due to treatment costs for WPM. However, this should be more than balanced by new purchases of treated pallets by exporter/importers, who must now use treated pallets when they reuse pallets used to ship goods overseas to subsequently ship goods back to the United States. This may create an increased demand by exporters for treated pallets. Also, some U.S. pallet makers also make alternative packing materials (plywood, particle board) and could maintain their business levels even if there is a small demand shift from one category to the other.

The pallet industry in the United States is characterized by many small firms and a few larger firms. No one firm is able to dominate the market. U.S. Census data show that there are approximately 3,000 firms in the wood pallet and container industry. Other estimates of the number of firms in the industry range up to 3,500 pallet manufacturers in the United States. Most firms sell their products within a 350 mile radius. The average number of employees in 1997 was 17. Thirty two percent of the firms had fewer than five employees. The average sales were $1.5 million.

The Small Business Administration (SBA) classifies wood container and pallet manufacturers as small businesses if they have 500 or fewer employees. According to the U.S. Census Bureau, 1997 Economic Census, all pallet manufacturers are considered small businesses.

Fumigation services are currently available at several dozen ports of entry on a permanent or ad hoc basis. In most cases these fumigation services are provided by large businesses that serve a number of ports. Two commenters on the proposed rule stated that several fumigators at ports were small businesses that could be adversely affected if the demand for fumigation upon arrival decreases, but these commenters did not provide any specific data on the number or location of these businesses or the scope of the potential impacts.

While decisions by other countries to adopt the IPPC standard are independent actions not directly resulting from adoption of this rule, those decisions do raise the associated issue that the international WPM market will adjust as Canada, Mexico, and other countries adopt the IPPC standard. Small businesses such as pallet manufacturers and fumigators at ports may be adversely affected by those countries' decisions if they are unable to adapt to the increased demand for treated pallets. The number of small businesses potentially affected by other countries' decisions to adopt the IPPC standard is unknown. However, the adoption of the treatment standards by IPPC member countries that will then apply to U.S. exports will likely create a broader impact on the domestic wood packaging industry (small and large businesses alike) than the provisions of this rule.

Conclusion

This rule will affect foreign manufacturers of pallets which may, in turn, affect importers and final consumers of goods transported on pallets. Because the cost of a pallet is a very small share of the bundle of goods transported on pallets, cost increases due to the treatment requirements are not expected to significantly affect domestic consumers and thus will not have a measurable impact on the flow of trade. This rule is not expected to reduce the amount of goods shipped internationally as is evident from observing trends in imports from China since implementation of the interim rule in 1999.

This rule will also affect U.S. consumers of imported pallets. Given the substitutability of wood pallets, the impact on consumers is expected to be small due to the availability of wood pallets. Foreign importers are likely to absorb a greater share of the cost increase.

The simultaneous adoption of the treatment standards by IPPC member countries that is directed at U.S. exports will likely create a broader impact on the domestic wood packaging industry than the provisions of this rule.

This rule contains information collection requirements, which have been approved by the Office of Management and Budget (see "Paperwork Reduction Act" below.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under this rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

National Environmental Policy Act

On September 19, 2003, the U.S. Environmental Protection Agency (EPA) published in the **Federal Register** (68 FR 54900–54901) a notice of availability of the final environmental impact statement titled "Importation of Solid Wood Packing Material." The FEIS considers the environmental impacts from importation of wood packaging material that could result from our adoption of the proposed rule as a final rule.[2] The FEIS 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' NEPA Implementing Procedures (7 CFR part 372).

Pursuant to the implementing regulations for NEPA, in cases requiring an EIS, APHIS must prepare a record of decision at the time of its decision. This final rule constitutes the required record of decision for the FEIS.

The NEPA implementing regulations require that a record of decision state what decision is being made; identify alternatives considered in the environmental impact statement process; specify the environmentally preferable alternative; discuss preferences based on relevant factors—economic and technical considerations, as well as national policy considerations, where applicable; and state how all of the factors discussed entered into the decision. In addition, the record of decision must indicate whether the ultimate decision has been designed to avoid or minimize environmental harm and, if not, why not.

The Decision

APHIS has decided, in this final rule, to amend its regulations to provide that wood packaging material imported into the United States from other countries will be subject to the requirements stipulated in the IPPC Guidelines. This includes specific treatment requirements for either heat treatment or fumigation with methyl bromide of the wood packaging material.

Alternatives Considered in the Impact Statement Process

The FEIS focuses mainly on pest risk issues from the use of wood packaging material, potential impacts from treatments with methyl bromide, and potential impacts from use of substitute packaging made from materials other than unmanufactured solid wood. The FEIS considers a reasonable range of alternatives, including: (1) No action, essentially maintaining the exemption from treatment requirements for importation of wood packaging material from foreign countries except as regulated under the September 18, 1998, interim rule that required treatment of WPM from China (China interim rule, 63 FR 50099–50111, Docket No. 98–087–1), (2) extension to all countries of the treatments in the China interim rule, (3) adoption of the IPPC Guidelines, (4) establishment of a comprehensive risk reduction program, and (5) use of substitute (non-solid wood) packaging material only.

Environmentally Preferable Alternative

The environmentally preferable alternative would be to prohibit importation of wood packaging material, which would virtually eliminate all associated pest risks, as well as the need for quarantine treatments. This regulatory approach (alternative 5 above) would require all commodities that are to be imported to the United States to be transported with only substitute packaging material, which at the current time would be technically and economically infeasible for many exporters, especially in developing countries.

Preferences Among Alternatives

There is a preference for the approach taken in this final rule, which we adopt herein (alternative (3), above). The preference for this alternative is based principally on the determination that it meets the Agency's obligations under the Plant Protection Act (PPA), and other legislation such as NEPA and the Clean Air Act.

The no action alterative (alternative 1 above) was rejected because recent interceptions of pests at ports of entry show a steady increase in serious pests associated with WPM from everywhere except China, whose WPM must already be treated due to past pest interceptions. If left unchecked, pests introduced by imported WPM have the potential to cause significant economic damage to the agricultural and forest resources of the United States.

The alternative of extending the China interim rule to all WPM worldwide (alternative 2 above) would not ensure long-term exclusion of some wood pests of quarantine concern, such as certain deep wood-borers, fungi, rots, and wilts. The adoption of the IPPC treatment standards for all importing countries will address pest threats posed not only by Cerambycidae, which was the primary target of the China interim rule, but nine other pest families as well. Additionally, adoption of the China interim rule requirements would result in the greatest additional use of methyl bromide of all the alternatives.

The comprehensive risk reduction program (alternative 4 above) would consist of an array of mitigation methods (*e.g.*, inspection, various heat treatments, various fumigants and other chemical treatments, irradiation, etc.) that is more extensive than that contained in either the China Interim Rule or the IPPC Guidelines. Many of the methods are in various phases of research and development that do not provide adequate basis for any final decisions about program usage.

Substitution of other packing materials (alternative 5 above) requires use of materials the cost of which exceed the likely costs of SWPM that is either heat treated or fumigated with methyl bromide.

Please see the FEIS for a full discussion of the reasons why adopting the IPPC standard was considered the preferred alternative.

Factors in the Decision

APHIS' mission is guided by the PPA, under which the detection, control, eradication, suppression, prevention, and retardation of the spread of plant pests or noxious weeds have been determined by Congress to be necessary and appropriate for the protection of the agriculture, environment, and economy of the United States. The PPA also has been designed to facilitate exports, imports, and interstate commerce in agricultural products and other commodities. In order to achieve these objectives, use of pesticides, including methyl bromide, has often been prescribed.

Methyl bromide is an ozone depleting substance that is strictly regulated under the Montreal Protocol and the Clean Air Act. While the goal of these authorities and agreements is to limit and ultimately phase out all ozone depleting substances, certain exemptions and exclusions are recognized, including an exemption for methyl bromide use for plant quarantine and preshipment purposes, including the purposes provided for in this final rule. The

[2] Copies of the FEIS are available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, the FEIS may be viewed from the APHIS Internet site at *http://www.aphis.usda.gov/ppd/es/swpm.html*, and copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

exemption is not unconditional, however. The United States, like other signatories to the Montreal Protocol, must review its national plant health regulations with a view to removing the requirement for the use of methyl bromide for quarantine and preshipment applications where technically and economically feasible alternatives exist.

This rule authorizes the use of methyl bromide, as well as heat treatment, to treat WPM imported from other countries in order to meet the mandates of the PPA. In addition, the Agency is working to promote environmental quality with ongoing work to identify and add to our regulations valid technically and economically feasible alternatives to methyl bromide.

Avoid or Minimize Environmental Harm

The environment can be harmed by using methyl bromide, in which case recovery of the ozone layer may be delayed, or by not using methyl bromide, in which case agriculture and forested ecosystems, among other aspects of environmental quality, could be devastated unless other equally or more effective alternatives were strictly enforced (*i.e.*, heat treatment or use of substitute packing materials). By assuring that use of methyl bromide is limited, the Agency strikes a proper balance in its efforts to minimize environmental harm. APHIS is committed to monitoring these efforts through the NEPA process, and otherwise. Furthermore, where appropriate, measures—gas recapture technology, for example—to minimize harm to environmental quality caused by methyl bromide emissions have been, and will continue to be, encouraged by APHIS. The prudent use of heat treatment and substitute packaging materials by developed nations is expected to promote this regulatory approach in developing countries as their trade opportunities expand.

Other

Methyl bromide used in quarantine applications prescribed by the United States contributes just a small fraction of total anthropogenic bromine released into the atmosphere. Nevertheless, the Montreal Protocol is action-forcing in the sense that signatories must review their national plant health regulations with a view to finding alternatives to exempted uses of methyl bromide. The EPA has also cautioned that, regardless of the incremental contribution, it is important to recognize that any additional methyl bromide releases would delay recovery of the ozone layer.

A considerable amount of research and development on methyl bromide alternatives has been conducted within the USDA and continues today. Under the Clean Air Act, EPA has also established a program to identify alternatives to ozone depleting substances, including methyl bromide, but EPA's listing of an acceptable alternative does not always adequately address its suitability for a particular use. We must not put agriculture and ecosystems at risk based on unproven technology.

APHIS is firmly committed to the objectives of the Montreal Protocol to reduce and ultimately eliminate reliance on methyl bromide for quarantine uses, consistent with its responsibilities to safeguard this country's agriculture and ecosystems. Achieving the objectives of both reducing (and ultimately eliminating) methyl bromide emissions as well as safeguarding agriculture and ecosystems in the most expeditious, cost-effective way possible, requires close coordination within the Federal Government of research, development, and testing efforts. APHIS is determined to cooperate actively with the Agricultural Research Service, EPA, the Office of Management and Budget, and others involved in this effort to find effective alternatives to quarantine methyl bromide uses.

In a notice summarizing EPA comments on recent environmental impact statements and proposed regulations that was published in the **Federal Register** on January 17, 2003 (68 FR 2539), EPA expressed no objection to the draft EIS and the APHIS proposed rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0225.

Government Paperwork Elimination Act Compliance

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

List of Subjects in 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, 7 CFR part 319 is amended as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450 and 7701–7772; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 319.40–1, the definitions for *Exporter statement*, *Importer statement*, and *Solid wood packing material* are removed, and two definitions are added in alphabetical order to read as follows:

§ 319.40–1 Definitions.

* * * * *

Regulated wood packaging material. Wood packaging material other than manufactured wood materials, loose wood packing materials, and wood pieces less than 6 mm thick in any dimension, that are used or for use with cargo to prevent damage, including, but not limited to, dunnage, crating, pallets, packing blocks, drums, cases, and skids.

* * * * *

Wood packaging material. Wood or wood products (excluding paper products) used in supporting, protecting or carrying a commodity (includes dunnage).

■ 3. In § 319.40–3, paragraph (b) is revised to read as follows:

§ 319.40–3 General permits; articles that may be imported without a specific permit; articles that may be imported without either a specific permit or an importer document.

* * * * *

(b) *Regulated wood packaging material.* Regulated wood packaging material, whether in actual use as packing for regulated or nonregulated articles or imported as cargo, may be imported into the United States under a general permit in accordance with the following conditions:

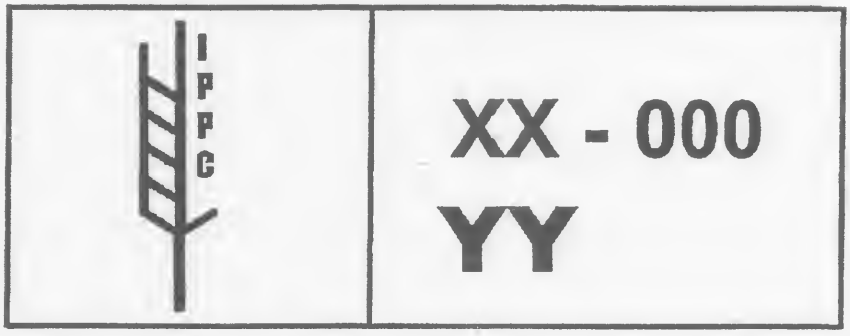
(1) *Treatment.* The wood packaging material must have been:

(i) Heat treated to achieve a minimum wood core temperature of 56 °C for a minimum of 30 minutes. Such treatment may employ kiln-drying, chemical pressure impregnation, or other treatments that achieve this specification through the use of steam, hot water, or dry heat; or,

(ii) Fumigated with methyl bromide in an enclosed area for at least 16 hours at the following dosage, stated in terms of grams of methyl bromide per cubic meter or pounds per 1,000 cubic feet of the enclosure being fumigated. Following fumigation, fumigated products must be aerated to reduce the concentration of fumigant below hazardous levels, in accordance with label instructions approved by the U.S. Environmental Protection Agency:

Temperature (°C/°F)	Initial dose g/m³ and lbs./1,000 c.f)	Minimum required concentration g/m³ and lbs./1,000 c.f.) after:			
		0.5 hrs	2 hrs.	4 hrs.	16 hrs.
21/70 or above	48/3.0	36/2.25	24/1.5	17/1.06	14/0.875
16/61 or above	56/3.5	42/2.63	28/1.75	20/1.25	17/1.06
11/52 or above	64/4.0	48/3.0	32/2.0	22/1.38	19/1.19

(2) *Marking.* The wood packaging material must be marked in a visible location on each article, preferably on at least two opposite sides of the article, with a legible and permanent mark that indicates that the article meets the requirements of this paragraph. The mark must be approved by the International Plant Protection Convention in its International Standards for Phytosanitary Measures to certify that wood packaging material has been subjected to an approved measure, and must include a unique graphic symbol, the ISO two-letter country code for the country that produced the wood packaging material, a unique number assigned by the national plant protection agency of that country to the producer of the wood packaging material, and an abbreviation disclosing the type of treatment (*e.g.*, HT for heat treatment or MB for methyl bromide fumigation). The currently approved format for the mark is as follows, where XX would be replaced by the country code, 000 by the producer number, and YY by the treatment type (HT or MB):



(3) *Immediate reexport of regulated wood packaging material without required mark.* An inspector at the port of first arrival may order the immediate reexport of regulated wood packaging material that is imported without the mark required by paragraph (b)(2) of this section, in addition to or in lieu of any port of first arrival procedures required by § 319.40–9 of this part.

(4) *Exception for Department of Defense.* Regulated wood packaging material used by the Department of Defense (DOD) of the U.S. Government to package nonregulated articles, including commercial shipments pursuant to a DOD contract, may be imported into the United States without the mark required by paragraph (b)(2) of this section.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0049 and 0579–0225.)

§ 319.40–5 [Amended]

■ 3. In § 319.40–5, paragraphs (b)(1)(i)(C), (b)(2), and (b)(2)(i), the words "solid wood packing materials" are removed each time they occur and the words "regulated wood packaging material" are added in their place, and paragraphs (g) through (k) are removed.

§ 319.40–10 [Amended]

■ 4. In § 319.40–10, footnote 6, the words "without a complete certificate or exporter statement" are removed and the words "without meeting the requirements of this subpart" are added in their place.

Done in Washington, DC, this 9th day of September 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–20763 Filed 9–15–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV04–920–2 IFR]

Kiwifruit Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate and changes the assessable unit from $0.045 per 22-pound, volume-fill container or container equivalent to $0.002 per pound of kiwifruit established for the Kiwifruit Administrative Committee (committee) for the 2004–05 and subsequent fiscal periods. The assessment rate of $0.002 per pound of kiwifruit is $0.000045 per pound less than the assessment rate currently in

effect. The committee locally administers the marketing order which regulates the handling of kiwifruit grown in California. Authorization to assess kiwifruit handlers enables the committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective September 17, 2004. Comments received by November 15, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; fax: (202) 720–8938, e-mail: *moab.docketclerk@usda.gov*; or Internet: *http://www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Toni Sasselli, Program Analyst, or Terry Vawter, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone: (559) 487–5901; fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California kiwifruit handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable kiwifruit beginning on August 1, 2004, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate and changes the assessable unit established for the committee for the 2004–05 and subsequent fiscal periods from $0.045 per 22-pound, volume-fill container or equivalent to $0.002 per pound of kiwifruit. The assessment rate of $0.002 per pound of kiwifruit is about $0.000045 per pound less than the assessment rate currently in effect for the 2003–04 and subsequent fiscal periods.

The California kiwifruit marketing order provides authority for the committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the committee are producers of California kiwifruit. They are familiar with the committee's needs and the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002–03 and subsequent fiscal periods, the committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The committee met on July 15, 2004, and unanimously recommended 2004–05 fiscal period expenditures of $91,839 and an assessment rate of $0.002 per pound of kiwifruit. In comparison, last fiscal period's budgeted expenditures were $88,659. The assessment rate of $0.002 per pound of kiwifruit is $0.000045 per pound lower than the rate currently in effect and is based upon a per-pound unit rather than upon a 22-pound, volume-fill container or container equivalent.

The committee unanimously recommended decreasing the assessment rate slightly because the 2004–05 fiscal period kiwifruit crop is expected to be 8,550,000 pounds larger than the 2003–04 crop of 41,850,000 pounds. Revenue from assessments, along with other revenue from interest income and reserve carryover funds, should allow the committee to meet its expenses. The reserve at the end of the fiscal period should be about $30,686, which is within the maximum amount permitted under the marketing order.

The following table compares major budget expenditures recommended by the committee for the 2003–04 and 2004–05 fiscal periods:

Budget expense categories	2003–04	2004–05
Administrative Staff & Field Salaries	$57,600	$61,000
Travel	7,200	6,500
Office Costs/Annual Audit	14,075	14,555
Vehicle Expense Account	9,784	9,784

The assessment rate recommended by the committee was derived by the following formula: The anticipated 2004–05 fiscal period expenses ($91,839) minus the 2003–04 fiscal period carry forward ($21,725), plus the 2005–06 fiscal period anticipated reserve ($30,686), divided by the total estimated 2004–05 fiscal period shipments (50,400,000 pounds of kiwifruit). This results in an assessment rate of $0.002 per-pound. This rate should provide sufficient funds in combination with reserve funds to meet the anticipated expenses of $91,839 and result in a reserve of $30,686 in July 2005, which is acceptable to the committee. This reserve is also within the maximum permitted by the order, approximately one fiscal period's expenses (§ 920.41).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other available information.

Although this assessment rate is effective for an indefinite period, the committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of committee meetings are available from the committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The committee's 2004–05 fiscal period budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 270 producers of kiwifruit in the production area and approximately 45 handlers subject to regulation under the marketing order. The Small Business Administration (13 CFR 121.201) defines small agricultural producers as those having annual receipts less than $750,000, and defines small agricultural service firms as those whose annual receipts are less than $5,000,000.

None of the 45 handlers subject to regulation have annual kiwifruit sales of $5,000,000. In addition, only six producers have annual sales of at least $750,000. Thus, the majority of handlers and producers of kiwifruit may be classified as small entities.

This rule decreases the assessment rate established for the committee and collected from handlers for the 2004–05 and subsequent fiscal periods from $0.045 per 22-pound, volume-fill container or container equivalent to $0.002 per pound of kiwifruit.

The committee unanimously recommended 2004–05 fiscal period expenditures of $91,839 and an assessment rate of $0.002 per pound of kiwifruit. The proposed assessment rate of $0.002 per pound of kiwifruit is $0.000045 lower than the rate during the 2003–04 fiscal period, and is based upon a per-pound assessable unit rather than the assessment rate currently in effect, which is based upon a 22-pound container or container equivalent. The quantity of assessable kiwifruit for the 2004–05 fiscal period is estimated to be 50,400,000 pounds of kiwifruit. Thus, the $0.002 per-pound rate should provide $100,800 in assessment income and be adequate to meet this fiscal period's expenses.

The following table compares major budget expenditures recommended by the committee for the 2003–04 and 2004–05 fiscal periods:

Budget expense categories	2003–04	2004–05
Administrative Staff & Field Salaries	$57,600	$61,000
Travel	7,200	6,500
Office Costs/Annual Audit	14,075	14,555
Vehicle Expense Account	9,784	9,784

The committee reviewed and unanimously recommended 2004–05 fiscal period expenditures of $91,839, which included increases in salaries and office/annual audit costs, and a decrease in travel expenses. Prior to arriving at this budget, the committee considered alternative expenditure levels and varying crop sizes, but ultimately decided that the recommended levels were reasonable to properly administer the order.

The assessment rate recommended by the committee was derived by the following formula: The anticipated 2004–05 fiscal period expenses ($91,839) minus the 2003–04 fiscal period carry forward ($21,725), plus the 2005–06 fiscal period anticipated reserve ($30,686), divided by the total estimated 2004–05 fiscal period shipments (50,400,000 pounds of kiwifruit). This results in an assessment rate of $0.002 per-pound. This rate should provide sufficient funds in combination with reserve funds to meet the anticipated expenses of $91,839 and result in a reserve of $30,686 in July 2005, which is acceptable to the committee. This reserve is also within the maximum permitted by the order, approximately one fiscal period's expenses (§ 920.41).

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2004–05 fiscal period could range between $9.50 and $13.00 per pound of kiwifruit. Therefore, the estimated assessment revenue for the 2004–05 fiscal period as a percentage of total grower revenue could range between 0.015 and 0.021 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers. In addition, the committee's meeting was widely publicized throughout the California kiwifruit industry, and all interested persons were invited to attend the meeting and participate in committee deliberations on all issues. Like all committee meetings, the July 15, 2004, meeting was a public meeting and all

entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2004–05 fiscal period began on August 1, 2004, and the marketing order requires that rate of assessment for each fiscal period apply to all assessable kiwifruit handled during such fiscal period; (2) the committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; (3) handlers are aware of this action which was unanimously recommended by the committee at a public meeting and is similar to other assessment rate actions issued in past fiscal periods; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements.

■ For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 920.213 is revised to read as follows:

§ 920.213 Assessment rate.

On and after August 1, 2004, an assessment rate of $0.002 per pound of kiwifruit is established for kiwifruit grown in California.

Dated: September 9, 2004.

A. J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–20849 Filed 9–15–04; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 35

RIN 3150–AH47

Medical Use of Byproduct Material Minor Amendments: Extending Expiration Date for Subpart J

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations governing the medical use of byproduct material to extend the expiration date for training and experience requirements that will be superseded (Subpart J) for 1 year, from October 24, 2004, to October 24, 2005. The rulemaking is necessary to allow sufficient time for implementation of the forthcoming final rule that amends the training and experience requirements, including new requirements for recognition of specialty board certifications.

EFFECTIVE DATE: October 22, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. Anthony N. Tse, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–6233, e-mail: *ant@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Background

The 2002 Final Rule

On April 24, 2002 (67 FR 20249), the NRC published a final rule amending its regulations regarding the medical use of byproduct material. The final rule addressed, among other things, new training and experience (T&E) requirements for radiation safety officers, authorized medical physicists, authorized nuclear pharmacists, and authorized users. This rule also addressed the requirements for recognition of medical and other specialty boards whose certifications may be used to demonstrate the adequacy of the T&E of individuals mentioned above. This final rule was effective on October 24, 2002. In addition, NRC retained the existing T&E requirements, designated as subpart J in 10 CFR part 35, for a 2-year period. Therefore, subpart J remains effective until October 24, 2004.

Statements in the Preamble of the 2002 Final Rule

In the preamble, NRC stated that during an NRC's Advisory Committee on the Medical Uses of Isotopes (ACMUI) briefing of the Commission on February 19, 2002, the issue of recognition of medical and other specialty boards was discussed. In that meeting, two committee members expressed concern that some boards did not qualify for recognition and might not be ready to apply for recognition within 6 months after publication of the final rule. Therefore, implementation of the new part 35, without Subpart J, could disrupt the current license authorization process for new medical personnel because many license authorizations are granted based on recognition of board certification.

The preamble further stated that NRC had considered this matter and decided to retain the training requirements in subpart J for a 2-year period after the effective date of the final rule. During this transition period, the NRC would continue working with the ACMUI and the medical community to resolve any concerns about the training and experience requirements. The NRC would consider changes to the T&E requirements, as appropriate.

The T&E Proposed Rule

After the publication of the 2002 final rule, the NRC worked with the ACMUI and other stakeholders to consider what changes were necessary to the T&E requirements. Several public meetings were held to discuss the changes. On December 9, 2003 (68 FR 68549), a proposed rule on T&E requirements was published for a 75-day public comment period. The NRC is currently considering public comments and developing the T&E final rule.

One commenter stated that the current transition period for subpart J, which ends on October 24, 2004, must be extended to allow time for boards to

prepare applications and for NRC to process applications, including ACMUI review. The NRC agrees that additional time for implementation of the changes to T&E should be allowed beyond October 24, 2004.

Actions Taken in This Final Rule

NRC is amending part 35 to extend the expiration date of subpart J for 1 year, from October 24, 2004, to October 24, 2005. The NRC believes that it is prudent to extend the expiration date of subpart J at this time to allow affected stakeholders (*i.e.*, medical and other specialty boards, and medical use licensees) to effectively plan their implementation.

The following sections are revised by changing the date from October 24, 2004, to October 24, 2005: § 35.2, paragraph (1) of the definitions of "Authorized medical physicist," "Authorized nuclear pharmacist," "Authorized user," and "Radiation Safety Officer"; §§ 35.10(b) and (c); 35.51(b)(2); 35.100(b)(2); 35.190(b), (c)(1)(ii) and (c)(2); 35.200(b)(2); 35.290(b), (c)(1)(ii), and (c)(2); 35.300(b)(2); 35.390(b)(1)(ii) and (b)(2); 35.392(b), (c)(2), and (c)(3); 35.394(b), (c)(2), and (c)(3); 35.490(b)(1)(ii), (b)(2), and (b)(3); 35.491(a) and (b)(3); and 35.690(b)(1)(ii), (b)(2), and (b)(3).

Because these amendments constitute minor administrative changes to the regulations, the notice and comment provisions of the Administrative Procedure Act do not apply, pursuant to 5 U.S.C. 553(b)(B).

Environmental Impact: Categorical Exclusion

NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0010 and 3150–0120.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information of an information collection requirement unless the requesting document displays a currently valid OMB control number.

Backfit Analysis

The NRC has determined that the backfit rule does not apply to this final rule; and therefore, a backfit analysis is not required for this final rule because these amendments do not involve any provisions that would impose backfits as defined in 10 CFR Chapter 1.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects for 10 CFR Part 35

Byproduct material, Criminal penalties, Drugs, Health facilities, Health professions, Medical devices, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 35.

PART 35–MEDICAL USE OF BYPRODUCT MATERIAL

■ 1 The authority citation for part 35 continues to read as follows:

Authority: Secs. 81, 161, 182, 183, 68 Stat. 935, 948, 953, 954, as amended (42 U.S.C. 2111, 2201, 2232, 2233); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); Sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 2. In § 35.2, the definitions of "authorized medical physicist," "authorized nuclear pharmacist," "authorized user," and "Radiation Safety Officer" are amended by republishing the introductory text and revising paragraph (1) of each definition to read as follows:

§ 35.2 Definitions.

* * * * *

Authorized medical physicist means an individual who—

(1) Meets the requirements in §§ 35.51(a) and 35.59; or, before October 24, 2005, meets the requirements in §§ 35.961(a), or (b), and 35.59; or

* * * * *

Authorized nuclear pharmacist means a pharmacist who—

(1) Meets the requirements in §§ 35.55(a) and 35.59; or, before October 24, 2005, meets the requirements in §§ 35.980(a) and 35.59; or

* * * * *

Authorized user means a physician, dentist, or podiatrist who—

(1) Meets the requirements in §§ 35.59 and 35.190(a), 35.290(a), 35.390(a), 35.392(a), 35.394(a), 35.490(a), 35.590(a), or 35.690(a); or, before October 24, 2005, meets the requirements in §§ 35.910(a), 35.920(a), 35.930(a), 35.940(a), 35.950(a), or 35.960(a) and 35.59; or

* * * * *

Radiation Safety Officer means an individual who—

(1) Meets the requirements in §§ 35.50(a) and 35.59; or, before October 24, 2005, meets the requirements in §§ 35.900(a) and 35.59; or

* * * * *

■ 3 In § 35.10, paragraph (b) and the introductory text of paragraph (c) are revised to read as follows:

§ 35.10 Implementation.

* * * * *

(b) A licensee shall implement the training requirements in §§ 35.50(a), 35.51(a), 35.55(a), 35.59, 35.190(a), 35.290(a), 35.390(a), 35.392(a), 35.394(a), 35.490(a), 35.590(a), and 35.690(a) on or before October 25, 2005.

(c) Prior to October 25, 2005, a licensee shall satisfy the training requirements of this part for a Radiation Safety Officer, an authorized medical physicist, an authorized nuclear pharmacist, or an authorized user by complying with either:

* * * * *

■ 4. In § 35.51, paragraph (b)(2) is revised to read as follows:

§ 35.51 Training for an authorized medical physicist.

* * * * *

(b) * * *

(2) Has obtained written certification that the individual has satisfactorily completed the requirements in paragraph (b)(1) of this section and has achieved a level of competency sufficient to function independently as an authorized medical physicist for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status. The written certification must be signed by a preceptor authorized medical physicist who meets the requirements in § 35.51, or, before October 24, 2005, § 35.961, or equivalent Agreement State requirements for an authorized medical physicist for each type of therapeutic medical unit for which the individual is requesting authorized medical physicist status.

■ 5 In § 35.100, paragraph (b)(2) is revised to read as follows:

§ 35.100 Use of unsealed byproduct material for uptake, dilution, and excretion studies for which a written directive is not required.

* * * * *

(b) * * *

(2) A physician who is an authorized user and who meets the requirements specified in §§ 35.290, 35.390, or, before October 24, 2005, § 35.920; or

* * * * *

■ 6. In § 35.190, paragraph (b), the introductory text of paragraph (c)(1)(ii), and paragraph (c)(2) are revised to read as follows:

§ 35.190 Training for uptake, dilution, and excretion studies.

* * * * *

(b) Is an authorized user under §§ 35.290, 35.390, or, before October 24, 2005, §§ 35.910, 35.920, or 35.930, or equivalent Agreement State requirements; or

* * * * *

(c) * * *

(1) * * *

(ii) Work experience, under the supervision of an authorized user who meets the requirements in §§ 35.190, 35.290, 35.390, or, before October 24, 2005, §§ 35.910, 35.920, or 35.930, or equivalent Agreement State requirements, involving—

* * * * *

(2) Has obtained written certification, signed by a preceptor authorized user who meets the requirements in §§ 35.190, 35.290, 35.390; or, before October 24, 2005, §§ 35.910, 35.920, or 35.930, or equivalent Agreement State requirements, that the individual has satisfactorily completed the requirements in paragraph (c)(1) of this section and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized under § 35.100.

■ 7. In § 35.200, paragraph (b)(2) is revised to read as follows:

§ 35.200 Use of unsealed byproduct material for imaging and localization studies for which a written directive is not required.

* * * * *

(b) * * *

(2) A physician who is an authorized user and who meets the requirements specified in §§ 35.290, 35.390, or, before October 24, 2005, § 35.920; or

* * * * *

■ 8. In § 35.290, paragraph (b), the introductory text of paragraph (c)(1)(ii), and paragraph (c)(2) are revised to read as follows:

§ 35.290 Training for imaging and localization studies.

* * * * *

(b) Is an authorized user under § 35.390, or, before October 24, 2005, § 35.920, or equivalent Agreement State requirements; or

(c) * * *

(1) * * *

(ii) Work experience, under the supervision of an authorized user, who meets the requirements in §§ 35.290, 35.390, or, before October 24, 2005, § 35.920, or equivalent Agreement State requirements, involving—

* * * * *

(2) Has obtained written certification, signed by a preceptor authorized user who meets the requirements in §§ 35.290, 35.390, or, before October 24, 2005, § 35.920, or equivalent Agreement State requirements, that the individual has satisfactorily completed the requirements in paragraph (c)(1) of this section and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized under §§ 35.100 and 35.200.

■ 9. In § 35.300, paragraph (b)(2) is revised to read as follows:

§ 35.300 Use of unsealed byproduct material for which a written directive is required.

* * * * *

(b) * * *

(2) A physician who is an authorized user and who meets the requirements specified in §§ 35.290, 35.390, or, before October 24, 2005, § 35.920; or

* * * * *

■ 10. In § 35.390, the introductory text of paragraph (b)(1)(ii) and paragraph (b)(2) are revised to read as follows:

§ 35.390 Training for use of unsealed byproduct material for which a written directive is required.

* * * * *

(b) * * *

(1) * * *

(ii) Work experience, under the supervision of an authorized user who meets the requirements in § 35.390(a), 35.390(b), or, before October 24, 2005, § 35.930, or equivalent Agreement State requirements. A supervising authorized user, who meets the requirements in § 35.390(b) or, before October 24, 2005, § 35.930(b), must also have experience in administering dosages in the same dosage category or categories (i.e., § 35.390(b)(1)(ii)(G)(*1*), (*2*), (*3*), or (*4*)) as the individual requesting authorized user status. The work experience must involve—

* * * * *

(2) Has obtained written certification that the individual has satisfactorily completed the requirements in paragraph (b)(1) of this section and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized under § 35.300. The written certification must be signed by a preceptor authorized user who meets the requirements in §§ 35.390(a), 35.390(b), or, before October 24, 2005, § 35.930, or equivalent Agreement State requirements. The preceptor authorized user, who meets the requirements in § 35.390(b) or, before October 24, 2005, § 35.930(b), must also have experience in administering dosages in the same dosage category or categories (i.e., § 35.390(b)(1)(ii)(G)(*1*), (*2*), (*3*), or (*4*)) as the individual requesting authorized user status.

■ 11. In § 35.392, paragraph (b), the introductory text of paragraph (c)(2), and paragraph (c)(3) are revised to read as follows:

§ 35.392 Training for the oral administration of sodium iodide I–131 requiring a written directive in quantities less than or equal to 1.22 gigabecquerels (33 millicuries).

* * * * *

(b) Is an authorized user under §§ 35.390(a), 35.390(b) for uses listed in § 35.390(b)(1)(ii)(G)(*1*) or (*2*), § 35.394, or, before October 24, 2005, §§ 35.930, 35.932, or 35.934, or equivalent Agreement State requirements; or

(c) * * *

(2) Has work experience, under the supervision of an authorized user who meets the requirements in §§ 35.390(a), 35.390(b), 35.392, 35.394, or, before October 24, 2005, §§ 35.930, 35.932, or 35.934, or equivalent Agreement State requirements. A supervising authorized user who meets the requirements in § 35.390(b), must also have experience in administering dosages as specified in § 35.390(b)(1)(ii)(G)(*1*) or (*2*). The work experience must involve—

* * * * *

(3) Has obtained written certification that the individual has satisfactorily completed the requirements in paragraphs (c)(1) and (c)(2) of this section and has achieved a level of competency sufficient to function independently as an authorized user for medical uses authorized under § 35.300. The written certification must be signed by a preceptor authorized user who meets the requirements in §§ 35.390(a), 35.390(b), 35.392, 35.394, or, before October 24, 2005, §§ 35.930, 35.932, or

35.934, or equivalent Agreement State requirements. A preceptor authorized user, who meets the requirement in § 35.390(b), must also have experience in administering dosages as specified in § 35.390(b)(1)(ii)(G)(*1*) or (*2*).

■ 12. In § 35.394, paragraph (b), the introductory text of paragraph (c)(2), and paragraph (c)(3) are revised to read as follows:

§ 35.394 Training for the oral administration of sodium iodide I–131 requiring a written directive in quantities greater than 1.22 gigabecquerels (33 millicuries).

* * * * *

(b) Is an authorized user under §§ 35.390(a), 35.390(b) for uses listed in § 35.390(b)(1)(ii)(G)(*2*), or, before October 24, 2005, §§ 35.930 or 35.934, or equivalent Agreement State requirements; or

(c) * * *

(2) Has work experience, under the supervision of an authorized user who meets the requirements in §§ 35.390(a), 35.390(b), 35.394, or, before October 24, 2005, §§ 35.930 or 35.934, or equivalent Agreement State requirements. A supervising authorized user, who meets the requirements in § 35.390(b), must also have experience in administering dosages as specified in § 35.390(b)(1)(ii)(G)(*2*). The work experience must involve—

* * * * *

(3) Has obtained written certification that the individual has satisfactorily completed the requirements in paragraphs (c)(1) and (c)(2) of this section and has achieved a level of competency sufficient to function independently as an authorized user for medical uses authorized under § 35.300. The written certification must be signed by a preceptor authorized user who meets the requirements in §§ 35.390(a), 35.390(b), 35.394, or, before October 24, 2005, §§ 35.930 or 35.934, or equivalent Agreement State requirements. A preceptor authorized user, who meets the requirements in § 35.390(b), must also have experience in administering dosages as specified in § 35.390(b)(1)(ii)(G)(*2*).

■ 13. In § 35.490, the introductory text of paragraph (b)(1)(ii), and paragraphs (b)(2) and (b)(3) are revised to read as follows:

§ 35.490 Training for use of manual brachytherapy sources.

* * * * *

(b) * * *

(1) * * *

(ii) 500 hours of work experience, under the supervision of an authorized user who meets the requirements in § 35.490, or, before October 24, 2005, § 35.940, or equivalent Agreement State requirements at a medical institution, involving—

* * * * *

(2) Has obtained 3 years of supervised clinical experience in radiation oncology, under an authorized user who meets the requirements in § 35.490, or, before October 24, 2005, § 35.940, or equivalent Agreement State requirements, as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by paragraph (b)(1)(ii) of this section; and

(3) Has obtained written certification, signed by a preceptor authorized user who meets the requirements in § 35.490, or, before October 24, 2005, § 35.940, or equivalent Agreement State requirements, that the individual has satisfactorily completed the requirements in paragraphs (b)(1) and (b)(2) of this section and has achieved a level of competency sufficient to function independently as an authorized user of manual brachytherapy sources for the medical uses authorized under § 35.400.

■ 14 In § 35.491, paragraphs (a) and (b)(3) are revised to read as follows:

§ 35.491 Training for ophthalmic use of strontium-90.

* * * * *

(a) Is an authorized user under § 35.490, or, before October 24, 2005, §§ 35.940 or 35.941, or equivalent Agreement State requirements; or

(b) * * *

(3) Has obtained written certification, signed by a preceptor authorized user who meets the requirements in §§ 35.490, 35.491, or, before October 24, 2005, §§ 35.940 or 35.941, or equivalent Agreement State requirements, that the individual has satisfactorily completed the requirements in paragraphs (a) and (b) of this section and has achieved a level of competency sufficient to function independently as an authorized user of strontium-90 for ophthalmic use.

■ 15 In § 35.690, the introductory text of paragraph (b)(1)(ii) and paragraphs (b)(2) and (b)(3) are revised to read as follows:

§ 35.690 Training for use of remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units.

* * * * *

(b) * * *

(1) * * *

(ii) 500 hours of work experience, under the supervision of an authorized user who meets the requirements in § 35.690, or, before October 24, 2005, § 35.960, or equivalent Agreement State requirements at a medical institution, involving—

* * * * *

(2) Has completed 3 years of supervised clinical experience in radiation oncology, under an authorized user who meets the requirements in § 35.690, or, before October 24, 2005, § 35.960, or equivalent Agreement State requirements, as part of a formal training program approved by the Residency Review Committee for Radiation Oncology of the Accreditation Council for Graduate Medical Education or the Committee on Postdoctoral Training of the American Osteopathic Association. This experience may be obtained concurrently with the supervised work experience required by paragraph (b)(1)(ii) of this section; and

(3) Has obtained written certification that the individual has satisfactorily completed the requirements in paragraphs (b)(1) and (b)(2) of this section and has achieved a level of competency sufficient to function independently as an authorized user of each type of therapeutic medical unit for which the individual is requesting authorized user status. The written certification must be signed by a preceptor authorized user who meets the requirements in § 35.690, or, before October 24, 2005, § 35.960, or equivalent Agreement State requirements for an authorized user for each type of therapeutic medical unit for which the individual is requesting authorized user status.

Dated at Rockville, Maryland, this 10th day of September, 2004.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 04–20856 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9158]

RIN 1545–BD59

Treatment of Certain Nuclear Decommissioning Funds for Purposes of Allocating Purchase Price in Certain Deemed and Actual Asset Acquisitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the allocation of purchase price in certain deemed and actual asset acquisitions under sections 338 and 1060. These regulations affect sellers and purchasers of nuclear power plants or of the stock of corporations that own nuclear power plants. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on September 15, 2004.

FOR FURTHER INFORMATION CONTACT: Richard Starke at (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Sections 338 and 1060 and the regulations thereunder provide a methodology by which the purchase or sales price in certain actual and deemed asset acquisitions is computed and allocated among the assets acquired or treated as acquired. The purchase price generally includes liabilities of the seller that are assumed by the purchaser. Those liabilities, however, must be treated as having been incurred by the purchaser. In order to be treated as having been incurred by the purchaser, in addition to other requirements, economic performance must have occurred with respect to the liability.

Sections 338 and 1060 and the regulations promulgated thereunder employ a residual method of allocation under which assets are divided into seven classes and the consideration is allocated to each of the first six classes in turn, up to the fair market value of the assets in the class. The residual amount is allocated to assets in the last class. Accordingly, under the residual method of § 1.338–6, the purchase or sales price is first allocated to Class I assets (cash and general deposit accounts other than certain certificates of deposit), then Class II assets (actively traded personal property, certificates of deposit, foreign currency, U.S. government securities, and publicly traded stock), then Class III assets (assets that the taxpayer marks to market at least annually and certain debt instruments), then Class IV assets (inventory), then Class V assets (assets that are not assets of another class), then Class VI assets (section 197 intangibles, except goodwill and going concern value), and then Class VII assets (goodwill and going concern value). The ordering of the nonresidual classes generally reflects a policy of allocating basis first to those assets that are susceptible to more accurate valuation or the cost of which is recovered most rapidly. See Notice of Proposed Rulemaking REG–107069–97 [64 FR 43462, 43465, 43469; August 10, 1999, (1999–2 C.B. 346, 350, 354)].

In connection with the sale of a nuclear power station, the assets sold by the seller and purchased by the purchaser may include the plant, equipment, operating assets, and one or more funds holding assets that have been set aside for the purpose of satisfying the owner's responsibility to decommission the nuclear power station after the conclusion of its useful life (the decommissioning liability), and the purchaser may have agreed to satisfy the decommissioning liability. One or more of the funds may be funds described in section 468A (qualified funds). Contributions to qualified funds are limited by statute and regulations but give rise to a deduction in the year of contribution. The qualified fund, not the contributor, is treated as the owner of the assets of the fund and is taxed on the income earned on the fund's assets. The assets of qualified funds are not treated as sold or purchased in an actual or deemed sale of the assets of a corporation that owns a nuclear power plant. One or more of the funds, however, may be funds that are not described in section 468A (nonqualified funds). Contributions to nonqualified funds do not give rise to a deduction in the year of contribution. In addition, the assets of a nonqualified fund continue to be treated as assets of the contributor.

Because the decommissioning liability will not satisfy the economic performance test until decommissioning occurs, as of the purchase date, it is not included in the purchase price that the purchaser allocates to the acquired assets. As a result, as of the purchase date, the purchase price to be allocated by the purchaser among the acquired assets may be significantly less than the fair market value of those assets. This situation will generally persist until economic performance with respect to the decommissioning liability is satisfied through decommissioning.

Under the residual method, the purchase price is allocated to the nonqualified fund's assets, which are typically Class II assets, before it is allocated to the plant, equipment, and other operating assets, which are typically Class V assets. Because the purchase price does not reflect the decommissioning liability and is first allocated to the assets of the nonqualified fund, the purchase price allocated to the plant, equipment, and other operating assets may be less than their fair market value. To the extent the purchase price allocated to the plant, equipment, and other operating assets is less than their fair market value, the purchaser will not recover a tax benefit (i.e., a depreciation deduction) for the decommissioning liability until economic performance occurs on decommissioning. This result is appropriate given Congress's decision in enacting section 468A not to allow a plant operator a deduction prior to decommissioning for funds set aside in excess of those amounts set aside in qualified funds, and Congress's decision in enacting section 461(h) not to allow a deduction for costs that do not satisfy the economic performance test.

A number of commentators have argued that economic performance occurs with respect to such decommissioning liabilities at the time of the purchase. These commentators have based their positions on section 461(h)(2)(A)(ii) and § 1.461–4(d)(5).

The IRS and Treasury Department do not believe that this position is consistent with the rule and policies of section 461(h)(2). Under section 461(h)(2)(A)(ii), if a liability arises out of the providing of property to the taxpayer by another person, economic performance occurs as such person provides such property. Decommissioning liabilities are the same type of liabilities to both the seller and the purchaser and are fixed by the same circumstances, specifically acquiring a power plant and the license to operate it. The economic performance rules look at the nature of the liability and look to what the taxpayer is required to "perform" in order to satisfy the liability. To the purchaser, merely acquiring the power plant does not satisfy the decommissioning liabilities. Instead, the purchaser cannot be considered to satisfy the liabilities until

it performs those services required to decommission the plant. See section 461(h)(2)(B) (providing that where the liability of the taxpayer requires the taxpayer to provide property or services, economic performance occurs as the taxpayer provides such property or service). Therefore, section 461(h)(2)(A)(ii) does not apply to treat economic performance as satisfied at the time of purchase.

With respect to the application of § 1.461–4(d)(5), that regulation provides that if, in connection with the sale or exchange of a trade or business by a taxpayer, the purchaser expressly assumes a liability arising out of the trade or business that the taxpayer (the seller) but for the economic performance requirement would have been entitled to incur as of the date of the sale, economic performance with respect to that liability occurs as the amount of the liability is properly included in the amount realized on the transaction by the taxpayer (the seller). The IRS and Treasury Department believe the "taxpayer" described in § 1.461–4(d)(5) is the seller, and the acceleration of economic performance is for the "taxpayer." Section 1.461–4(d)(5) does not address the treatment of the purchaser. This interpretation is consistent with the discussion of the preamble to that regulation. [TD 8408, 57 FR 12412–3, 12415–6 (April 10, 1992), (1992–1 C.B. 157, 160)].

Nonetheless, the IRS and Treasury Department recognize the special circumstances related to the purchase and sale of nuclear power plants and transfer of nonqualified funds. The Nuclear Regulatory Commission requires, as one of several decommissioning alternatives available to nuclear power plant operators, that funds be established and maintained to fund decommissioning and related administrative expenditures and that the use of such set aside funds be primarily restricted to such uses. Thus, although the assets in nonqualified funds are relatively liquid, they are ones to which the purchaser's access is significantly limited.

To mitigate the tax effect of these decommissioning liabilities' not satisfying the statutory requirements for economic performance as to the purchaser, these temporary regulations add § 1.338–6T. That regulation provides that, for purposes of allocating purchase or sales price among the acquisition date assets of a target, a taxpayer may elect to treat a nonqualified fund as if such fund were an entity classified as a corporation the stock of which were among the acquisition date assets of the target and a Class V asset. In these cases, for allocation purposes, the hypothetical corporation will be treated as bearing the responsibility for decommissioning to the extent assets of the fund are expected to be used for that purpose. A section 338(h)(10) election will be treated as made for the hypothetical corporation (regardless of whether the requirements for a section 338(h)(10) election are otherwise satisfied).

The election provided for in these temporary regulations converts the assets of the nonqualified fund from primarily Class I and Class II assets to the assets of a corporation the stock of which is a Class V asset and allows the present cost of the decommissioning liability funded by the nonqualified fund, which otherwise cannot be taken into account for income tax purposes, to be netted against the fund assets for the sole purpose of valuing the stock of the hypothetical subsidiary corporation. Therefore, if this election were made, it would be expected that the assets of the nonqualified fund would be allocated a much smaller amount of the initial purchase price than if no such election had been made, and the disposition of fund assets would result in gain. A larger amount of the initial purchase price, however, would be available for allocation to the plant and other operating assets.

This election is available for applicable asset acquisitions and qualified stock purchases on or after September 15, 2004. The purchaser may make this election regardless of whether the seller or sellers also make the election. However, in the case of a deemed asset acquisition under section 338, if the target corporation is an S corporation, all of the S corporation shareholders, including those that do not sell their stock, must consent to the election for the election to be effective as to any S corporation shareholder. In the case of a deemed asset acquisition under section 338, the election is made by taking a position on an original or amended tax return for the taxable year of the qualified stock purchase that is consistent with having made the election. Such tax return, however, must be filed no later than the later of 30 days after the date on which the section 338 election is due or the day the original tax return for the taxable year of the qualified stock purchase is due (with extensions). The election is irrevocable. If the transaction is an applicable asset acquisition within the meaning of section 1060, the election is made by taking a position on the timely filed original return for the year of the applicable asset acquisition.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. These temporary regulations provide elective relief to certain purchasers of stock and assets by providing an alternative method for allocating basis among acquired assets. It is necessary to provide this relief immediately to remove an impediment to such transactions. Accordingly, good cause is found for dispensing with prior notice and comment pursuant to 5 U.S.C. 553(b) and for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d). For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), see the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**. The IRS and the Treasury Department request comments from small entities that believe they might be adversely affected by these regulations. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for the Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is Richard Starke, Office of the Associate Chief Counsel (Corporate).

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read, in part, as follows:

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

Section 1.338–6T also issued under 26 U.S.C. 337(d), 338, and 1502. * * *

■ **Par. 2.** Section 1.338–0 is amended by adding an entry in the list of captions for paragraph (c)(5) of § 1.338–6 and § 1.338–6T to read as follows:

§ 1.338–0 Outline of topics.

* * * * *

§ 1.338–6 Allocation of ADSP and AGUB among target assets.

* * * * *

(c) * * *

(5) Allocation to certain nuclear decommissioning funds. [Reserved]

* * * * *

§ 1.338–6T Allocation of ADSP and AGUB among target assets (temporary).

(a) through (c)(4) [Reserved]

(c)(5) Allocation to certain nuclear decommissioning funds.

(d) [Reserved]

■ **Par. 3.** Section 1.338–6 is amended by adding paragraph (c)(5) to read as follows:

§ 1.338–6 Allocation of ADSP and AGUB among target assets.

* * * * *

(c) * * *

(5) *Allocation to certain nuclear decommissioning funds.* [Reserved]. For further guidance, see § 1.338–6T.

* * * * *

■ **Par. 4.** Section 1.338–6T is added to read as follows:

§ 1.338–6T Allocation of ADSP and AGUB among target assets (temporary).

(a) through (c)(4) [Reserved]. For further guidance, see § 1.338–6(a) through (c)(4).

(5) *Allocation to certain nuclear decommissioning funds*—(i) *General rule.* For purposes of allocating ADSP or AGUB among the acquisition date assets of a target (and for no other purpose), a taxpayer may elect to treat a nonqualified nuclear decommissioning fund (as defined in paragraph (c)(5)(ii) of this section) of the target as if—

(A) Such fund were an entity classified as a corporation;

(B) The stock of the corporation were among the acquisition date assets of the target and a Class V asset;

(C) The corporation owned the assets of the fund;

(D) The corporation bore the responsibility for decommissioning one or more nuclear power plants to the extent assets of the fund are expected to be used for that purpose; and

(E) A section 338(h)(10) election were made for the corporation (regardless of whether the requirements for a section 338(h)(10) election are otherwise satisfied).

(ii) *Definition of nonqualified nuclear decommissioning fund.* A nonqualified nuclear decommissioning fund means a trust, escrow account, Government fund or other type of agreement—

(A) That is established in writing by the owner or licensee of a nuclear generating unit for the exclusive purpose of funding the decommissioning of one or more nuclear power plants;

(B) That is described to the Nuclear Regulatory Commission in a report described in 10 CFR 50.75(b) as providing assurance that funds will be available for decommissioning;

(C) That is not a Nuclear Decommissioning Reserve Fund, as described in section 468A;

(D) That is maintained at all times in the United States; and

(E) The assets of which are to be used only as permitted by 10 CFR 50.82(a)(8).

(iii) *Availability of election.* P may make the election described in this paragraph (c)(5) regardless of whether the selling consolidated group (or the selling affiliate or the S corporation shareholders) also makes the election. In addition, the selling consolidated group (or the selling affiliate or the S corporation shareholders) may make the election regardless of whether P also makes the election. If T is an S corporation, all of the S corporation shareholders, including those that do not sell their stock, must consent to the election for the election to be effective as to any S corporation shareholder.

(iv) *Time and manner of making election.* The election described in this paragraph (c)(5) is made by taking a position on an original or amended tax return for the taxable year of the qualified stock purchase that is consistent with having made the election. Such tax return must be filed no later than the later of 30 days after the date on which the section 338 election is due or the day the original tax return for the taxable year of the qualified stock purchase is due (with extensions).

(v) *Irrevocability of election.* An election made pursuant to this paragraph (c)(5) is irrevocable.

(vi) *Effective date.* This paragraph (c)(5) applies to qualified stock purchases occurring on or after September 15, 2004.

(d) [Reserved]. For further guidance, see § 1.338–6(d).

■ **Par. 5.** Section 1.1060–1 is amended in paragraph (a)(3) to add an entry to reflect the addition of paragraph (e)(1)(ii)(C); by adding a sentence to the end of paragraph (c)(3); and by adding paragraph (e)(1)(ii)(C) to read as follows:

§ 1.1060–1 Special allocation rules for certain asset acquisitions.

(a) * * *

(3) * * *

* * * * *

(e) Reporting requirements.

(1) Applicable asset acquisitions.

* * * * *

(ii) Time and manner of reporting.

* * * * *

(C) Election described in § 1.338–6T(c)(5).

* * * * *

(c) * * *

(3) * * * For further guidance, see § 1.1060–1T.

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(C) *Allocation to certain nuclear decommissioning funds.* [Reserved]. For further guidance, see § 1.338–6T.

* * * * *

■ **Par. 6.** Section 1.1060–1T is added to read as follows:

§ 1.1060–1T Special allocation rules for certain asset acquisitions (temporary).

(a) through (c)(2) [Reserved]. For further guidance, see § 1.1060–1(a) through (c)(2).

(c)(3) *Certain costs.* The seller and purchaser each adjusts the amount allocated to an individual asset to take into account the specific identifiable costs incurred in transferring that asset in connection with the applicable asset acquisition (*e.g.*, real estate transfer costs or security interest perfection costs). Costs so allocated increase, or decrease, as appropriate, the total consideration that is allocated under the residual method. No adjustment is made to the amount allocated to an individual asset for general costs associated with the applicable asset acquisition as a whole or with groups of assets included therein (*e.g.*, non-specific appraisal fees or accounting fees). These latter amounts are taken into account only indirectly through their effect on the total consideration to be allocated. If an election described in § 1.338–6T(c)(5) is made with respect to an applicable asset acquisition, any allocation of costs pursuant to this paragraph (c)(3) shall be made as if such election had not been made. The preceding sentence applies to applicable asset acquisitions occurring on or after September 15, 2004.

(c)(4) through (e)(1)(ii)(B) [Reserved]. For further guidance, see § 1.1060–1(c)(4) through (e)(1)(ii)(B).

(e)(1)(ii)(C) *Election described in § 1.338–6T(c)(5)—(1) Availability.* The election described in § 1.338–6T(c)(5) is available in respect of an applicable asset acquisition provided that the requirements of that section are satisfied. Such election may be made by the seller, regardless of whether the purchaser also makes the election, and may be made by the purchaser, regardless of whether the seller also makes the election.

(2) Time and manner of making election. The election described in § 1.338–6T(c)(5) is made by taking a position on a timely filed original tax return for the taxable year of the applicable asset acquisition that is

consistent with having made the election.

(3) *Irrevocability of election.* The election described in § 1.338–6T(c)(5) is irrevocable.

(4) *Effective date.* This paragraph (e)(1)(ii)(C) applies to applicable asset acquisitions occurring on or after September 15, 2004.

(e)(2) [Reserved]. For further guidance, see § 1.1060–1(e)(2).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: September 8, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–20914 Filed 9–15–04; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, 25, 31, 40, 41, 44, 53, 55, 156, and 301

[TD 9156]

RIN 1545–BB00

Place for Filing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that update obsolete references in the existing regulations under section 6091 of the Internal Revenue Code (Code) regarding the place for filing hand-carried returns and other documents. These final regulations reflect changes in the organizational structure of the IRS but do not make substantive changes to taxpayers' current ability to hand carry returns to a local IRS office.

DATES: These final regulations are effective September 16, 2004.

FOR FURTHER INFORMATION CONTACT: Emly B. Berndt of the Office of the Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains final regulations that amend 26 CFR parts 1, 20, 25, 31, 40, 41, 44, 53, 55, 156, and 301 with respect to the place for filing returns and other documents under section 6091 of the Code. These final regulations reflect the changes in the IRS organizational structure following the Internal Revenue Service Restructuring and Reform Act of 1998 (112 Stat. 685). These final regulations specify where the IRS now accepts hand-carried returns in a manner consistent with the instructions in Notice 2003–19 (2003–1 C.B. 703) and do not make any substantive changes to a taxpayer's ability to hand carry returns to a local IRS office.

These final regulations remove the examples under § 1.6091–4(a)(4), which are obsolete due to various amendments to the Code, and add an example in their place that illustrates the application of the rules in § 1.6091–4(a)(2) and (3) to a current provision of the Code. These final regulations also include one citation correction in sect; 1.6091–1(b). In certain cases, these final regulations cross reference regulations that contain references to obsolete IRS offices or titles. Taxpayers in those cases should continue to follow any updated instructions in other published guidance. See, *e.g.*, Notice 2003–19.

Special Analyses

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that section 553(b) of the administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations for two reasons. First, these final regulations reflect changes in the organizational structure of the IRS and are rules concerning agency organization, procedure, or practice that are exempted from the notice and comment requirement of 5 U.S.C. 553. Second, for good cause, Treasury and the IRS have determined that notice and public procedure are impracticable, unnecessary, and contrary to the public interest because these final regulations do not make substantive changes to taxpayers' current ability to hand carry returns to a local IRS office. Instead, these final regulations replace obsolete references to IRS organizations and titles with updated references that are sufficiently flexible to take into account future changes to IRS structure or operations. In addition, these final regulations reflect existing instructions given to taxpayers with respect to the hand-carrying of returns. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Code, these final regulations were submitted four weeks prior to filing with the Office of the Federal Register to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these final regulations are Ann M. Kramer and Emly B. Berndt of the Office of the Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 41

Excise taxes, Motor vehicles, Reporting and recordkeeping requirements.

26 CFR Part 44

Excise taxes, Gambling, Reporting and recordkeeping requirements.

26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

26 CFR Part 55

Excise taxes, Investments, Reporting and recordkeeping requirements.

26 CFR Part 156

Excise tax on greenmail, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR parts 1, 20, 25, 31, 40, 41, 44, 53, 55, 156, and 301 are to be amended as follows:

PART 1—INCOME TAXES

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

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

§ 1.6091–1(b) [Amended]

■ **Par. 2.** Section 1.6091–1 is amended as follows:

■ 1. Paragraph (b)(1) is amended by removing the reference "1.6031–1" and adding "1.6031(a)–1" in its place.

■ 2. Paragraph (b)(5) is amended by removing the language "paragraph (d) of § 1.6035–1 and paragraph (d) of § 1.6035–2" and adding "§ 1.6035–1" in its place.

■ 3. Paragraph (b)(8) is amended by removing the language "paragraph (d) of § 1.6042–1 and".

■ 4. Paragraph (b)(11) is amended by removing the language "paragraph (b) of § 1.6044–1, and" and the parenthetical "(relating to returns for calendar years after 1962)".

■ 5. Paragraph (b)(12) is amended by removing the language "(e)" and adding "(j)(2)" in its place.

■ **Par. 3.** Section 1.6091–2 is amended as follows:

■ 1. The introductory text is amended by removing the parenthetical "(relating to income tax returns required to be filed with the Director of International Operations)" and adding the parenthetical "(relating to certain international income tax returns)" in its place.

■ 2. Paragraph (a)(1) is revised.

■ 3. Paragraph (b) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 4. Paragraph (d)(1) is revised.

■ 5. Paragraph (d)(2), first sentence, is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

■ 6. Paragraph (e)(1) is amended by removing the language "internal revenue district referred to in paragraph (a) of this section" and adding "legal residence or principal place of business of the person required to make the return" in its place.

■ 7. Paragraph (e)(2) is amended by removing the language "internal revenue district referred to in paragraph (b) of this section" and adding "principal place of business or principal office or agency of the corporation" in its place.

■ 8. Paragraph (f)(1) is amended by removing the language "the district director" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office" in its place.

■ 9. Paragraph (f)(2) is amended by removing the language "the district director" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office" in its place.

■ 10. Paragraph (g) is amended by removing the language "the district director" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office" in its place.

The revisions read as follows:

§ 1.6091–2 Place for filing income tax returns.

(a) *Individuals, estates, and trusts.* (1) Except as provided in paragraph (c) § f this section, income tax returns of individuals, estates, and trusts shall be filed with any person assigned the responsibility to receive returns at the local Internal Revenue Service office that serves the legal residence or principal place of business of the person required to make the return.

* * * * *

(d) * * *

(1) *Persons other than corporations.* Returns of persons other than corporations which are filed by hand carrying shall be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office as provided in paragraph (a) of this section.

* * * * *

■ **Par. 4.** Section 1.6091–3 is amended by revising the section heading and introductory text to read as follows:

§ 1.6091–3 Filing certain international income tax returns.

The following income tax returns shall be filed as directed in the applicable forms and instructions:

* * * * *

■ **Par. 5.** Section 1.6091–4 is amended as follows:

■ 1. Paragraph heading for (a) is amended by removing the language "district other than required district" and adding "office other than required office" in its place.

■ 2. Paragraph (a)(1) is amended by removing the language "internal revenue district" and adding "Internal Revenue Service office" in its place.

■ 3. Paragraph (a)(2), first sentence is amended by removing the language "a director of".

■ 4. Paragraph (a)(2), first sentence is amended by removing the language "the director" and adding "that service center" in its place.

■ 5. Paragraph (a)(2), first sentence is amended by removing the language "with him" and adding "there" in its place.

■ 6. Paragraph (a)(2), second sentence is amended by removing the language "director of a".

■ 7. Paragraph (a)(3)(i) is amended by removing the language "the director of".

■ 8. Paragraph (a)(3)(i) is amended by removing the language "district director" and adding "members of the office" in its place.

■ 9. Paragraph (a)(3)(ii) is amended by removing the language "director of a".

■ 10. Paragraph (a)(3)(iii) is amended by removing the language "director of a".

■ 11. Paragraph (a)(4) is revised.

■ 12. Paragraph (b) is amended by removing the language "district" and adding "Internal Revenue Service office" in its place.

The revision reads as follows:

§ 1.6091–4 Exceptional cases.

(a) * * *

(4) The application of paragraphs (a)(2) and (3) of this section may be illustrated by the following example:

Example. The Commissioner has authorized the Internal Revenue Service Center, Philadelphia, Pennsylvania (for all purposes except venue), to receive Form 1120. Except for that authorization, A, a corporation with its principal place of business in Greensboro, North Carolina, is required to file its Form 1120 for Year X with the Internal Revenue Service Center, Atlanta, Georgia. In addition, A may file an election to defer development expenditures paid or incurred in Year X. Under § 1.616–2(e)(2) and applicable published guidance (in this case Notice 2003–19 (2003–1 C.B. 703)) that statement of election must be filed with the service center that serves A's principal place of business where A filed its income tax return. A may make that election on its income tax return or by filing it separately. Under paragraph (a)(2) of this section, A may send its Form 1120 to either the Internal Revenue Service Center, Philadelphia, Pennsylvania, or to the Internal Revenue Service Center, Atlanta, Georgia. If A files its statement of election separately from its income tax return for Year X, then the statement of election is not a proper attachment to A's income tax return and A should send the statement of election to the Internal Revenue Service Center, Atlanta, Georgia (with which A must, without regard to paragraph (a)(2) of this section, file its income tax return), no later than the time prescribed for filing Form 1120 for Year X (including extensions).

* * * * *

PART 20—ESTATE TAXES

■ **Par. 6.** The authority citation for part 20 continues to read, in part, as follows:

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

§ 20.6091–1 [Amended]

■ **Par. 7.** Section 20.6091–1 is amended as follows:

■ 1. Paragraph (a)(1) is amended by removing the language "district" and adding "location" in its place.

■ 2. Paragraph (a)(2) is amended by removing the language "The district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within an internal revenue district of such director) in whose district" and adding "Any person assigned the responsibility to receive returns in the local Internal Revenue Service office serving the location in which" in its place.

■ 3. Paragraph (b) is amended by removing the language "the Director of International Operations, Washington, DC, depending upon the place" and adding "as" in its place.

§ 20.6091–2 [Amended]

■ **Par. 8.** Section 20.6091–2 is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

PART 25—GIFT TAXES

■ **Par. 9.** The authority citation for part 25 continues to read, in part, as follows:

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

§ 25.6091–1 [Amended]

■ **Par. 10.** Section 25.6091–1 is amended as follows:

■ 1. Paragraph (a), first sentence is amended by removing the language "the district director for the district in which the legal residence or principal place of business of the donor is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves the legal residence or principal place of business of the donor" in its place.

■ 2. Paragraph (a), second sentence is amended by removing the language "located in an internal revenue district, the gift tax return shall be filed with the district director for the internal revenue district in which the donor's principal place of business is located" and adding "served by a local Internal Revenue Service office, the gift tax return shall be filed with any person assigned the responsibility to receive returns in that office" in its place.

■ 3. Paragraph (b), second sentence is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within an internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

■ 4. Paragraph (c) is amended by removing the language "which is located in an internal revenue district" and adding "in the United States" in its place.

■ 5. Paragraph (c) is further amended by removing the language "the Director of International Operations, Washington, D.C., depending upon the place" and adding "as" in its place.

§ 25.6091–2 [Amended]

■ **Par. 11.** Section 25.6091–2 is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Par. 12.** The authority citation for part 31 continues to read, in part, as follows:

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

■ **Par. 13.** Section 31.6091–1 is amended as follows:

■ 1. Paragraph (a), first sentence is amended by removing the language "The" and adding "Except as provided in paragraph (c) of this section, the" in its place.

■ 2. Paragraph (a) is further amended by removing from the first sentence the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place, and removing the last sentence.

■ 3. Paragraph (b) is amended by removing the language "the district director for the district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 4. Paragraph (c) is revised.

■ 5. Paragraph (e)(1) is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

■ 6. Paragraph (e)(2) is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

■ 7. Paragraph (e)(3)(i) is amended by removing the language "in any internal revenue district" and adding "served by a local Internal Revenue Service office" in its place.

■ 8. The heading for paragraph (f) is amended by removing the language *"district other than required district"* and adding *"office other than required office"* in its place.

■ 9. Paragraph (f) is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

■ 10. Paragraph (g) is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

The revision reads as follows:

§ 31.6091–1 Place for filing returns.

* * * * *

(c) *Returns of taxpayers outside the United States.* The return of a person (other than a corporation) outside the United States having no legal residence or principal place of business in the United States, or the return of a corporation having no principal place of business or principal office or agency in the United States, shall be filed with the Internal Revenue Service, Philadelphia, Pennsylvania 19255, or as otherwise directed in the applicable forms and instructions.

* * * * *

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

■ **Par. 14.** The authority citation for part 40 continues to read, in part, as follows:

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

§ 40.6091–1 [Amended]

■ **Par. 15.** Section 40.6091–1 is amended as follows:

■ 1. Paragraph (b)(1) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

■ 2. Paragraph (b)(2) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

■ 3. Paragraph (c) is amended by removing the language "instructions of the district director requiring that filing" and adding "forms and instructions, or other published guidance" in its place.

PART 41—EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

■ **Par. 16.** The authority citation for part 41 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 41.6091–1 [Amended]

■ **Par. 17.** Section 41.6091–1 is amended as follows:

■ 1. Paragraph (b)(1) is amended by removing the language "the Commissioner in the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

■ 2. Paragraph (b)(2) is amended by removing the language "the Commissioner in the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

PART 44—EXCISE TAXES AND GAMBLING

■ **Par. 18.** The authority citation for part 44 continues to read, in part, as follows:

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

§ 44.6091–1 [Amended]

■ **Par. 19.** Section 44.6091–1 is amended as follows:

■ 1. Paragraph (a), first sentence is amended by removing the language "A" and adding "Except as provided in paragraph (b) of this section, a" in its place.

■ 2. Paragraph (a), first sentence is further amended by removing the language "the district director of internal revenue for the district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 3. Paragraph (a) is amended by removing the second sentence.

■ 4. Paragraph (b) is amended by removing the language "any internal revenue district" and adding "the United States" in its place.

■ 5. Paragraph (b) is further amended by removing the language "Director, International Operations Division, Internal Revenue Service, Washington, DC 20225" and adding "Internal Revenue Service Center, Cincinnati, Ohio 45999, or as otherwise directed in the applicable forms and instructions" in its place.

■ 6. Paragraph (d) is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

■ **Par. 20.** The authority citation for part 53 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 53.6091–1 [Amended]

■ **Par. 21.** Section 53.6091–1 is amended as follows:

■ 1. Paragraph (a) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 2. Paragraph (b) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 3. Paragraph (c), second sentence is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

■ 4. Paragraph (d) is amended by removing the language "the district director" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office" in its place.

§ 53.6091–2 [Amended]

■ **Par. 22.** Section 53.6091–2 is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

PART 55—EXCISE TAXES AND INVESTMENTS

■ **Par. 23.** The authority citation for part 55 continues to read, in part, as follows:

Authority: Secs. 6001, 6011, 6071, 6091, and 7805 * * *

§ 55.6091–1 [Amended]

■ **Par. 24.** Section 55.6091–1 is amended as follows:

■ 1. Paragraph (a) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office serving" in its place.

■ 2. Paragraph (b), second sentence is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within an internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

§ 55.6091–2 [Amended]

■ **Par. 25.** Section 55.6091–2 is amended by removing the language "internal revenue district" and adding "local Internal Revenue Service office" in its place.

PART 156—EXCISE TAX ON GREENMAIL

■ **Par. 26.** The authority citation for part 156 continues to read, in part, as follows:

Authority: Secs. 6001, 6011, 6061, 6071, 6091, 6161, and 7805 * * *

■ **Par. 27.** Section 156.6091–1 is amended as follows:

■ 1. Paragraph (a) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 2. Paragraph (b) is amended by removing the language "the district director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 3. Paragraph (c) is amended by removing the language "the district

director for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves" in its place.

■ 4. Paragraph (d) is revised.

■ 5. Paragraph (e), second sentence is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within an internal revenue district of such director)" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

The revision reads as follows:

§ 156.6091–1 Place for filing chapter 54 (Greenmail) tax returns.

* * * * *

(d) *Returns of taxpayers outside the United States.* The return of a person (other than a partnership or a corporation) outside the United States having no legal residence or principal place of business or agency in the United States, or the return of a partnership or a corporation having no principal place of business or principal office or agency in the United States, shall be filed with the Internal Revenue Service, Philadelphia, PA 19255, or as otherwise directed in the applicable forms and instructions.

* * * * *

§ 156.6091–2 [Amended]

■ **Par. 28.** Section 156.6091–2 is amended by removing the language "with any internal revenue district" and adding "in any local Internal Revenue Service office" in its place.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 29.** The authority citation for part 301 continues to read, in part, as follows:

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

§ 301.6091–1 [Amended]

■ **Par. 30.** Section 301.6091–1 is amended as follows:

■ 1. Paragraph (b)(1), first sentence is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

■ 2. Paragraph (b)(1), first sentence is further amended by removing the language "internal revenue district in which was" and adding "local Internal Revenue Service office serving" in its place.

■ 3. Paragraph (b)(1), last sentence is amended by removing the language "(i) with the Office of International Operations, by hand carrying to such Office, or (ii) with the office of the assistant regional commissioner (alcohol and tobacco tax) by hand carrying to such office" and adding in its place the language "with an office of the Alcohol and Tobacco Tax and Trade Bureau, by hand carrying as specified in regulations of the Alcohol and Tobacco Tax and Trade Bureau, see, 27 CFR chapter I, subchapter F".

■ 4. Paragraph (b)(2) is amended by removing the language "the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) for the internal revenue district in which is located" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office that serves" in its place.

■ 5. Paragraph (b)(2), last sentence is amended by removing the language "(i) with the Office of International Operations, by hand carrying to such Office, or (ii) with the office of the assistant regional commissioner (alcohol and tobacco tax) by hand carrying to such office" and adding in its place the language "with an office of the Alcohol and Tobacco Tax and Trade Bureau, by hand carrying as specified in regulations of the Alcohol and Tobacco Tax and Trade Bureau, see, 27 CFR chapter I, subchapter F".

■ 6. Paragraph (c) is amended by removing the language "district director" and adding "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office" in its place.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 13, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–19478 Filed 9–15–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–024]

RIN 1625–AA09

Drawbridge Operation Regulation; Bayou Lafourche, Clotilda, LA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing regulations for the operation of the draw of the new vertical lift span bridge on State Route LA 654 across Bayou Lafourche, mile 53.2 at Clotilda, Lafourche Parish, Louisiana. This final rule establishes a four-hour notice requirement for opening the draw of the bridge.

DATES: This rule is effective September 16, 2004.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, 500 Poydras Street, New Orleans, Louisiana 70130–3310, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Eighth District Bridge Administration Branch maintains the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Phil Johnson, Bridge Administration Branch, at (504) 589–2965.

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. This final rule establishes the same operating requirements for the new State Route LA 654 vertical lift span bridge that were in effect for the old bridge that is being removed. The new bridge would normally be required to open on signal as per 33 CFR 117.5. Since by design the old pontoon span bridge had to be opened for all waterway users and the new vertical lift bridge has to be opened for all vessels except very small pleasure craft to pass, the establishment of this regulation does not place more constraint on the waterway users than the old regulation governing the old pontoon span bridge. Furthermore, two drawbridges, which cross Bayou Lafourche directly upstream of the State

Route LA 654 Bridge, at miles 58.2 and 58.7 respectively, each have a six-hour notice requirement for an opening of the draw. Thus, waterway users must give a longer notice to transit through this area of the waterway than this regulation requires.

Good Cause for Making Rule Effective in Less Than 30 Days

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register** because this rule merely establishes the same requirements as the old regulation for the old pontoon span bridge. Accordingly, the primary waterway users will not be required to change their current practices of transiting this waterway. Thus, no negative impact on vessel traffic in the area is anticipated.

Background and Purpose

The new vertical lift span bridge has been opened to traffic and placed in service, and will be required to open on signal as per 33 CFR 117.5. The old pontoon span bridge has been taken out of service and is presently being demolished. The new bridge has been constructed on essentially the same alignment, but one mile downstream of the old bridge. The old bridge provided no clearance in the closed-to-navigation position. The replacement vertical lift span bridge provides a vertical clearance of 4.3 feet above mean high water in the closed-to-navigation position, which will only allow very small pleasure craft to pass through. Thus, this regulation will be identical to the old regulation for the old pontoon span bridge and the new regulation will state that the draw of the bridge will open on signal if at least four hours notice is given. The new regulation further states that during the advance notice period, the draw shall open on less than four hours notice for an emergency and shall open on demand should a temporary surge in waterway traffic occur.

Due to the infrequency of requests for openings of the draw for navigation, the Louisiana Department of Transportation and Development has requested that the same four-hour notice for an opening to navigation be required for the new bridge. Furthermore, two drawbridges, which cross Bayou Lafourche directly upstream of the SR 654 Bridge, at miles 58.2 and 58.7 each have a six-hour notice requirement for an opening of the draw.

Navigation at the site of the bridge consists primarily of commercial fishing vessels and some recreational pleasure craft. Alternate routes are not available to marine traffic.

This final rule will be identical to the old regulation governing the operation of the old bridge because the same constraints exist for primary waterway users as were formerly in effect with the old bridge.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

During the many years that the old bridge had operated under an identical regulation to this new regulation, the Coast Guard had not received any complaints regarding the drawbridge operating schedule. The new bridge has been constructed on essentially the same alignment as the old bridge, and the number of requests for openings are anticipated to be about the same, an average of 6 per month, for the new bridge. However, since the new bridge provides more than four feet of vertical clearance at high water, some very small pleasure craft may actually be able to transit the new bridge without requiring an opening, effectively reducing the number of openings of the draw. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will have no impact on any small entities because the regulation will apply to a new bridge, which replaced a bridge on which the same regulation already exists.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to

minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. In § 117.465, paragraph (c) is revised to read as follows:

§ 117.465 Bayou Lafourche.

* * * * *

(c) The draw of the State Route LA 654 bridge, mile 53.2 at Clotilda, shall open on signal if at least four hours notice is given. During the advance notice period, the draw shall open on less than four hours notice for an emergency and shall open on demand should a temporary surge in waterway traffic occur.

* * * * *

Dated: September 3, 2004.

R.F. Duncan,

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

[FR Doc. 04–20863 Filed 9–15–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04–OAR–2004–KY–0001–200423; FRL–7813–9]

Approval and Promulgation of Implementation Plans Kentucky: 1-Hour Ozone Maintenance Plan Update for Lexington Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's action consists of three distinct but related final rulemakings briefly characterized here and further discussed in the supplementary information section of this rule. First, EPA is finalizing approval of the Lexington portion of a revision to the state implementation plan (SIP) of the Commonwealth of Kentucky submitted on February 19, 2004 in draft form, and in final form on August 24, 2004. The SIP revision provides the 10-year update to the original 1-hour ozone maintenance plans for five 1-hour maintenance areas, including the Lexington Maintenance Area, and also provides revised 2004 motor vehicle emission budgets (MVEBs) and establishes 2015 MVEBs. The Lexington Maintenance Area is composed of Fayette County, Kentucky and Scott County. Kentucky. Secondly, through this action, EPA is providing notification of its determination that the Lexington portion of the Commonwealth's SIP revision satisfies the requirements of the Clean Air Act (CAA) for the 10-year update to the 1-hour ozone maintenance plan for the Lexington Maintenance Area. Thirdly, through this action, EPA is providing information on the status of its transportation conformity adequacy determination for the new MVEBs for the year 2015 that are contained in the 10-year update to the 1-hour ozone maintenance plan for the Lexington Maintenance Area.

DATES: This rule will be effective October 18, 2004.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) ID No. R04–OAR–2004–KY–0001. All documents in the docket are listed in the RME index at *http://docket.epa.gov/rmepub/*, once in the system, select "quick search," then key in the appropriate RME Docket identification number. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9031. E-mail: *notarianni.michele@epa.gov*.

or

Lynorae Benjamin, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9040. E-mail: *benjamin.lynorae@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Today's Action

In this final rulemaking, EPA is approving revisions to the Lexington portion of the Commonwealth of Kentucky's SIP revision submitted on August 24, 2004. EPA is approving the Lexington portion of Kentucky's SIP revision because it satisfies the requirements of the CAA for the 10-year update to the 1-hour ozone maintenance plan for the Lexington Maintenance Area. In a previous action on April 23, 2004 (69 FR 21983), EPA proposed approval of these revisions to the Lexington 1-Hour Ozone Maintenance Plan contingent upon Kentucky addressing EPA's clarifying comments in the final SIP submittal. The public comment period closed on May 24, 2004. No adverse comments were received in response to the proposed rule. Additionally, Kentucky has adequately addressed EPA's requested clarifications. Upon final approval of the 10-year update to the Lexington 1-Hour Ozone Maintenance Plan, the revised 2004 MVEBs and the newly established 2015 MVEBs must be used to determine transportation conformity. Also in this final action, EPA is correcting an error in the April 23, 2004, proposed rule on page 69 FR 21985. In Table 1, the safety margin value for the year 2012 is corrected to read, "4.49" rather than "4.94."

II. Background

On February 19, 2004, Kentucky submitted to EPA a draft SIP revision for parallel processing to provide for the 10-year update to the original maintenance plans for five 1-hour ozone maintenance areas as required by section 175A(b) of the CAA. These five 1-hour ozone maintenance plan updates addressed the 1-hour ozone maintenance areas for Lexington, Edmonson, Owensboro, Paducah, and the Kentucky portion of the Huntington-Ashland area. Specific to the Lexington maintenance area, the proposed revision provides an update to the Lexington 1-Hour Ozone Maintenance Plan for the next 10 years, *i.e.*, 2005 through 2015. This 10-year update for the Lexington Maintenance Area includes updated MVEBs for the year 2004 and establishes new MVEBs for the year 2015. The Commonwealth held a public hearing on these draft maintenance plan revisions on March 31, 2004. On August 24, 2004, the Commonwealth submitted to EPA a SIP revision providing the final 10-year updates for the 1-hour ozone maintenance plans of the Lexington, Edmonson, and Kentucky portion of the Huntington-Ashland Areas.

III. Analysis of the Submittal

The Commonwealth's August 24, 2004, final SIP revision includes a second 10-year maintenance plan for the Lexington maintenance area that indicates continued maintenance of the 1-hour ozone standard through 2015. In this submittal, Kentucky opted to use 1990 as the comparison year to demonstrate continued maintenance. While use of the 1990 emission inventory appears to demonstrate continued maintenance for the 1-hour ozone standard with regard to the volatile organic compound (VOC) precursor inventory, the use of the 1990 emission inventory does not appear to demonstrate continued maintenance for the 1-hour ozone standard with regard to the nitrogen oxide (NO_X) precursor inventory because the total NO_X emissions levels in 2000, 2004, and 2005 are higher than those in 1990. However, the revision includes new ozone precursor emission inventory for 2000 for Fayette and Scott counties which reflects updated emission controls applicable for the area.

In the September 4, 1992, EPA guidance document, entitled, "Procedures for Processing Requests to Redesignate Areas to Attainment," EPA encourages the use of updated emission inventories to verify continued attainment. As the Commonwealth mentions in its submittal, the 2000 emission inventories are updated, and are being provided as a part of the August 24, 2004, final SIP revision. This area was attainment for the 1-hour ozone standard in 2000, so EPA believes that these emission inventories also indicate attainment for the area, and can be used for comparison purposes for demonstrating continued maintenance in the projected years of 2004, 2005, 2009, 2012, and 2015. The level of the projected emissions for all the projected years for both the NO_X and VOC precursors is below the level of emissions for these precursors in 2000. Therefore, EPA believes that this is a sufficient demonstration of continued maintenance for the 1-hour ozone standard for the Lexington area. Furthermore, this area is currently attainment for the more stringent 8-hour ozone standard. This rationale is consistent with the September 4, 1992, EPA Guidance memorandum entitled "Procedures for Processing Requests to Redesignate Areas to Attainment."

The Commonwealth's August 24, 2004, final SIP revision also updates the MVEBs for the Lexington maintenance area for 2004, and establishes new MVEBs for 2015. Because EPA did not provide a separate notice regarding the adequacy of the 2015 MVEBs, EPA is taking the opportunity through this rulemaking to announce that it has determined that the 2015 MVEBs are adequate for use to determine transportation conformity. For more information on Lexington's Maintenance Plan revisions and EPA's detailed analysis of these revisions, please see the proposed rule published on April 23, 2004, at 69 FR 21983.

As part of this final approval, EPA is approving both the revisions to the 2004 MVEBs and the newly-established 2015 MVEBs for the Lexington Maintenance Area. Upon EPA approval of the revised 2004 and new 2015 MVEBs in this final rulemaking, the Lexington maintenance area must use the revised MVEBs for future transportation conformity determinations effective the date of publication of EPA's final approval of the MVEBs in the **Federal Register**.

IV. Final Action

EPA is approving Kentucky's August 24, 2004, SIP revision pertaining to the Lexington maintenance area's 10-year update for its 1-hour ozone maintenance plan, and providing notice that it has determined the 2015 VOC and NO_X MVEBs to be adequate under the requirements of 40 CFR 93.118(e)(4). Additionally, through this action, EPA is approving the revised 2004 MVEBs and the newly-established 2015 MVEBs for the Lexington area. The revised 2004 MVEBs are 18.14 tons per day (tpd) for VOC and 27.36 tpd for NO_X; the 2015 MVEBs are 10.59 tpd for VOC and 13.27 tpd for NO_X. EPA is approving the aforementioned changes to Kentucky's SIP because they are consistent with Agency policy and guidance and meet all of the requirements of section 110 of the Clean Air Act. Also in this final action, EPA is correcting an error in the April 23, 2004, proposed rule on page 69 FR 21985. In Table 1, the safety margin value for the year 2012 is corrected to read, "4.49" rather than "4.94."

V. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: September 8, 2004.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. Section 52.920(e), is amended by revising the entry for "Lexington Maintenance Plan" to read as follows:

§ 52.920 Identification of plan.

(e) * * *

EPA APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approval date	Explanation
* *	*	* *	*	*
Lexington Maintenance Plan	Fayette County, Scott County.	08/24/04	09/16/04, [Insert Federal Register citation].	
* *	*	* *	*	*

[FR Doc. 04–20893 Filed 9–15–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[RME Docket Number R08–OAR–2004–CO–0001; FRL–7813–3]

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Denver Revised Carbon Monoxide Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving a State Implementation Plan (SIP) revision submitted by the State of Colorado. On October 15, 2003, the Governor of Colorado submitted a revised maintenance plan for the Denver-Boulder metropolitan (hereafter, Denver) carbon monoxide (CO) maintenance area for the CO National Ambient Air Quality Standard (NAAQS). The revised maintenance plan also contained a revised transportation conformity budget for the year 2013. In this action, EPA is approving the Denver CO revised maintenance plan and revised transportation conformity budget. This action is being taken under section 110 of the Clean Air Act.

DATES: This rule is effective on November 15, 2004 without further notice, unless EPA receives adverse comment by October 18, 2004. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by RME Docket Number R08–OAR–2004–CO–0001, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Agency Web site: http://docket.epa.gov/rmepub/index.jsp.* Regional Materials in EDOCKET (RME), EPA's electronic public docket and comment system for regional actions, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- *E-mail: long.richard@epa.gov* and *russ.tim@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466.
- *Hand Delivery:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME Docket Number R08–OAR–2004–CO–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available at *http://docket.epa.gov/rmepub/index.jsp*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, *regulations.gov*, or e-mail. EPA's Regional Materials in EDOCKET and *federal regulations.gov* Web site are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET online or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the Regional Materials in EDOCKET index at *http://docket.epa.gov/rmepub/index.jsp.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publically available only in hard copy form. Publicly available docket materials are available either electronically in Regional Materials in EDOCKET or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air and Radiation Program, Environmental Protection Agency

(EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone (303) 312–6479, and e-mail at: *russ.tim@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *NAAQS* mean National Ambient Air Quality Standard.

(iv) The initials *SIP* mean or refer to State Implementation Plan.

(v) The word *State* means the State of Colorado, unless the context indicates otherwise.

I. General Information

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

1. Submitting CBI. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

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

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

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

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

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

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

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

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

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

II. What Is the Purpose of This Action?

In this action, we are approving a revised maintenance plan for the Denver CO attainment/maintenance area, that is designed to keep the area in attainment for CO through 2013, and we're also approving revised transportation conformity motor vehicle emissions budgets (MVEB). We approved the original CO redesignation to attainment and maintenance plan for the Denver area on December 14, 2001 (see 66 FR 64751); our approval became effective on January 14, 2002.

The original Denver CO redesignation maintenance plan, approved on December 14, 2001, utilized the then applicable EPA mobile sources emission factor model, MOBILE5a. On January 18, 2002, we issued policy guidance for States and local areas to use to develop SIP revisions based on the new, updated version of the model, MOBILE6. The policy guidance was entitled "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity" (hereafter, January 18, 2002 MOBILE6 policy). On November 12, 2002, EPA's Office of Transportation and Air Quality (OTAQ) issued an updated version of the MOBILE6 model, called MOBILE6.2, and notified Federal, State, and local agency users of this update. MOBILE6.2 contained additional updates for air toxics and particulate matter. However, the CO emission factors were essentially the same as in the MOBILE6 version of the model. The State revised and updated the mobile sources CO emissions with MOBILE6.2 for each of the three years assessed in the previously approved maintenance plan (2001, 2006, and 2013), recalculated the CO intersection levels using CAL3QHC, revised the MVEB, and also applied a selected amount of the available safety margin to the transportation conformity MVEB. We have determined that these changes are approvable as further described below.

III. What Is the State's Process To Submit These Materials to EPA?

Section 110(k) of the CAA addresses our actions on submissions of revisions to a SIP. The CAA requires States to observe certain procedural requirements in developing SIP revisions for submittal to us. Section 110(a)(2) of the CAA requires that each SIP revision be adopted after reasonable notice and public hearing. This must occur prior to the revision being submitted by a State to us.

The Colorado Air Quality Control Commission (AQCC) held a public hearing for the revised Denver Carbon Monoxide (CO) Maintenance Plan on June 19, 2003. The AQCC adopted the revised maintenance plan directly after the hearing. This SIP revision became State effective on August 30, 2003, and was submitted by the Governor to us on October 15, 2003.

We have evaluated the Governor's submittal for the revised maintenance plan and have determined that the State met the requirements for reasonable notice and public hearing under section 110(a)(2) of the CAA. By operation of law under section 110(k)(1)(B) of the CAA, the Governor's October 15, 2003, submittal became complete on April 15, 2004.

IV. EPA's Evaluation of the Revised Maintenance Plan

EPA has reviewed the State's revised maintenance plan for the Denver attainment/maintenance area and believes that approval is warranted. The following are the key aspects of this revision along with our evaluation of each:

(a) The State has revised the original Denver maintenance plan and has provided air quality data that show continuous attainment of the CO NAAQS.

As described in 40 CFR § 50.8, the national primary ambient air quality standard for carbon monoxide is 9 parts per million (10 milligrams per cubic meter) for an 8-hour average concentration not to be exceeded more than once per year. 40 CFR § 50.8 continues by stating that the levels of CO in the ambient air shall be measured by a reference method based on 40 CFR part 50, Appendix C and designated in accordance with 40 CFR part 53 or an equivalent method designated in accordance with 40 CFR part 53. The original Denver CO maintenance plan,

approved by EPA on December 14, 2001, relied on ambient air quality data from 1996 through 1999. The revised Denver CO maintenance plan, submitted by the Governor on October 15, 2003, relies on ambient air quality data from 2000, 2001, and 2002. Further, we have reviewed ambient air quality data from 2003 and the first calendar quarter of 2004 and the Denver area shows continuous attainment of the CO NAAQS from 2000 to present. All the above-referenced air quality data are archived in our Aerometric Information and Retrieval System (AIRS).

(b) The State updated the attainment year (2001) and projected years (2006 and 2013) emission inventories.

The revised maintenance plan that the Governor submitted on October 15, 2003, included comprehensive inventories of CO emissions for the Denver area. These inventories include emissions from stationary point sources, area sources, non-road mobile sources, and on-road mobile sources. More detailed descriptions of the revised 2001 attainment year inventory, the revised 2006 projected inventory, and the revised 2013 projected inventory are documented in the maintenance plan in section C, and in the State's TSD. The State's submittal contains emission inventory information that was prepared in accordance with EPA guidance. Summary emission figures from the 2001 attainment year and the projected years are provided in Table IV–1 below.

TABLE IV–1.—SUMMARY OF CO EMISSIONS IN TONS PER DAY FOR DENVER

	2001	2006	2013
Point Sources	*31.6	*25.6	*25.6
Area Sources	185.7	160.9	160.8
Non-Road Mobile Sources	55.9	57.7	61.4
On-Road Mobile Sources	1638	1614	1125
Total	1911	1858	1373

*The reduction in point source emission figures, from the original maintenance plan, is due to the use of actual emissions instead of allowable emissions for non-elevated sources.

We note in Table IV–1, the revised emission figures project significant reductions in years 2006 and 2013 for point sources and area sources. The majority of the projected area source reductions are from the State's estimates for less woodburning in future years. We believe this projection of less woodburning is reasonable. For point sources, the original Denver CO maintenance plan used sources' potential-to-emit (PTE) for 2001, but used projections of actual emissions for the years 2006 and 2013. The revised maintenance plan now uses actual point source emissions for 2001 and also projects actual emissions from point sources in 2006 and 2013. The State's approach follows EPA guidance on projected emissions and we believe it is acceptable.[1] Further information on these projected emissions may also be found in Section 3 "Non-Mobile Source Emission Inventory" of the State's TSD. The revised mobile source emissions show the largest change from the original maintenance plan and this is primarily due to the use of MOBILE6.2 instead of MOBILE5a. The MOBILE6.2 modeling information is contained in the State's TSD in Chapter 2 and Appendix C. Much of the modeling data, input-output files, fleet makeup, MOBILE6.2 input parameters, etc. are on a compact disc (CD), included with the docket for this action, and are available from either EPA or the State. Other revisions to the mobile sources category were due to revised vehicle miles traveled (VMT) estimates that were provided to the State from the Denver Regional Council of Governments (DRCOG) which is the metropolitan planning organization (MPO) for the Denver area. The revised VMT were extracted from DRCOG's 2025 Regional Transportation Plan of April, 2002. In summary, the revised maintenance plan and State TSD contain detailed emission inventory information, that was prepared in accordance with EPA guidance, and are acceptable to EPA.

(c) The State revised the maintenance demonstration used in the original Denver maintenance plan.

The original Denver CO redesignation maintenance plan, approved on December 14, 2001, utilized the then applicable EPA mobile sources emission factor model, MOBILE5a. On January 18, 2002, we issued policy guidance for States and local areas to use to develop SIP revisions using the new, updated version of the model, MOBILE6. The policy guidance was entitled "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity" (hereafter, January 18, 2002 MOBILE6 policy). Additional policy guidance regarding EPA's MOBILE model was issued on November 12, 2002; this guidance notified Federal, State, and local agencies that the updated MOBILE6.2 model was available and was the recommended version of the model to be used. We note that throughout the development of the revised Denver CO maintenance plan, the State used the MOBILE6.2 model.

Our January 18, 2002, MOBILE6 policy allows areas to revise their motor vehicle emission inventories and transportation conformity MVEBs using the MOBILE6 model without needing to revise the entire SIP or completing additional modeling if: (1) The SIP continues to demonstrate attainment or maintenance when the MOBILE5-based motor vehicle emission inventories are replaced with MOBILE6-based attainment and maintenance year inventories and, (2) the State can document that the growth and control strategy assumptions for non-motor vehicle emission sources continue to be valid and minor updates do not change the overall conclusion of the SIP. Our January 18, 2002 MOBILE6 policy also speaks specifically to CO maintenance plans on page 10 of the policy. The first paragraph on page 10 of the policy states "* * * if a carbon monoxide (CO) maintenance plan relied on either a relative or absolute demonstration, the first criterion could be satisfied by documenting that the relative emission reductions between the base year and the maintenance year are the same or greater using MOBILE6 as compared to MOBILE5." For clarity, a "relative demonstration" for maintenance is based on the comparison of an attainment level of emissions to projected future year emissions. Maintenance is demonstrated when the projected future year emissions are at or

[1] "Use of Actual Emissions in Maintenance Demonstrations for Ozone and Carbon Monoxide (CO) Nonattainment Areas", signed by D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993.

below the attainment level. This method was applicable to CO nonattainment areas classified as "moderate" with a design value of less than 12.7 ppm. An "absolute demonstration" for maintenance is based on modeling which shows that modeled CO emissions in future projected years will be less than 9 ppm (the CO NAAQS). For CO nonattainment areas, this requirement was applicable to areas classified as "moderate" with a design value greater than 12.7 ppm and to "serious" areas such as Denver.

As discussed above, the State prepared revised emission inventories for the years 2001, 2006, and 2013 using MOBILE6.2. The results of these calculations are presented in Table 8 "Comparison of Attainment Area Inventory Changes and Percent for Attainment, Interim & Maintenance Years" on page 16 of the revised Denver maintenance plan and are also presented below in Table IV–2:

TABLE IV–2

[Figures are in tons per day of CO]

Year	2001	2006	2013
Previously Approved Denver Maintenance Plan (based on MOBILE5a)*.	1083	1020 −5.8% from 2001	1041 −3.9% from 2001
Revised Denver Maintenance Plan (based on MOBILE6.2)**.	1911	1858 −2.8% from 2001	1373 −28.2% from 2001

* As approved by EPA on December 14, 2001 (66 FR 64751).
** As submitted by the Governor on October 15, 2003.

Based on this information we have determined that the revised maintenance plan meets the first criterion of our January 18, 2002 MOBILE6 policy for replacement of MOBILE5 emissions inventories and MVEB with MOBILE6.2 emissions inventories and MVEB. Specifically, the relative emissions reductions between the attainment year (2001) and the maintenance year (2013) are greater using MOBILE6.2 (−28.2%) than they were using MOBILE5 (−3.9%).

To address the second criterion of our January 18, 2002 MOBILE6 policy, the State documented that the growth and control strategy assumptions for non-motor vehicle emission sources are still valid and minor updates have not changed the overall conclusion of the SIP. The State's analysis is contained in section C.2 of the revised maintenance plan, entitled "Methodology and Control Assumptions for Source Categories", in which the State evaluated updated planning information from DRCOG, updated point source information, updated area and non-road source information, and specific updated information for Denver International Airport (DIA). We summarize the State's approach below.

For modeling of mobile sources emissions, the original maintenance plan relied on planning data from the 2020 DRCOG plan. The revised maintenance plan relies on data from the 2025 DRCOG plan. The changes in the modeling domain-wide VMT are presented in section C.2.(a) of the revised maintenance plan and Table IV–3 below:

TABLE IV–3

[Figures are in estimated Daily VMT]

Year	2001	2006	2013
Previously Approved Denver Maintenance Plan (based on MOBILE5a)*	58,156,000	66,760,000	77,187,000
Revised Denver Maintenance Plan (based on MOBILE6.2)**	61,362,264	68,123,584	77,750,300
Percent change	+5.2	+2.0	+0.7

* As approved by EPA on December 14, 2001 (66 FR 64751).
** As submitted by the Governor on October 15, 2003.

The comparison of daily VMT between the two maintenance plans, as shown in Table IV–3 above, indicates a minor change in planning assumptions.

Section C.2.(b) of the revised maintenance plan contains a discussion of the State's assessment of point source emissions. The State indicates that the prior analysis and growth assumptions used in the original maintenance plan are still valid for the revised maintenance plan. EPA notes that the State elected to base point source emissions for 2001 on actual emissions and emissions for 2006 and 2013 on projected actual emissions. This methodology is acceptable to us.[2] We also find the State's overall analysis of revised point source emissions acceptable.

For the non-road and area source emissions, the State relied upon updated demographic information from DRCOG. Several of the non-road and area source emissions are dependent on demographic data as a surrogate emission factor. DRCOG demographics are presented below from section C.1 (Table 5 and Table 6) of the revised maintenance plan and a further discussion is presented in the State's TSD.

[2] "Use of Actual Emissions in Maintenance Demonstrations for Ozone and Carbon Monoxide (CO) Nonattainment Areas", signed by D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993.

TABLE IV–4
[Demographics]

Year	2001	2006	2013
Previously Approved Denver Maintenance Plan—Population*	2,364,000	2,616,000	2,889,000
Revised Denver Maintenance Plan—Population**	2,414,804	2,617,645	2,902,912
Percent change	+0.1	+0.1	+0.1
Previously Approved Denver Maintenance Plan—Households*	970,000	1,097,000	1,244,000
Revised Denver Maintenance Plan—Households**	957,780	1,050,166	1,172,902
Percent change	−1.3	−4.3	−5.7
Previously Approved Denver Maintenance Plan—Employment*	1,415,500	1,568,000	1,718,000
Revised Denver Maintenance Plan—Employment**	1,360,814	1,495,791	1,678,079
Percent change	−3.9	−4.6	−2.3

*As approved by EPA on December 14, 2001 (66 FR 64751).
**As submitted by the Governor on October 15, 2003.

This comparison of demographics between the two maintenance plans indicates a minimal level of change. Therefore, the planning and growth assumptions used in the original maintenance plan continue to be valid for the revised maintenance plan.

As discussed above, the State has satisfactorily addressed the requirements of our January 18, 2002 MOBILE6 policy for the substitution of MOBILE6.2-based inventories and MVEB for MOBILE5 based inventories and MVEB in the revised maintenance plan. The State has also documented that the growth and control strategy assumptions for non-motor vehicle emission sources remain valid and minor updates have not changed the overall conclusions of the Denver CO maintenance plan SIP element. We have concluded that the revised maintenance demonstration is approvable.

(d) Monitoring Network and Verification of Continued Attainment

Continued attainment of the CO NAAQS in the Denver area depends, in part, on the State's efforts to track indicators throughout the maintenance period. This requirement is met in section F. "Monitoring Network/ Verification of Continued Attainment" of the revised Denver CO maintenance plan. In section F., the State commits to continue operating the CO monitors in the Denver area and to annually review this monitoring network and make changes as appropriate.

Also, in section F., the State commits to track mobile sources' CO emissions (which are the largest component of the inventories) through the ongoing regional transportation planning process that is done by DRCOG. Since revisions to Denver's transportation improvement programs are prepared every two years, and must go through a transportation conformity finding, the State will use this process to periodically review the Vehicle Miles Traveled (VMT) and mobile source emissions projections used in the maintenance plan. This regional transportation process is conducted by DRCOG in coordination with the Denver Regional Air Quality Council (RAQC), the State's Air Pollution Control Division (APCD), the AQCC, and EPA.

Based on the above, we are approving these commitments as satisfying the relevant requirements. We note that our final rulemaking approval renders the State's commitments federally enforceable. These commitments are also the same as those we approved in the original maintenance plan.

(e) Contingency Plan

Section 175A(d) of the CAA requires that a maintenance plan include contingency provisions. To meet this requirement, the State has identified appropriate contingency measures along with a schedule for the development and implementation of such measures.

As stated in section G of the revised maintenance plan, the contingency measures for the Denver area will be triggered by a violation of the CO NAAQS. (However, the maintenance plan does note that an exceedance of the CO NAAQS may initiate a voluntary, local process by the RAQC and APCD to identify and evaluate potential contingency measures.)

The RAQC, in coordination with the APCD and AQCC, will initiate a subcommittee process to begin evaluating potential contingency measures no more than 60 days after being notified by the APCD that a violation of the CO NAAQS has occurred. The subcommittee will present recommendations to the RAQC within 120 days of notification and the RAQC will present recommended contingency measures to the AQCC within 180 days of notification. The AQCC will then hold a public hearing to consider the contingency measures recommended by the RAQC, along with any other contingency measures that the AQCC believes may be appropriate to effectively address the violation of the CO NAAQS. The necessary contingency measures will be adopted and implemented within one year after the violation occurs.

The potential contingency measures that are identified in section G.1 of the revised Denver CO maintenance plan include: (1) A 3.1% oxygenated fuels program from November 8th through February 7th, with a 2.0% oxygen content required from November 1st through November 7th, (2) reinstatement of the enhanced I/M program in effect before January 10, 2000, and (3) Transportation Control Measures (TCM) such as financial incentives for Ecopass, Auraria transit pass, and improved traffic signalization.

Based on the above, we find that the contingency measures provided in the State's revised Denver CO maintenance plan are sufficient and meet the requirements of section 175A(d) of the CAA. We note the contingency measures and methodology to implement them are the same as those we approved in the original maintenance plan.

(f) Subsequent Maintenance Plan Revisions

In accordance with section 175A(b) of the CAA, Colorado has committed to submit a revised maintenance plan eight years after our approval of the original redesignation. This provision for revising the maintenance plan is contained in section H of the revised Denver CO maintenance plan. In section H, the State commits to submit a revised maintenance plan by December, 2009 to correspond with our approval of the original maintenance plan on December 14, 2001 (66 FR 64751).

Based on our review of the components of the revised Denver CO maintenance plan, as discussed in items IV.(a) through IV.(f) above, we have

concluded that the State has met the necessary requirements for us to fully approve the revised Denver CO maintenance plan.

V. EPA's Evaluation of the Transportation Conformity Requirements

One key provision of our conformity regulation requires a demonstration that emissions from the transportation plan and Transportation Improvement Program are consistent with the emissions budget(s) in the SIP (40 CFR sections 93.118 and 93.124). The emissions budget is defined as the level of mobile source emissions relied upon in the attainment or maintenance demonstration to maintain compliance with the NAAQS in the nonattainment or maintenance area. The rule's requirements and EPA's policy on emissions budgets are found in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62193–96) and in the sections of the rule referenced above.

With respect to maintenance plans, our conformity regulation requires that MVEB(s) must be established for the last year of the maintenance plan and may be established for any other years deemed appropriate (40 CFR 93.118).

Section E ("Carbon Monoxide Motor Vehicle Emissions Budget") of the maintenance plan describes the applicable transportation conformity requirements and updated MVEB for the revised Denver CO maintenance plan. The State has only established a MVEB for the last year of the revised maintenance plan, 2013. Based on this choice, in order for a positive conformity determination to be made, transportation plan analyses for years after 2013 must show that motor vehicle emissions will be less than or equal to the MVEB in 2013. Our conformity regulation also allows the implementation plan (maintenance plan in this case) to quantify explicitly the amount motor vehicle emissions could be higher in 2013, while allowing a demonstration of maintenance of the NAAQS (40 CFR 93.124). This process is known as allocating all or a portion of the designated "safety margin" to the MVEB and is further described in 40 CFR 93.124 and below.

In addition, our January 18, 2002 MOBILE6 policy states that "* * * regardless of the technique used for attainment or maintenance demonstrations, a more rigorous assessment of the SIP's demonstration may be necessary if a State decides to reallocate possible excess emission reductions to the motor vehicle emissions budget safety factor." Since the State decided to allocate available excess emissions reductions in the revised maintenance plan to the 2013 MVEB, we required a "more rigorous assessment" in order to ensure that even with the allocation of "safety margin" to the 2013 MVEB, the revised maintenance plan would continue to demonstrate maintenance. The "more rigorous assessment" is described in section E.3 of the maintenance plan, in the State's TSD, and below.

The original Denver CO maintenance plan, approved on December 14, 2001, contained a MVEB that was based on MOBILE5 and was 800 tons per day of CO for the Denver attainment/maintenance area for the years 2002 and beyond. The State did not allocate any "safety margin" as none was available for use. Section E.3 of the revised maintenance plan states that the prior 800 tons per day MVEB is removed from the SIP and is replaced by the new MVEB as described below.

In section E.3. of the revised maintenance plan, the State indicates that the revised maintenance plan establishes a MVEB for 2013 and beyond and that this MVEB is applicable to the boundaries of the Denver CO attainment/maintenance area. The revised maintenance plan indicates there is a 28.2% reduction in CO emissions between the attainment year of 2001 and the final maintenance year of 2013 (1911 tons per day in 2001 down to 1373 tons per day in 2013). As a result, a "safety margin" of CO emissions was identified. The "safety margin" and the allocation of these CO emissions is presented in Table 10 of the revised maintenance plan and is reproduced in our Table V–1 below.

TABLE V–1.—DERIVATION OF THE MVEB FOR 2013 AND ALLOCATION OF THE "SAFETY MARGIN"

	Tons per day (TPD) of CO	Explanation
Total 2001 Attainment Year Inventory CO Emissions	1911	2001 Attainment year inventory from all sources that establishes the attainment level of emissions in the attainment/maintenance area.
Estimated 2013 Point and Area Emissions	248	Total estimated 2013 emissions from point and area sources.
Estimated 2013 Mobile Source Emissions	1125	Estimated 2013 mobile source emissions based on MOBILE6.2 and State control strategies.
Total 2013 Emission Inventory	1373	Total 2013 emissions from all source categories.
Potential 2013 "Safety Margin"	[1] 538	This is the difference between the 2001 and 2013 total emission inventories.
Allowable 2013 Mobile Source Emissions	1539	This is the total mobile source emissions (after subtracting 2013 point and area emissions) that would still demonstrate maintenance of the CO NAAQS based on EPA's recommended "more rigorous assessment."
Avaiablle "safety margin"	414	This is the difference between the allowable 2013 mobile source emissions (1539 TPD) and the estimated 2013 mobile source emissions (1125 TPD). This is the "safety margin" that may be allocated to the MVEB.
Portion of the "safety margin" reserved	19	This is the portion of the "safety margin" that the State is reserving to account for point and area source growth and other modeling uncertainties.
Amount of "safety margin" allocated to the 2013 MVEB	395	This is the difference between the available "safety margin" (414 TPD) and the reserved "safety margin" (19 TPD).
2013 and Beyond MVEB	1520	This is the 2013 MVEB (1125 TPD from mobile sources plus the allocated "safety margin" of 395 TPD).

[1] The State lists this value as 548 but it should be 538. This error does not affect the State's calculation of the MVEB for 2013.

As stated above, our January 18, 2002 MOBILE6 policy required a "more rigorous assessment" in order to ensure that even with the allocation of "safety margin" emissions to the 2013 MVEB, the revised maintenance plan would continue to demonstrate maintenance. We determined that a "more rigorous assessment" for the revised Denver CO maintenance plan would be an intersection modeling analysis similar to that performed by the State for the original EPA-approved Denver CO maintenance plan. The State's intersection analysis used a background CO concentration combined with CAL3QHC intersection ("hot spot") modeling of the same six high-volume, high congestion intersections that were analyzed for the original maintenance plan.

The background CO concentration for each intersection used the second highest 8-hour maximum monitored value at a nearby CO ambient air quality monitor for the time period of 2000 through 2002. The CAL3QHC intersection modeling used 2013 MOBILE6.2 mobile sources emissions and DRCOG projected traffic data. The background concentration and results from the CAL3QHC modeling were them combined for each intersection. If the resulting concentration was greater than 9 ppm (the CO NAAQS), the background concentration was reduced by the necessary percentage to bring the total intersection value below 9 ppm. This was necessary for only one case, the Foothills/Arapahoe intersection in Boulder, where the initial background concentration was 4.3 ppm and the resulting intersection concentration was 9.27 ppm.

Since it is assumed that background concentrations are influenced by regional emissions of CO, the State, in order to determine the allowable regional emissions, reduced the base regional emissions (1911 tons per day in 2001) by the same percentage it had to reduce the initial background concentration.

Specifically, the State applied a percentage reduction of about 6.5% to 4.3 ppm and 1911 tons per day to arrive at values of 4.02 ppm and 1787 tons per day. To determine the available "safety margin", the State then subtracted 1373 tons per day (the total 2013 emission inventory) from 1787 tons per day to arrive at 414 tons per day. Of this amount, the State "reserved" 19 tons per day. Thus, the State applied 395 tons per day of the "safety margin" to the 2013 MVEB. The 2013 MVEB of 1520 tons per day results from the addition of the 2013 projected mobile source emissions (1125 tons per day) and the allocated "safety margin" (395 tons per day).

The State modeled the six intersections based on the MVEB of 1520 tons per day. The results are shown in Table 11 of the State's revised maintenance plan and are reproduced in Table V–2 below.

TABLE V–2.—INTERSECTION MODELING RESULTS (IN PARTS PER MILLION) USING THE EMISSIONS BUDGET OF 1520 TONS PER DAY

Intersection	Background (ppm)	CAL3QHC (ppm)	Total (ppm)
Broadway & Champa	5.00	1.47	6.47
Foothills & Arapahoe	3.98	4.97	8.95
1st & University	4.35	4.05	8.40
Hampden & University	3.52	4.83	8.35
Parker & Iliff	3.52	3.29	6.81
Arapahoe & University	3.52	4.62	8.14

The modeling results presented in the revised Denver CO maintenance plan and the State's TSD, and repeated in Table V–2 above, show that CO concentrations are not estimated to exceed the 9.0 ppm 8-hour average CO NAAQS for 2013. We have concluded that the State has satisfactorily addressed the requirements of our January 18, 2002 MOBILE6 policy for a more rigorous assessment of MVEBs and has also demonstrated maintenance of the CO NAAQS while using a transportation conformity MVEB of 1520 tons per day for 2013. Therefore, we are approving the transportation conformity MVEB of 1520 tons per day of CO, for the Denver attainment/maintenance area, for 2013 and beyond.

VI. Consideration of Section 110(l) of the CAA

Section 110(l) of the CAA states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of a NAAQS or any other applicable requirement of the CAA. The revised Denver CO maintenance plan will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA.

VII. Final Action

In this action, EPA is approving the revised Denver CO maintenance plan, that was submitted by the Governor on October 15, 2003, and we are also approving the revised transportation conformity motor vehicle emission budget for CO for the year 2013 and beyond.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the "Proposed Rules" section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective November 15, 2004 without further notice unless the Agency receives adverse comments by October 18, 2004. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VIII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 3, 2004.

Robert E. Roberts,

Regional Administrator, Region VIII.

■ 40 CFR part 52 is amended to read as follows:

PART 52—[AMENDED]

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

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

Subpart G—Colorado

■ 2. Section 52.349 is amended by adding paragraph (i) to read as follows:

§ 52.349 Control strategy: Carbon monoxide.

* * * * *

(i) Revisions to the Colorado State Implementation Plan, revised Carbon Monoxide Maintenance Plan for Denver, as adopted by the Colorado Air Quality Control Commission on June 19, 2003, State effective on August 30, 2003, and submitted by the Governor on October 15, 2003.

[FR Doc. 04–20793 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[MD001–1001a; FRL–7813–6]

Approval of Section 112(l) Authority for Hazardous Air Pollutants; Maryland Equivalency by Permit Provisions; NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving a request from the Maryland Department of the Environment (MDE) for authority to implement and enforce state permit terms and conditions in place of those of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, with respect to the operations of MeadWestvaco Company's Luke Mill, located in Luke, Maryland. Thus, the EPA is hereby granting the MDE the authority to implement and enforce alternative requirements in the form of Clean Air Act (CAA) Title V permit terms and conditions after EPA has approved the State's alternative requirements. EPA is approving this request because it has found that the MDE has satisfied the requirements.

DATES: This rule is effective on November 15, 2004 without further notice, unless EPA receives adverse written comment by October 7, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by MD001–1001, by one of the following methods:

A. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: Campbell.Dave@epa.gov.*

C. *Mail:* David J. Campbell, Chief, Permits and Technical Assessment Branch, Mailcode 3AP11, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. MD001–1001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The federal regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Copies of all comments should also be sent to the Maryland Department of the Environment. Copies of written comments should be sent to Thomas C. Snyder, Director, Air and Radiation Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, Maryland 21230. Copies of electronic comments should be sent to *tsnyder@mde.state.md.us.* Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Paresh R. Pandya, (215) 814–2167, or by e-mail at *pandya.perry@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 112 of the Clean Air Act (CAA), the Environmental Protection Agency (EPA) promulgates NESHAP for various categories of air pollution sources. On January 12, 2001, EPA promulgated a NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, as codified at 40 CFR part 63, subpart MM, §§ 63.860 through 63.868. (*See*, 66 FR 3193.) MeadWestvaco Company operates a pulp and paper mill called the Luke Mill, located in Luke, Maryland which is subject to the requirements of this NESHAP.

Under section 112(l) of the CAA, EPA may approve State or local rules or programs to be implemented and enforced in place of certain otherwise applicable Federally promulgated CAA section 112 rules, emission standards, or requirements. EPA's approval of State and local rules or programs under section 112(l) is governed by regulations found at 40 CFR part 63, subpart E. (*See*, 65 FR 55810, dated September 14, 2000). Under the provisions of subpart E found at 40 CFR 63.94, a State or local air pollution control agency may seek approval, for affected sources permitted by the State or local agency under a CAA Title V permitting program developed pursuant to the EPA regulations found at 40 CFR part 70, of State or local CAA Title V permit terms and conditions to be implemented and enforced in lieu of specified existing and future Federal CAA section 112 rules, emissions standards, or requirements. This option is referred to as the equivalency by permit (EBP) option. To receive EPA approval using this option, the State or local agency must meet the requirements of 40 CFR 63.91 and 63.94.

Approval of alternative requirements under the EBP process comprises three steps. The first step is EPA granting "up-front approval" of a State's EBP program. (*See*, 40 CFR 63.94(a) and (b).) The second step is EPA review and approval of the State's proposed alternative CAA section 112 requirements in the form of pre-draft permit terms and conditions. (*See*, 40 CFR 63.94(c) and (d).) The third step is incorporation of the approved pre-draft permit terms and conditions into a specific CAA Title V permit and the CAA Title V permit issuance process itself. (*See*, 40 CFR 63.94(e).)

The first step, obtaining EPA's "up-front approval" of a State's EBP program, enables EPA to ensure that: (1) A State meets the criteria at 40 CFR 63.91(d) for up-front approval common to all approval options; (2) a legal foundation exists for a State to replace the otherwise applicable Federal section 112 requirements with alternative, Federally enforceable requirements that will be reflected in final CAA Title V permit terms and conditions; and, (3) the specific source(s) and Federal emission standard(s) for which a State will be accepting delegation under the EBP program are clearly specified.

The second step, having EPA review and approve the State's alternative CAA section 112 requirements, provides EPA with an opportunity to ensure that the State's proposed pre-draft CAA Title V permit terms and conditions reflect all of the requirements of the otherwise applicable Federal requirements and are equivalent to those requirements. The approval criteria used by EPA are set forth at 40 CFR 63.94(d). If the EPA finds that the pre-draft CAA Title V permit terms and conditions submitted by the State meet the criteria of paragraph (d), EPA approves the State's alternative requirements (by approving the pre-draft permit terms and conditions) and notifies the State in writing of the approval.

The third step, requiring incorporation of the approved pre-draft permit terms and conditions into a specific CAA Title V permit and the CAA Title V permit issuance process itself, serves to make the requirements legally effective. EPA's final approval of the State's proposed alternative requirements that substitute for the Federal standard does not occur until the completion of step three.

On March 26, 2004 (as amended on July 8, 2004) the MDE requested delegation of authority to implement and enforce State CAA Title V permit terms and requirements for MeadWestvaco Company's Luke Mill as an alternative to those of the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, found at 40 CFR, part 63, subpart MM. The MDE states in its request that it intends for the submittal to fulfill only the requirements of step one of the EBP process, pertaining to obtaining "up-front approval" of its program. The MDE explains that it will later fulfill steps

two and three of the EBP process by submitting substitute CAA Title V operating permit terms and conditions for EPA review and approval, and then proceeding with the CAA Title V permit issuance process. The MDE sought this authority pursuant to the provisions of 40 CFR 63.94 and 63.91, and the MDE submitted information addressing the requirements of those sections.

II. Analysis of State's Submittal

EPA has reviewed the MDE's submittal and has concluded that the MDE meets the requirements for "up-front approval" of its EBP program which are specified at 40 CFR 63.94(b) and 63.91(d). The requirements a State or local agency must meet can be summarized as follows: (1) Identify the source(s) for which the State seeks authority to implement and enforce alternative requirements; (2) request delegation (or have delegation) for any remaining sources required to be permitted by the State under 40 CFR part 70 that are in the same category as the source(s) for which it wishes to establish alternative requirements; (3) identify all existing and future CAA section 112 emission standards for which the State is seeking authority to implement and enforce alternative requirements; (4) demonstrate that the State has an approved CAA Title V operating permits program that permits the affected sources; and, (5) demonstrate that the State meets the general approval criteria set forth at 40 CFR 63.91(d).

EPA lists each requirement below and after each requirement explains its reasons for concluding that the MDE meets the requirement:

A. Identify the Source(s) for Which the State Is Seeking Authority To Implement and Enforce Alternative Requirements

The MDE identified MeadWestvaco Company's Luke Mill, a pulp and paper mill located in Luke, Maryland, as the source for which it is seeking authority to implement and enforce alternative requirements. According to the MDE, MeadWestvaco Company's Luke Mill is the only operating pulp and paper mill in Maryland subject to 40 CFR part 63, subpart MM. MeadWestvaco Company's Luke Mill is situated on the border of both Maryland and West Virginia. The portion of the Luke mill that is located in West Virginia is also subject to the requirements of 40 CFR part 63, subpart MM. However, this Direct Final Rule does not grant Maryland or West Virginia the authority to implement the EBP process in West Virginia. For this Direct Final Rule, the EBP process will only apply to MeadWestvaco's Luke Mill units that are subject to subpart MM and located in Maryland only.

B. Request or Have Delegation for any Remaining Sources Required To Be Issued CAA Title V Permits by the State and That Are in the Same Category as the Source(s) for Which it Seeks To Establish Alternative Requirements

The MDE is currently delegated the authority to implement and enforce the Federal requirements of 40 CFR part 63, subpart MM for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills. Subpart MM applies to "the owner or operator of each Kraft, Soda, Sulfite, or Stand-Alone Semichemical Pulp Mill that is a major source of hazardous air pollutants * * *" (*See*, 40 CFR 63.860). On November 3, 1999, EPA delegated to the MDE the authority to implement and enforce EPA's NESHAP standards for affected sources of hazardous air pollutants (HAPs), as defined in 40 CFR part 63, for all source categories which are located at major sources. EPA also delegated to the MDE the authority to implement and enforce all future EPA NESHAP standards applicable to such sources, on the condition that the MDE legally adopt such new standards with only approved wording changes and that the MDE provide notice to EPA of such adoption. The MDE subsequently adopted additional MACT standards which became effective on November 24, 2003. In a letter dated January 13, 2004, MDE notified EPA that they had adopted these additional MACT standards. The additional standards that the State adopted included 40 CFR part 63, subpart MM.

C. Identify All Existing and Future Federal Section 112 Rules for Which the State Is Seeking Authority To Implement and Enforce Alternative Requirements

In its March 26, 2004 (as amended on July 8, 2004) submittal, the MDE requested only the authority to implement and enforce State permit requirements for MeadWestvaco Company's Luke Mill as alternatives to the Federal requirements applicable to that Mill found at 40 CFR part 63, subpart MM. The MDE confirmed that there are no other existing and future Federal CAA section 112 rules for which the State is seeking authority to implement and enforce alternative requirements.

D. Demonstrate That the State has an Approved CAA Title V Permits Program and That the Program Permits the Affected Source(s)

EPA granted final full approval to Maryland's CAA Title V operating permits program on February 14, 2003 (68 FR 1974), and under this approved program the MDE has the authority to issue CAA Title V permits to all major stationary sources. In its March 26, 2004 (as amended on July 8, 2004) submittal, the MDE confirmed that MeadWestvaco Company's Luke Mill is a CAA Title V source and that it is subject to the State's CAA Title V permits program. The MDE noted the MeadWestvaco Company had submitted a CAA Title V permit application, and that the MDE was reviewing this application.

E. Demonstrate That the State Meets the General Approval Criteria Found at 40 CFR 63.91(d)

The provisions of 40 CFR 63.91(d) specify that "Interim or final CAA Title V program approval will satisfy the criteria set forth in § 63.91(d), up-front approval criteria." As discussed in item D. above, EPA has fully approved Maryland's CAA Title V operating permits program.

III. Final Action

EPA is granting the MDE "up-front" approval of an EBP program under which the MDE may establish and enforce alternative State requirements for MeadWestvaco Company's Luke Mill in lieu of those of the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, found at 40 CFR part 63, subpart MM. The MDE may only establish alternative requirements for the Luke Mill which are equivalent to and at least as stringent as the otherwise applicable Federal requirements. (*See*, 40 CFR 63.94(d).) The MDE must, in order to establish alternative requirements for the Luke Mill under its EPA approved EBP program: (1) Submit to EPA for review pre-draft CAA Title V permit terms specifying alternative requirements which are at least as stringent as the otherwise applicable Federal requirements, (2) obtain EPA's written approval of the alternative pre-draft CAA Title V permit requirements, and (3) issue a CAA Title V permit for the Luke Mill which contains the approved alternative requirements. (*See*, 40 CFR 63.94(c) and (e).) Until EPA has approved the alternative permit terms and conditions and the MDE has issued a final CAA Title V permit incorporating them, MeadWestvaco Company's Luke

Mill will remain subject to the Federal NESHAP requirements found at 40 CFR part 63, subpart MM.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve if adverse comments are filed. This rule will be effective on November 15, 2004 without further notice unless EPA receives adverse comment by October 7, 2004. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

EPA's role in reviewing this submittal is to approve a State request for authority to establish State permit terms and conditions to be implemented and enforced in lieu of specified existing and future Federal rules, emissions standards or requirements promulgated under CAA section 112, for those affected sources permitted by the State under a program meeting the requirements of CAA part 70, provided that the request meets the criteria of the CAA. In this context, in the absence of a prior existing requirement for a State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a State's submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, in reviewing this submission, to use VCS in place of a State submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for MeadWestvaco Company's Luke Mill located in Luke, Maryland.

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action granting the MDE "up-front" approval of an EBP program under which the MDE may establish and enforce alternative State requirements for MeadWestvaco Company's Luke Mill in lieu of those of the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills found at 40 CFR part 63, subpart MM may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Paper and paper products industry, Reporting and recordkeeping requirements.

Dated: September 7, 2004.

Donald S Welsh,

Regional Administrator, Region III.

■ 40 CFR part 63 is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart E—Approval of State Programs and Delegation of Federal Authorities

■ 2. Section 63.99 is amended by adding paragraph (a)(20)(iii) to read as follows:

§ 63.99 Delegated Federal authorities.

(a) * * *

(20) * * *

(iii) EPA has granted the Maryland Department of the Environment (MDE) "up-front" approval to implement an Equivalency by Permit (EBP) program under which the MDE may establish and enforce alternative State requirements for MeadWestvaco Company's Luke Mill in lieu of those of the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills found at 40 CFR part 63, subpart MM. The MDE may only establish alternative requirements for the Luke Mill which are equivalent to and at least as stringent as the otherwise applicable Federal requirements. The MDE must, in order to establish alternative requirements for the Luke Mill under its EPA approved EBP program: submit to EPA for review pre-draft Clean Air Act (CAA) Title V permit terms specifying alternative requirements which are at least as stringent as the otherwise applicable Federal requirements, obtain EPA's written approval of the alternative pre-draft CAA Title V permit requirements, and issue a CAA Title V permit for the Luke Mill which contains the approved alternative requirements. Until EPA has approved the alternative permit terms and conditions and the MDE has issued a final CAA Title V permit incorporating them, MeadWestvaco Company's Luke Mill will remain subject to the Federal NESHAP requirements found at 40 CFR part 63, subpart MM.

* * * * *

[FR Doc. 04–20898 Filed 9–15–04; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 414

[CMS–1380–F]

RIN 0938–AN05

Medicare Program; Manufacturer Submission of Manufacturer's Average Sales Price (ASP) Data for Medicare Part B Drugs and Biologicals

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: On April 6, 2004, we published an interim final rule in the **Federal Register** implementing the provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) related to the calculation and submission of manufacturer's average sales price (ASP) data on certain Medicare Part B drugs and biologicals by manufacturers. This final rule responds to the public comments received on the interim final rule concerning the methodology for estimating price concessions associated with manufacturers' ASP reporting requirements. Other issues and comments relating to the interim final rule will be addressed at a future time.

DATES: These regulations are effective September 16, 2004.

FOR FURTHER INFORMATION CONTACT: Marjorie Baldo, (410) 786–0548.

SUPPLEMENTARY INFORMATION:

I. Background

Section 303(c) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) amends Title XVIII of the Social Security Act (the Act) by adding new section 1847A. This new section establishes the use of the ASP methodology for payment for drugs and biologicals described in section 1842(o)(1)(C) of the Act furnished on or after January 1, 2005. For calendar quarters beginning on or after January 1, 2004, the statute requires manufacturers to report manufacturer's ASP data to CMS for Medicare Part B drugs and biologicals paid under sections 1842(o)(1)(D), 1847A, or 1881(b)(13)(A)(ii) of the Act. Manufacturers are required to submit their quarterly ASP data to us beginning April 30, 2004. Reports are due not later than 30 days after the last day of each calendar quarter. The types of Medicare Part B covered drugs and biologicals paid under sections 1842(o)(1)(D), 1847A, or 1881(b)(13)(A)(ii) of the Act include drugs furnished incident to a physician's service, drugs furnished under the durable medical equipment (DME) benefit, certain oral anti-cancer drugs, and oral immunosuppressive drugs.

All Medicare Part B covered drugs and biologicals paid under sections 1842(o)(1)(D), 1847A, or 1881(b)(13)(A)(ii) of the Act are subject to the ASP reporting requirements. Certain drugs and biologicals (for example, radiopharmaceuticals) are not paid under these sections of the Act and are not subject to the ASP reporting requirements.

As stated in the summary of this final rule, the April 6, 2004, interim final rule implemented the manufacturer ASP reporting requirements of section 303(i)(4) of the MMA, effective April 30, 2004. In this final rule, we are addressing those comments concerning price concession calculation issues because we believe a clearer understanding of the issues is required in order that manufacturers report ASP data accurately and consistently in time for the submissions due in October 2004. The October data will be used to calculate the payment allowances effective January 1, 2005. The 2005 ASP based payment system was displayed at the Office of the Federal Register on July 27, 2004, and published on August 5, 2004, in the **Federal Register** (69 FR 47488).

II. Provisions of the Final Rule

In the April 6, 2004, interim final rule published in the **Federal Register** (69 FR 17935), we implemented the requirement in section 1847A(c)(3) of the Act, which provides that in calculating the manufacturer's ASP, a manufacturer must include volume discounts, prompt pay discounts, cash discounts, free goods that are contingent on any purchase requirement, chargebacks, and rebates (other than rebates under the Medicaid drug rebate program).

To the extent that data on volume discounts, prompt pay discounts, cash discounts, free goods that are contingent on any purchase requirement, chargebacks, and rebates are available on a lagged basis, the rule provides the following methodology: The manufacturer is required to apply a methodology based on the most recent 12-month period available to estimate costs attributable to these price concessions. Specifically, a manufacturer would sum the volume discounts, prompt pay discounts, cash discounts, free goods that are contingent on any purchase requirement, chargebacks, and rebates for the most recent 12-month period available and divide by 4 to determine the estimate to apply in calculating the manufacturer's ASP for the quarter being submitted. Manufacturers are required to report ASP data to us within 30 days after the last day of the calendar quarter in accordance with section 1927(b)(3)(A) of the Act.

Since publication of the interim final rule, manufacturers have expressed concerns regarding the estimation methodology for pricing concessions. As discussed in section III of this final rule, they have noted that the methodology may result in a disproportionate allocation of pricing concessions within quarterly ASP submissions. In response to these concerns, we have decided to revise the estimation methodology in this final rule.

III. Analysis of and Response to Public Comments on the April 6, 2004, Interim Final Rule.

We received 79 timely comments in response to the April 6, 2004, interim final rule. We received comments from drug manufacturers, pharmacies, physicians, national associations of the pharmaceutical industry, national associations of physicians, and consultants. Although we received comments on a variety of issues pertaining to the interim final rule, we are addressing only the comments that pertain to the methodology for estimating price concessions associated with ASP reporting requirements in this final rule. Those comments and our responses are summarized in this section of the final rule.

Comment: Several commenters stated that the methodology implemented by the April 6, 2004, interim final rule could result in excessive quarter-to-quarter variability in the reported ASP. The commenters suggested an alternative methodology based on a rolling average percentage of price concessions divided by total sales in dollars (described below) for making this calculation.

Response: We agree with these commenters and are adopting the alternative methodology they recommended. As a result, in § 414.804, we are revising the methodology manufacturers must use to calculate the estimates of price concessions. A manufacturer sums the volume discounts, prompt pay discounts, cash discounts, free goods that are contingent on any purchase requirement, chargebacks, and rebates (other than rebates under section 1927 of the Act) for the most recent 12-month period available associated with all sales included in the ASP reporting requirements as stated in the April 6, 2004, interim final rule. However, the manufacturer then calculates a percentage using this summed amount as the numerator and the corresponding total sales data (that is, the total in dollars for the sales subject to the ASP reporting requirement for the same 12-month period) as the denominator. This results in a 12-month rolling average price concession percentage of Total Price Concessions (12-month)/Total Sales (12-month). This percentage is then applied to the total in dollars for the sales subject to the ASP reporting requirement for the quarter being submitted to determine the price concession amount for the quarter. The price concession amount is then applied as a reduction to the total sales dollar amount, and that result (that is, Total Sales (quarter) minus [Price Concession percentage × Total Sales (quarter)]) is the numerator used in calculating the quarterly ASP for that National Drug Code (NDC). We are also specifying that the price concession percentage must be carried out to a sufficient number of decimal places so that the price concession amount for the quarter being reported is accurate to the nearest dollar. We included this specification because otherwise the price concession amount might be less accurate and because these calculations are administratively simple.

Example: The total price concessions (discounts, rebates, etc.) over the most recent 12-month period available associated with sales for NDC 12345–6789–01 subject to the ASP reporting requirement equal $200,000. The total in dollars for those same sales equals $600,000. The price concessions percentage for this period equals 200,000/600,000 = .33333. The total in dollars for the sales subject to the ASP reporting requirement for the quarter being reported equals $50,000 for 10,000 units sold. The manufacturer's ASP calculation for this NDC for this quarter is as follows: $50,000 − (0.33333* × $50,000) = $33,334 (net total sales amount); $33,334/10,000 = $3.33 (ASP). *(The manufacturer must carry a sufficient number of decimal places in the calculation of the price concessions percentage in order to round the net total sales amount accurately to the nearest whole dollar.)

IV. Waiver of 30-Day Delay in Effective Date

We ordinarily provide an effective date 30 days after the publication of a final rule in the **Federal Register**. We can waive this procedure, however, if we find good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and we incorporate a statement of this finding and its reasons in the rule issued. The provisions of this final rule are effective upon publication in the **Federal Register** because in this instance these provisions are necessary clarifications to the interim final rule that was published on April 6, 2004 (69 FR 17935). The statute requires implementation of the ASP payment methodology by January 1, 2005, which will require ASP data to be reported accurately by October 2004. In order to meet this deadline, drug manufacturers must be able to act on the information in this final rule immediately. The old methodology for estimating price concessions results in greater quarter to quarter price variation. This new methodology is more stable. Accordingly, we believe there is good cause to waive the 30-day delay in effective date.

V. Collection of Information Requirements

The requirements in § 414.804 are subject to the Paperwork Reduction Act of 1995, however, these requirements are currently approved under OMB control #0938–0921 with a current expiration date of 9/30/2007.

VI. Regulatory Statement

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 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 1 year). This rule does not reach the economic threshold and, thus, is not considered a major rule. The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 for final rules of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. While this final rule revises a statutory data reporting requirement for drug manufacturers, the costs associated with this requirement are expected to be below the $110 million annual threshold established by section 202 of the Unfunded Mandates Reform Act.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this final rule does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 414

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR Chapter IV, as set forth below:

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1871, and 1881(b)(1) of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr(b)(1)).

■ 2. Section § 414.804 is amended by revising paragraph (a)(3) to read as follows:

§ 414.804 Basis of payment.

(a) * * *

(3) To the extent that data on price concessions, as described in paragraph (a)(2) of this section, are available on a lagged basis, the manufacturer must estimate this amount in accordance with the methodology described in paragraphs (a)(3)(i) through (a)(3)(iv) of this section.

(i) For each such National Drug Code, the manufacturer calculates a percentage equal to the sum of the price concessions for the most recent 12-month period available associated with sales subject to the average sales price reporting requirement divided by the total in dollars for the sales subject to the average sales price reporting requirement for the same 12-month period.

(ii) The manufacturer then multiplies the percentage described in paragraph (a)(3)(i) of this section by the total in dollars for the sales subject to the average sales price reporting requirement for the quarter being submitted. (The manufacturer must carry a sufficient number of decimal places in the calculation of the price concessions percentage in order to round accurately the net total sales amount for the quarter to the nearest whole dollar.) The result of this multiplication is then subtracted from the total in dollars for the sales subject to the average sales price reporting requirement for the quarter being submitted.

(iii) The manufacturer then uses the result of the calculation described in paragraph (a)(3)(ii) of this section as the numerator and the number of units sold in the quarter as the denominator to calculate the manufacturer's average sales price for the National Drug Code in the quarter being submitted.

(iv) *Example.* The total price concessions (discounts, rebates, etc.) over the most recent 12-month period available associated with sales for National Drug Code 12345–6789–01 subject to the ASP reporting requirement equal $200,000. The total in dollars for the sales subject to the average sales price reporting requirement for the same period equals $600,000. The price concessions percentage for this period equals 200,000/600,000 = .33333. The total in dollars for the sales subject to the average sales price reporting requirement for the quarter being reported equals $50,000 for 10,000 units sold. The manufacturer's average sales price calculation for this National Drug Code for this quarter is: $50,000 − (0.33333 × $50,000) = $33,334 (net total sales amount); $33,334/10,000 = $3.33 (average sales price).

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: August 17, 2004.

Mark McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Approved: September 10, 2004.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–20823 9–10–04; 4:16 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 04–53 and 02–278; FCC 04–194]

Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules to implement those aspects of the Controlling the Assault of the Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) directed to the Federal Communications Commission (FCC or Commission). Also, in this document, the Commission adopts a general prohibition on sending commercial messages to any address referencing an Internet domain name associated with wireless subscriber messaging services. Furthermore, the Commission clarifies the delineation between these new rules implementing the CAN SPAM Act and our existing rules concerning messages sent to wireless telephone numbers under the Telephone Consumer Protection Act (TCPA).

DATES: Effective October 18, 2004 except § 64.3100(a)(4), (d), (e) and (f) of the Commission's rules, which contain information collection requirements under the Paperwork Reduction Act (PRA) that are not effective until approved by Office of Management and Budget (OMB). Written comments by the public on the new and modified information collections are due November 15, 2004. The Commission will publish a document in the **Federal Register** announcing the effective date for these rules.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the

Paperwork Reduction Act (PRA) information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov*, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, via the Internet to *Kristy_L._LaLonde@omb.eop.gov*, or via fax at (202) 395–5167.

FOR FURTHER INFORMATION CONTACT: Ruth Yodaiken, of the Consumer & Governmental Affairs Bureau at (202) 418–7928 (voice), or e-mail *Ruth.Yodaiken@fcc.gov*. For additional information concerning the PRA information collection requirements contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION: This *Order* contains new or modified information collection requirements subject to the PRA of 1995, Public Law 104–13. These will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. The *Order* addresses issues arising from *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Notice of Proposed Rulemaking (NPRM)*, CG Docket Nos. 02–278 and 04–53; FCC 04–52. Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their web site: *www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This *Order* can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/pol*.

Paperwork Reduction Act of 1995 Analysis

This *Order* contains new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in the *Order* as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Public and agency comments are due November 15, 2004. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In the present document we have assessed the effects of adopting these rules, and find that there may be an administrative burden on businesses with fewer than 25 employees. However, since this action is consistent with our mandate from Congress under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, we believe small businesses will also benefit from this requirement in that they too will receive less unwanted commercial messages. In addition, the rules allow entities and persons a variety of ways to obtain express prior authorization to send such messages, which should substantially alleviate any burdens imposed on all businesses, including those with fewer than 25 employees.

Synopsis

In this *Order*, the Commission adopts rules to implement those aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) directed to the Federal Communications Commission (FCC or Commission). The CAN SPAM Act directs the Commission to issue regulations to protect consumers from "unwanted mobile service commercial messages." Thus, we adopt a general prohibition on sending commercial messages to any address referencing an Internet domain name associated with wireless subscriber messaging services. To assist the senders of such messages in identifying those subscribers, we require that commercial mobile radio service (CMRS) providers submit those domain names to the Commission, for inclusion in a list that will be made publicly available. We also clarify the delineation between these new rules implementing the CAN SPAM Act, and our existing rules concerning messages sent to wireless telephone numbers under the Telephone Consumer Protection Act (TCPA).

Discussion

A. Mobile Service Commercial Message (MSCM)

Section 14 (b)(1) of the CAN SPAM Act requires that the Commission adopt rules to provide subscribers with the ability to avoid receiving a "mobile service commercial message" unless the subscriber has expressly authorized such messages beforehand. An MSCM is defined in the CAN SPAM Act as a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service" as defined in 47 U.S.C. 332(d) "in connection with that service." The CAN SPAM Act defines an electronic mail message as a message having a unique electronic mail address that includes "a reference to an Internet domain."

In the CAN SPAM *NPRM*, we asked whether it was appropriate to find that only commercial electronic mail messages transmitted directly to a wireless device used by a CMRS subscriber would fall within the definition of MSCMs under the CAN SPAM Act. We sought comment on whether the statutory language would be satisfied by our proposed interpretation that an MSCM is a message transmitted to an electronic mail address provided by a CMRS provider for delivery to the addressee subscriber's wireless device. We asked for comment on whether an MSCM must be limited to a message sent to a wireless device used by a subscriber of CMRS "in connection with that service."

Few commenters directly addressed the scope of MSCMs, aside from references to forwarding, SMS, and similar technology discussed below. We agree with Dobson that the definition of MSCM should be limited to messages sent to addresses referencing domain names assigned by each CMRS carrier for mobile service message (MSM) service. This is consistent with the intent of the CAN SPAM Act in that section 14 of the CAN SPAM Act governs only those messages that are mobile services messages. We therefore adopt a definition of MSCM that is limited to a message transmitted to an electronic mail address provided by a CMRS provider for delivery to the subscriber's wireless device. Our definition of MSCM only applies to

those CMRS mail addresses designated by carriers specifically for mobile service messaging. For example, if a wireless carrier offered general electronic mail service not designed specifically for mobile devices, such service would not be covered by section 14 of the CAN SPAM Act. *Forwarded messages.* We sought comment on our tentative conclusion that messages "forwarded" by a subscriber to his or her own wireless device are not covered under section 14 of the CAN SPAM Act. Commenters agree with the Commission that section 14 of the CAN SPAM Act is not meant to cover forwarding in general. The Consumers Union warned the Commission not to allow the exclusion of "forwarded" messages to become a loophole for marketers who encourage others to forward messages to their friends and associates. We agree that the rules should exclude those messages forwarded by the subscriber's actions to forward messages to his or her own wireless device. However, a person who receives consideration or inducement to forward a commercial message to a wireless device other than his or her own device would be subject to the rules implementing section 14 of the CAN SPAM Act. In addition, VeriSign notes that some technologies being explored would allow for differentiation of forwarded mail from other mail. We do not rule out revisiting this issue in the future if such technology becomes widely available.

SMS Messages: In the *NPRM,* we asked for comment on whether the definition of an MSCM should include messages using different technologies, including Internet-to-phone SMS. We noted that the TCPA and Commission's rules that specifically prohibit using automatic telephone dialing systems to call wireless numbers already apply to any type of call, including both voice and text calls. We also noted in the *NPRM* that the legislative history of The CAN SPAM Act suggests section 14, in conjunction with the TCPA, was intended to address wireless text messaging. We proposed that Internet-to-phone SMS calls, which include addresses that reference Internet domains, should be considered MSCMs and should be addressed under section 14 of the CAN SPAM Act.

Commenters in general agree with our proposal that Internet-to-phone SMS calls should be covered by section 14 of the CAN SPAM Act. National Association of Attorneys General (NAAG) and other commenters argue that the FCC should also address all SMS, whether Internet-to-phone or phone-to-phone SMS service. Several commenters raise the issue of whether MSCMs should include all types of message services, including those transmitting images, audio messages and those using short codes.

We conclude that the definition of MSCM under the CAN SPAM Act includes any commercial electronic mail message as long as the address to which it is sent or transmitted includes a reference to the Internet and is for a wireless device as discussed above. This holds true regardless of the format of the message, such as audio messages. We believe this interpretation best applies the statutory language to the evolving technology for delivering such messages. Therefore, messages sent using Internet-to-phone SMS technology are among messages covered by section 14 of the CAN SPAM Act when they include an Internet reference in the address to which the message is sent or delivered.

We find, however, that the CAN SPAM Act does not apply to those technologies that use other types of addresses or numbers to send or deliver messages to wireless devices. For example, as discussed above, we agree with those commenters who maintain that phone-to-phone SMS is not captured by section 14 of the CAN SPAM Act because such messages do not have references to Internet domains. However, we note that while section 14 of the CAN SPAM Act is limited in scope to messages sent or transmitted to addresses that have references to Internet domains, the TCPA provides separate protections for calls made to wireless telephone numbers (without such references). And, as we explained in the *NPRM* and a previous Commission *Order,* the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages (*e.g.,* phone-to-phone SMS), as well as voice calls. We clarify here that this prohibition applies to all autodialed calls made to wireless numbers, including audio and visual services, regardless of the format of the message.

B. Avoiding Unwanted MSCMs

As a preliminary matter, we noted in the *NPRM* that one possible interpretation of section 14 of the CAN SPAM Act is that it was intended to prohibit senders of commercial electronic mail from sending any MSCMs unless they first obtain express authorization from the recipient. This reading would allow a subscriber to avoid all MSCMs unless the subscriber acts affirmatively to give express prior authorization to receive messages from individual senders. Another interpretation of this provision is that Congress intended the subscriber to take affirmative steps to avoid receiving MSCMs by indicating his or her desire not to receive such messages.

Most commenters argue that Congress intended section 14 of the CAN SPAM Act to be a flat prohibition on sending MSCMs unless authorized by a given subscriber, and that such a prohibition is, in fact, necessary to protect subscribers. NAAG indicates that wireless devices are often used not for receiving commercial messages, but rather as security and safety devices—for emergencies and to communicate with family members. NAAG contends that Congress intended to craft a flat prohibition unless the consumer first consented to receive the messages, and that any rule treating inaction by the consumer as consent to receive any commercial messages would conflict with Congressional intent. The Direct Marketing Association (DMA) argues that the prohibition should apply only to messages for which the recipient must pay. The National Association of Realtors (NAR) contends that a general prohibition without certain exceptions would harm small businesses.

We conclude that wireless subscribers would be best protected by a flat prohibition on sending MSCMs unless express prior authorization has been obtained from the subscriber. We agree that wireless devices are not ones on which subscribers would expect to receive commercial messages. We agree that it is the intrusive nature of such messages, in addition to the costs to receive them, which necessitates our adopting a ban unless the consumer has taken some action to invite them. We believe that NAR's concerns about the burden on small businesses are addressed by the exemption for express prior authorization, discussed below.

Verizon Wireless argues that a prohibition without an exemption for wireless providers would violate the First Amendment. We disagree. A flat prohibition here satisfies the criteria set forth in *Central Hudson Gas & Elec.* v. *Pub. Serv. Comm. of N.Y.,* in which the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech. Under the framework established in *Central Hudson,* a regulation of commercial speech will be found compatible with the First Amendment if (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulations are not more extensive than necessary to serve that interest.

Under the first prong, we find that there is a substantial governmental interest in protecting privacy. Congress found that "there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis." Specifically, Congress found that (1) electronic mail has become an extremely important and popular means of communication, (2) that the convenience and efficiency of electronic mail are threatened by the high volume of unsolicited commercial electronic mail, (3) that the receipt of unsolicited commercial electronic mail may result in costs for storage and/or time spent accessing, reviewing, and discarding such mail, and (4) that the growth in such electronic mail imposes significant monetary costs on providers of Internet access services, businesses, and educational and nonprofit institutions. NAAG notes that in addition to being intrusive in general, unwanted calls to wireless devices use battery power and interfere with a consumer's ability to use devices during emergencies.

We find that the rules we adopt today will advance those interests, and do so with regulations that are no more extensive than necessary. Under the second prong, the method we adopt directly advances the government's interest by alerting senders to the electronic mail addresses that are associated with mobile services and prohibiting the sending of such messages to wireless devices. Under the third prong, we have reviewed other possible options and we believe the method we adopt today, tailored to affect only those addresses associated with mobile service, is no more extensive than necessary. In addition, senders of such messages may continue to contact recipients that have provided express prior authorization to do so. Our conclusion is also consistent with Court of Appeals decisions regarding First Amendment challenges to the TCPA. We conclude we have the authority and a mandate to adopt measures to protect the public from such messages. We believe that a prohibition, combined with a domain name list as discussed below, is the most effective method, but it is no more extensive than necessary, to accomplish that end.

1. List of Wireless Domain Names

In the *NPRM* we noted that a key problem with regulating MSCMs, as opposed to messages sent to other devices such as desktop computers, is the current difficulty senders have in recognizing electronic mail addresses associated with wireless service and devices. Our task, therefore, differs substantially from that of the FTC's efforts to implement the CAN SPAM Act. We note that should the FTC or Congress take significant action to change the landscape of commercial electronic mail messaging, such as requiring labeling of all commercial electronic mail, the Commission may revisit the options discussed below.

We sought comment on several proposals to enable senders to recognize which addresses were associated with wireless devices. These included developing a list of domain names, requiring carriers to use standard subdomain names, requiring a registry of individual electronic mail addresses, incorporating challenge-response technology, and otherwise maximizing use of filters.

We believe that creating a list of Internet domain names associated with CMRS subscribers and prohibiting the sending of commercial messages to addresses using those domain names is the best option at this time to allow subscribers to avoid unwanted MSCMs. We believe that if senders are able to identify wireless subscribers by domain name, consumers and carriers alike will benefit. The record reveals that it is already industry practice for CMRS providers to use certain subdomains exclusively to serve their MSM subscribers and that these subdomains distinguish such customers from other customers. Therefore the burden on wireless providers, even small wireless providers, to supply such names for a directory would be minimal. In addition, we agree with those commenters who indicate that making available to senders of MSCMs a list of the domains used by wireless subscribers is the most efficient option to assist senders in complying with the rules.

Senders will need to check the list on a regular basis to avoid sending MSCMs to the domain names on the list. We believe that, due to the estimated small size of the list and the evidence that the list is anticipated to remain relatively static; the list is the option that imposes a burden that is no more extensive than necessary for senders as well. Furthermore, such a registry places no burdens on subscribers who wish to avoid unwanted MSCMs and it does not collect personal information about those subscribers. Subscribers need not change their electronic mail addresses or take any further action to avail themselves of the protections under section 14 of the CAN SPAM Act. Thus, despite the concerns of some commenters regarding other proposals in the *NPRM,* under this system wireless subscribers will not have to change addresses, and incur associated advertising and administrative costs, if they wish to avoid commercial electronic mail.

T-Mobile urges the Commission not to require wireless service providers to provide domain names for a domain name list. T-Mobile argues instead that a voluntary list would afford each provider the ability to choose whether to publicize its domain name. However, we note that many of these domain names are already widely known or publicly available. Congress has directed us to give all wireless consumers the ability to avoid unwanted MSCMs, and we have no authority to limit such protections to subscribers of those carriers that elect to submit a domain name to the list. Therefore, we decline to make the submission of domain names to the list voluntary for wireless providers.

Therefore, we require all CMRS carriers, including small carriers, to file with the Commission the names of all electronic mail domain names used to offer subscribers messaging specifically for mobile devices. Once we have obtained approval from the Office of Management and Budget (OMB) for information collections associated with these rules, the Commission will issue a separate public notice in this docket outlining the process for submitting this information and the timeframe for doing so. Carriers will also be required to file any updates to their listings with the Commission not less than 30 days before issuing subscribers a new or modified domain name. Carriers are encouraged to file updated information further in advance. In addition, to ensure the continued accuracy of the list, carriers must remove any domain name that has not been issued to subscribers or is no longer in use within 6 months of placing it on the list or last date of use.

We will make the official list of domain names available to the public from the FCC's website, in a similar fashion to the list of Section 255 Service Provider contacts. The list will be updated regularly. The Commission will issue a second public notice announcing the date on which senders of commercial electronic mail will have access to the domain name list from the Commission's website. Senders will then have an additional 30 days from the date the list becomes publicly available to comply with the rules to avoid sending MSCMs to wireless subscribers absent their express prior authorization.

As discussed above, to make such a list effective, we also adopt rules to prohibit the sending of any commercial

message to an address that references a domain name on the Commission's domain name list, unless the sender has received the express prior authorization of the person or entity to which the message is sent or delivered. This prohibition only applies to "commercial" messages, as defined in the CAN SPAM Act, and as interpreted by the FTC. We note that in promulgating the rules we adopt today, we have incorporated portions of the CAN SPAM Act directly.

Persons initiating commercial messages would be expected to check the domain name list to ensure that they are not sending MSCMs without express prior authorization. While we will not require any person or entity to provide proof of when they consulted the domain name list, any person or entity may use as a "safe harbor" defense proof that a specific domain name was not on the list more than 30 days before the offending message was initiated. This "safe harbor" defense shall not excuse any willful violation of the ban on sending unwanted messages to wireless subscribers. Any person or entity will be considered in violation of the prohibition if the message is initiated knowingly to a subscriber of MSM service, even if it is sent within 30 days of the domain name appearing on the list. This prohibition applies to the entity on whose behalf the message is sent and to any other entity that knowingly transmits an MSCM without consulting the domain name list.

2. Other Proposals

Standard subdomain names. We decline at this time to require CMRS providers to adopt a standard subdomain name for wireless devices. In the *NPRM* we sought comment on two related proposals. First, we sought comment on whether it would be possible and useful to require the use of specific top-level and second-level domains, which form the last two portions of the Internet domain address. No commenter specifically addressed our proposal. Second, we sought comment on whether we should require one portion of the domain to follow a standard naming convention to be used for all MSM service. As we noted in the *NPRM,* unless we required use of a limited top-level domain, we have no way to prevent entities that do not provide MSM service from adopting such names. In addition, any ban associated with such a subdomain outside a limited top-level domain, could inadvertently ban commercial messages for any entities that happened to already have such subdomains. Thus, the sender would not be able to distinguish between those addresses which were truly used for wireless messaging, and other addresses.

Cingular, Nextel, VeriSign and Verizon Wireless caution the Commission against requiring subdomain naming standards. They note this would be costly for subscribers, especially small businesses, who could have large administrative costs to change their advertising and business materials to reflect a new address. Cingular states that a subdomain naming standard would also force carriers to absorb considerable costs. Carriers argue also that any cost to protect wireless subscribers from unwanted commercial mail should fall instead to the senders of such mail. While we agree with NAAG and National Automobile Dealers Association (NADA) that a standard subdomain name would be simpler for senders, we believe it would be more burdensome for carriers, especially small businesses, to implement than a domain name list. In addition, we agree that, consistent with the intent of the CAN SPAM Act, subscribers should not have to bear additional costs, such as the administrative costs mentioned, in *Order* to avoid unwanted MSCMs. Thus, we decline to adopt this option at this time.

Registry of Individual E-mail Addresses. We also decline to establish a limited national registry containing individual electronic mail addresses, similar to the national "do-not-call" registry. In the *NPRM,* we noted that the FTC is tasked with reviewing whether a nationwide marketing "Do-Not-E-Mail" registry might offer protection for those consumers who opt to place their electronic mail addresses on such a registry. In June, the FTC released its report to Congress recommending against adopting a national do-not-e-mail registry at this time. The FTC noted that there is no directory of valid individual addresses and, therefore, creating a registry of individual addresses would create "a gold mine" for marketers, both legitimate and illegal. The report stated that existing security measures are currently inadequate to protect such a registry. In addition, the report noted that there were practical concerns with the large number of anticipated addresses.

Commenters generally oppose the establishment of a registry of individual subscriber addresses, even if it is limited to MSM subscribers. They contend that such a registry would not be secure, could enable spammers to send more unwanted electronic mail messages, and that the security risk would threaten consumer privacy interests. Commenters also maintain that such a registry would be burdensome for consumers and for senders, that there would be huge operational problems with setting up such a registry, that it would be ineffective, and that it would be costly to train senders to use it properly. The DMA submitted a detailed study demonstrating what it believes are significant problems with the security, practicality, and technical feasibility of such a registry. Only a few commenters argue that a registry of electronic mail addresses would be useful, with little or no support for their conclusions, and one commenter saying it would be beneficial if combined with other anti-spam measures.

Upon careful consideration of the costs and benefits of creating a national wireless do-not-e-mail registry of individual electronic mail addresses, we believe that the disadvantages of such a system described in the record outweigh any possible advantages at this time. A national registry containing individual electronic mail addresses would involve significant resources and cost to set up and administer. Because a registry of individual addresses may potentially contain millions of records, it could also be burdensome for senders of MSCMs, including small businesses, to regularly access, download, and use the registry to check against targeted addresses. It would be less burdensome to do the same with a much smaller list of mobile service domain names. Even if the resources were devoted to establishing such a registry, commenters describe serious concerns about a registry becoming a target for unscrupulous marketers who would target electronic mail addresses on the list. As noted by the DMA, other commenters, and by the FTC in a Report to Congress, because such a list would be considered valuable to such marketers, there is a significant risk that such individuals might be motivated to try to obtain the list specifically for the purpose of sending unsolicited messages to those addresses. The record also reveals that at this time such a registry would not be as effective as one containing only domain names. Commenters note that the annual rate for electronic mail address turnover is high as much as 32 percent per annum. As the FTC noted, unlike the do-not-call registry, which uses phone databases to purge the list of disconnected phone numbers, there is no database for abandoned electronic mail addresses. Thus, any database containing such addresses would continually expand, and include valid and unused addresses. For all of these

reasons, we decline to adopt a registry of individual electronic mail addresses of wireless subscribers at this time.

Additional Mechanisms and CMRS Providers' Roles. There was little consensus on what other technical solutions should be required. Because the rules we adopt today address the statutory requirements for protecting consumers from unwanted messages to mobile devices, we decline to require other specific technical solutions such as the challenge-response mechanisms or technological solutions related to filtering as discussed in the *NPRM*. The Members of the U.S. House Representatives who commented in the proceeding urge the Commission to make things simple for users. We believe the domain name list does so.

We believe that it is the industry itself that can help give consumers additional protections and abilities to avoid unwanted electronic mail from sources other than legitimate businesses. Wireless and technology providers contend the Commission should not regulate in detail the wireless providers' efforts to combat unwanted messages. Those providers who commented in this proceeding note that they are aggressively working to stop unwanted messages. We applaud them for those efforts and do not want to interfere with this area of evolving technologies and market forces. We agree that at this time it is not necessary for the Commission to become involved in mandating detailed technical solutions. However, we strongly encourage providers to provide subscribers with additional reasonably effective methods to avoid receiving unauthorized MSCMs. We believe service providers should determine for themselves appropriate solutions to employ and offer, and we expect all providers to offer subscribers protections against unwanted messages. We will continue to monitor the effectiveness of our rules and the efforts of wireless providers to protect wireless subscribers from MSCMs and may revisit this issue at a later date to ensure that subscribers are afforded sufficient safeguards from all unwanted commercial messages.

C. Express Prior Authorization

Congress directed the FCC to adopt rules to provide consumers with the ability to avoid receiving MSCMs, unless the subscriber has provided express prior authorization to the sender. We sought comment on the form and content that such "express prior authorization" should take. Specifically, we sought comment on whether senders should be required to obtain a subscriber's express authorization in writing, and how any such requirement could be met electronically. We also asked if senders should be required to provide a notice to recipients about the possibility that costs could be incurred in receiving any such messages. We asked whether the term "affirmative consent" in The CAN SPAM Act would be suited to use in defining "express prior authorization."

Commenters were generally split on whether the Commission should require senders to obtain express authorization from subscribers in writing. Wireless providers generally oppose any written authorization requirement, while consumers' groups contend that authorization should be obtained in writing, along with a signature. Wireless providers instead argue that senders should be allowed flexibility to obtain authorization via the Internet, orally over the telephone, or through messages sent to the subscriber's wireless device. Some suggest that consent forms requiring a signature would be impractical and hinder communications between sellers and consumers. NAAG, on the other hand, contends that the rules should be modeled after the Commission's "do-not-call" provisions, where express authorization must be evidenced only with a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by the seller and includes the telephone number to which calls may be placed. Electronic Privacy Information Center (EPIC) warns that authorization not provided in writing may result in some senders falsely claiming they had the recipient's authorization to send MSCMs. EPIC adds that any authorization notice to the subscriber should be clear and conspicuous and written in plain language for the subscriber.

As mandated by the CAN SPAM Act, we require any sender of MSCMs to obtain the express authorization of the recipient prior to sending any MSCMs to that subscriber. We agree with those commenters that contend that "affirmative consent" as defined in the CAN SPAM Act is not suited to defining "express prior authorization" because protections for wireless subscribers are meant to be more stringent. Given the intent of Congress to afford greater protections from spam to wireless subscribers than to consumers generally, we believe that the burden must rest with the sender of MSCMs to obtain authorization from any subscriber prior to sending any MSCMs. Senders must also do so in a manner that best protects subscribers' privacy interests. However, we decline to require senders to obtain a subscriber's authorization in writing.

We will permit senders to obtain authorization by oral or written means, including electronic methods. A sender may obtain the subscriber's express prior authorization to transmit MSCMs to that subscriber in writing. Written authorization may be obtained in paper form or via an electronic means such as an electronic mail message from the subscriber. It must include the subscriber's signature and the electronic mail address to which MSCMs may be sent. Senders who choose to obtain authorization in oral format are also expected to take reasonable steps to ensure that such authorization can be verified.

We note here that in the event any complaint is filed, the burden of proof rests squarely on the sender, whether authorization has been obtained in written or in oral form. We do so to avoid the likelihood that any businesses will try to fabricate authorization. Given the potential costs and inconvenience to subscribers to receive such MSCMs, it is important that such messages be sent only to those wireless devices belonging to receptive subscribers. We strongly suggest that senders take steps promptly to document that they received such authorization. Recognizing the potential for fraud by both a person signing up someone else to receive MSCMs and by businesses fabricating authorization, we recommend that the business confirm the electronic mail address with a confirmatory notice sent to the recipient requesting a reply. We emphasize that sending any commercial message to a wireless device, including any falsely purporting to be confirmatory messages, is a violation of our rules unless the subscriber has already provided express prior authorization and the sender bears the burden of showing that has occurred.

Whether given orally or in writing, express prior authorization must be express, must be given prior to the sending of any MSCMs, and must include the electronic mail address to which such MSCMs may be sent. In addition, we believe that consistent with the intent of the CAN SPAM Act, consumers must not bear any additional costs to receive a request for authorization, and must be able to reply to such a request without incurring any additional costs. In addition to actual costs for such messages, as noted above, recipients may incur costs for time spent accessing, reviewing, and discarding such mail. Thus, senders are prohibited from sending any request for authorization to any wireless subscriber's wireless devices. Express prior authorization may not be obtained in the form of a "negative option." If a

sender chooses to use a website, we note that such authorization must include an affirmative action on the part of the subscriber, such as checking a box or hitting an "I Accept" button, accompanied by the clear disclosures outlined below. In addition, the subscriber must have an opportunity in the process to input the specific electronic mail address for which they are authorizing MSCMs. Express prior authorization need only be secured once from the recipient in Order to send MSCMs to that subscriber until the subscriber revokes such authorization. Senders who claim they obtained authorization from wireless subscribers to send them MSCMs prior to the effective date of these rules will not be in compliance with the rules unless they can demonstrate that such authorization met all the requirements as adopted herein, including the disclosure requirements below.

We emphasize that if the sender subsequently is notified by the subscriber that the subscriber does not wish to receive MSCMs, the sender must cease sending such messages within 10 business days of the receipt of such request in compliance with section 5(a)(4)(A) of the CAN SPAM Act. We note, however, that this 10-day time period may change should the FTC amend its rules. We delegate to the Consumer & Governmental Affairs Bureau the authority to amend the rules to reflect any updates in the time-frames adopted by the FTC.

A subscriber who provides an electronic mail address for a specific purpose, *e.g.*, notifying the subscriber when a car repair is completed, will not be considered to have given express prior authorization for purposes of sending MSCMs in general. In addition, should a sender allow subscribers to choose the types of MSCMs they receive from that sender, and authorization is provided for those specific types of messages, the sender should transmit only those types of MSCMs to the subscriber. Finally, authorization provided to a particular sender will not entitle that sender to send MSCMs on behalf of third parties, including on behalf of affiliated entities and marketing partners. If a sender obtains express prior authorization, that sender must be identified in the message in a form that will allow a subscriber to reasonably determine that the sender is the authorized entity.

Required Disclosures. As noted above, Congress found that the receipt of unsolicited commercial electronic mail often results in monetary costs and inconvenience for wireless subscribers. Thus, the rules we adopt today require senders to disclose to the subscriber at the time they obtain any subscriber's express prior authorization that: (1) The subscriber is agreeing to receive mobile service commercial messages sent to their wireless device from a particular sender; (2) the subscriber may be charged by their wireless service provider in connection with receipt of such messages; and (3) the subscriber may revoke her authorization to receive MSCMs at any time. Any such disclosure notice containing the required disclosures must be clearly legible, use sufficiently large type (or, if audio, be of sufficiently loud volume), and be placed so as to be readily apparent to a customer. The disclosure notice must also be separate from any other authorizations in the document. And, it must clearly provide the name of the person or entity sending the MSCM and the person or entity whose product or service is advertised or promoted in the MSCMs if different from the sender. Finally, if any portion of the disclosure notice is translated into another language, then all portions of the notice must be translated into that language. Senders are cautioned that if they use a website for obtaining authorization, such authorization notice must comply with these disclosure requirements as well. We note that if authorization is obtained orally, all required disclosures must still be made by the sender.

We decline to carve out any exemptions from the "express prior authorization" requirements. We find that any exemption for a particular industry would be in direct conflict with the intent of the CAN SPAM Act to protect wireless subscribers from commercial electronic mail messages that they do not wish to receive. We also find that permitting senders to obtain authorization orally or in writing, addresses the concerns described by certain commenters in obtaining such authorization.

The legislative history demonstrates that section 14 of the CAN SPAM Act was included so that wireless subscribers would have greater protections from commercial electronic mail messages than those protections provided elsewhere in the CAN SPAM Act. Congress was concerned about the intrusive nature of wireless spam and the costs to subscribers associated with receiving such spam. Thus, we emphasize that any MSCM sender that claims its messages are transmitted based on oral, written, or electronic authorization must be prepared to provide clear and convincing evidence of such express prior authorization by the subscriber. The failure to obtain such authorization before sending MSCMs will be a clear violation of the CAN SPAM Act and Commission's rules.

D. Electronic Rejection of MSCMs

Required technical mechanisms. In the *NPRM* we sought comment on how we could best fulfill the mandate of section 14 (b)(2) of the CAN SPAM Act to develop rules that "allow recipients of MSCMs to indicate electronically a desire not to receive future MSCMs from the sender." We also sought comment on technical options that might be used to do this simply.

Commenters suggested technical options for withdrawing authorization including a return electronic mail address, a hyperlink to a website, the use of short code mechanisms, telephone-based techniques such as those that allow the caller to use key pads, or some combination of the foregoing. Members of the U.S. House of Representatives and the Motion Picture Association of America, encourage the Commission to adopt a simple, streamlined electronic response technique to quickly withdraw prior authorization using a recipient's handset. Two commenters contend that requiring small businesses to set-up and maintain a website for the purpose of rejecting future messages would impose an unreasonable burden. NAAG contends the first screen of any MSCM should display the existence of an option to decline to receive messages and the means by which it can be exercised.

As a preliminary matter we note that section 5(a)(3) of the CAN SPAM Act requires that all commercial electronic mail include "a return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed." Several commenters endorsed the applicability of the general provision of section 5(a)(3) of the CAN SPAM Act for MSCMs, indicating that a return electronic mail address or other Internet-based mechanism, such as a link to a website, would serve as a mechanism for electronically rejecting further items and should be included in any MSCM sent. We agree that this provision would need to be included in all MSCMs in *Order* for our rules to be consistent with the CAN SPAM Act.

We believe, however, that more is required. Our decision is informed by the significant differences between the resources that may be available to recipients of MSCM and the resources available to recipients of electronic mail messages in general. In particular our definition of MSCM includes messages that originate on the Internet and that

are converted for delivery to wireless devices which may not have Internet access. Some of these wireless services and devices are by nature one-way services. Moreover, we cannot assume that all MSCM recipients have an alternative means of access to Internet-based electronic messaging or to other Internet-based mechanisms, such as a web browser. Consequently, we strongly agree with the Mobile Marketing Code of Conduct principle that "consumers must be allowed to terminate their participation in an ongoing mobile messaging program through channels identical to those through which they can opt to receive messages about a given program."

Therefore, we conclude that in addition to the general requirement of the CAN SPAM Act that each MSCM have a functioning return electronic mail address or other form of Internet-based communication, a sender of an MSCM must provide the recipient with access to whatever mechanism they were given access to in *Order* to grant express prior authorization. For example, if a subscriber was given a short-code mechanism for granting authorization for MSCMs to the sender, the sender must provide that subscriber with a way to send a short code as a means to electronically reject future MSCMs from that sender. A sender must also include basic instructions by which this option or these options can be exercised to reject further items.

A sender may include other mechanisms at his discretion, so long as these basic requirements are met. The means by which a recipient notifies the sender that the recipient does not wish to receive additional MSCMs can impose no new requirements on the recipient beyond the means by which he provided prior express authorization. In addition, the sender may not subject the subscriber to further commercial advertising or solicitation as part of the procedure the recipient must use to reject future messages.

Consistent with CAN SPAM Act section 5(a)(3), for no less than 30 days following the transmission of an MSCM, all included mechanisms for acquiring express prior authorization must remain capable of receiving and honoring the recipient's rejection of further messages. As we indicate above, the sender must cease sending further messages within the amount of time that the FTC has allotted for senders to act upon requests for rejecting subsequent messages, currently set at 10 business days after receipt of any request from the subscriber.

In regards to small businesses, we note that the flexibility provided for obtaining express prior authorization and for notifying the sender of the subsequent rejection of further items addresses the concerns of small business interests that, for example, a small business not be required to set-up and maintain a new website. We further note that because the recipient must be given express prior authorization for any MSCM that arrives, we see no need to adopt NAAG's suggestion to require material regarding how to decline to receive more messages to be displayed on the first screen of any MSCM. Finally, the record does not indicate that provider services and subscriber devices currently support a common response-based technique that is simple for subscribers to use and that the Commission could adopt. We therefore encourage industry to develop an industry-standard means by which a subscriber can use his handset to easily respond to a sender that he no longer wishes to receive MSCMs. We will monitor whether industry has developed a standard means by which subscribers can use handsets to respond and may revisit this issue at a later date.

Other technical mechanisms. In the *NPRM* we sought comment on the applicability of a variety of other technical options that could be used by subscribers for electronically rejecting messages. For example, we asked about the possible applicability of mechanisms for blocking messages from particular senders at the subscriber's request, of an ability to add a changeable personal identifier to a wireless device mail address by means of which the subscriber could easily alter his address, and of challenge-response mechanisms that a subscriber might invoke. One commenter supported establishing a policy framework to deploy subscriber-controlled blocking solutions. Many providers acknowledged that they voluntarily provide their subscribers such means for mitigating unsolicited MSCM, but cautioned the Commission against mandating their availability. Given the record and the apparent success to date of the voluntary approach in generally blocking unwanted MSCMs, we decline to require that all providers make such mechanisms available for use at the option of their subscribers.

E. Consideration of CMRS Provider Exemption

Section 14 (b)(3) of the CAN SPAM Act allows the Commission to exempt providers of commercial mobile services to the general prohibition on the sending of MSCMs. In doing so, the Commission must take into consideration the "relationship that exists between providers of such services and their subscribers." However, as the CAN SPAM Act clearly states, our overall mandate is to protect consumers from unwanted MSCMs. The CAN SPAM Act does not require the Commission to provide an exemption, only to consider whether such an exemption would be appropriate. As a result, the Commission sought comment in the *NPRM* on whether there is a need for such an exemption and how it would impact consumers.

In the *NPRM*, we noted that the CAN SPAM Act already excludes certain "transactional and relationship" messages from the definition of unsolicited commercial electronic mail. Specifically the CAN SPAM Act states that transaction and relationship messages are those messages in which the primary purpose is:

> (i) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to provide (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient's standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

In light of the exclusions of those types of messages, we asked in the *NPRM* whether there was a need for a separate exemption for CMRS providers from the section 14 of the CAN SPAM Act "express prior authorization" requirement and, if so, how the Commission would implement the requirements allowing subscribers who indicated a desire not to receive future MSCMs from the provider (1) at the time of subscribing to such service and (2) in any billing mechanism. Additionally, we requested in the *NPRM* that CMRS providers supply us with specific examples of messages that they send to their customers that are not already excluded from the CAN SPAM Act. Finally, if such an exemption were created, we asked whether there would

be any impact on small businesses and whether small wireless service providers should be treated differently.

NAAG, consumer groups, and a privacy organization argue that there is no basis for granting an exemption for CMRS providers. CMRS providers argue they should have an exemption—with two providers noting this should be only if the carriers do not charge subscribers for the messages they send. However, despite the *NPRM's* request that carriers provide specific examples of messages that would not already be covered by the CAN SPAM Act's exemption for "transactional" or "relationship" messages, CMRS providers offer few such examples and, as discussed below, they might already be allowed under The CAN SPAM Act. NAR says it would be unfair to give an exemption to one business model and not others. Many CMRS providers counter that we should not make a special exemption for small businesses. As to the scope of the exemption, CTIA urges that any exemption for CMRS providers also should extend to its business partners, while the DMA warns that any such exemption must be narrowed to include only messages from a carrier about its own services. Verizon argues that declining to exempt carriers would be an unlawful restriction on commercial speech; however, we have already addressed that issue above.

Based upon the record before us, we decline to grant CMRS providers a special exemption from the requirement to obtain express prior authorization from their current subscribers before sending them any MSCM. In reaching this decision, we are persuaded by commenters, including many consumer groups and individuals, who urge us to provide greater consumer protection for wireless consumers—protection that is not diluted by such an exemption. The CAN SPAM Act itself requires us to protect consumers from "unwanted" commercial messages, not only those that have additional costs. As commenters note, consumers are concerned with the nuisance of receiving such messages.

Several of these commenters emphasize that CMRS providers should not be exempt from the rules requiring express prior authorization because the bulk of CMRS providers' communications with their customers are already expressly exempted under the CAN SPAM Act as "transactional and relationship" messages. We agree that the few examples that CMRS providers supplied in the record appear to already fall within "transactional and relationship" messages or otherwise outside of the definition of "commercial" messages. For example, T-Mobile contends that it needs to be able to send notices to customers about fraud. As noted above, the CAN SPAM Act defines a "commercial electronic mail message" as an electronic message for which the "primary purpose" is the "commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." If the primary purpose of the message was to alert customers about fraud, we do not believe T-Mobile's example would fall within the definition of "commercial" and therefore would not fall under the CAN SPAM Act at all. In addition, Nextel provides the example of a carrier needing to send out an alert to a prepaid customer that his account balance is running low. If that was the primary purpose of the message, such a message would fall under the exemption for transaction and relationship message.

As noted previously, the FTC has authority to develop the criteria used to define whether a message is "commercial," as well as any modifications for what is considered in the exemption of transactional and relationship messages. Therefore, we delegate to the Consumer & Governmental Affairs Bureau the authority to amend the rules we adopt today to ensure consistency with any rule the FTC adopts under the CAN SPAM Act to further define "commercial" and "transactional relationship" messages.

Although CMRS providers contend that an exemption should be provided, very little support for such an exemption was provided in the record in this proceeding. Much of the comment in support of the exemption is conclusory in nature. T–Mobile states that, by empowering the Commission to exempt wireless carriers from section 14 (b)(1) of the CAN SPAM Act, Congress has recognized that the MSCMs sent by wireless carriers are fundamentally different than MSCMs sent by all other senders. Cingular, Nextel and Sprint urge the Commission to presume that the customer is willing to receive information about their providers' new products and services. Nextel notes that, unlike third parties, wireless carriers can ensure that customers are not charged for such messages. Dobson states that, in many cases, a subscriber would prefer an SMS message from its carrier rather than a phone call or bill insert.

We note again that Congress' intent in including section 14 in the CAN SPAM Act was to afford wireless consumers greater protection from unwanted commercial electronic mail messages. Ultimately, we are persuaded that safeguarding wireless consumers from MSCMs, undiluted with an exemption for CMRS providers, will ensure that consumers receive "less, not more, spam." The record shows that MSCMs sent by CMRS providers are not fundamentally different from those sent by other senders, other than that they may be provided without additional cost to subscribers. An MSCM from a CMRS provider may be just as intrusive, and costly in other respects, as an MSCM from a third party. As Congress noted, the receipt of unwanted mail can result in costs "for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail." In addition, providers have unique channels such as monthly statements and web sites, through which they can request a subscriber's prior express authorization. We note that the rules we establish in this proceeding are sufficiently flexible to enable the CMRS provider to readily obtain the subscriber's express prior authorization in a number of ways, if a CMRS provider desires to send an MSCM to any wireless subscriber. For all of those reasons, a promise to make them cost-free alone does not suffice as justification for an exemption.

Accordingly, we decline to exempt CMRS providers from the requirement to obtain express prior authorization from their current subscribers before sending them any MSCM. For similar reasons, we also decline to create an exemption for other entities, such as realtors or small businesses. NAR argues that the MSCM rules should not apply to a real estate professional's communications to their clients about the services they are providing to that client, or to communications between associations and their members. As noted above, the CAN SPAM Act's existing exemption already broadly covers many transaction and relationship messages. Furthermore, the allowance for orally obtaining express prior authorization, which NAR advocates, should allow realtors to obtain such authorizations as needed. NAR has not established that messages sent by its members are fundamentally different from those sent by other senders. An MSCM from a real estate professional may be just as intrusive, and costly as an MSCM from any other entity. ACA International contends that messages sent to wireless devices for the primary purpose of collecting debts are not MSCMs as they are not "commercial" and therefore are exempt from the CAN SPAM Act. As we noted

previously, while the statute leaves the interpretation of "transactional and relationship" messages to the FTC, in the absence of any ruling to the contrary, we believe that messages from a person or entity with whom the recipient has previously agreed to enter into a transaction and that concern a debt owed for that transaction would fall under the exemption. However, consistent with our *2003 TCPA Order,* a call to sell debt consolidation services, for example, is a commercial call regardless of whether the consumer is also referred to a tax-exempt nonprofit organization for counseling services. We believe that to do so would be inconsistent with our mandate from Congress to protect subscribers from unwanted commercial messages.

F. General Compliance With the CAN SPAM Act

We asked for comment on specific compliance issues that senders of MSCM might have with other sections of the CAN SPAM Act. We noted in the *NPRM* that although we believed that currently, some carriers choose to limit the length of certain text messages that some commercial mobile service subscribers already appeared to be supplementing the limited text handling functionality with ancillary personal computer technology. We received little response about this issue. CTIA states that some handsets are limited in message storage beyond a certain length and screens are small; thus, CTIA argues that senders should not be required to meet all of the disclosures. Consumer Action, the Consumer Federation of America and the National Consumers League contend that the disclosure requirements of the main provisions of the CAN SPAM Act are so important that they should trump any awkwardness with messages being filled with disclosures. We agree. There is insufficient evidence on the record to warrant a waiver of the basic disclosure requirements mandated by the CAN SPAM Act.

Finally, CTIA contends that wireless carriers should be given special treatment with regard to general compliance with the information requirements of section 5 of the CAN SPAM Act, given that they can provide this data at the time of subscription and in each monthly bill. CTIA contends in a footnote that interpreting the statute to mean that CMRS providers would need to comply with all the information requirements of section 5 would render section 14 (b)(4) of the CAN SPAM Act meaningless. We disagree. Based on the information discussed above regarding messages sent by CMRS providers, we find there is no reason for treating them differently from other businesses.

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (NPRM & FNPRM) released by the Federal Communications Commission (Commission) on March 19, 2004. The Commission sought written public comments on the proposals contained in both the NPRM & FNPRM, including comments on the IRFA. None of the comments filed in this proceeding was specifically identified as comments addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, This Order

On December 8, 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN SPAM Act) to address the growing number of unwanted commercial electronic mail messages, which Congress determined to be costly, inconvenient, and often fraudulent or deceptive. Congress found that recipients "who cannot refuse to accept such mail" may incur costs for storage and for "time spent accessing, reviewing, and discarding such mail." The CAN SPAM Act prohibits any person from transmitting such messages with false or misleading information about the source or content, and gives recipients the right to decline to receive additional messages from the same source. Certain agencies, including the Commission, are charged with enforcement of the CAN SPAM Act.

Section 14 of the CAN SPAM Act requires the Commission to (1) promulgate rules to protect consumers from unwanted mobile service commercial messages, and (2) consider, in doing so, the ability of senders to determine whether a message is a mobile commercial electronic mail message. In addition, the Commission shall consider the ability of senders of mobile service commercial messages to comply with the CAN SPAM Act in general. Furthermore, the CAN SPAM Act requires the Commission to consider the relationship that exists between providers of such services and their subscribers.

On March 19, 2004, the Commission issued the *NPRM & FNPRM* regarding implementation of section 14 of the CAN SPAM Act. The Commission sought comment on how to protect wireless subscribers from those electronic mail messages, such as traditional e-mail and forms of text messaging, that fall under section 14 of the CAN SPAM Act, while not interfering with regular electronic messages that are covered under the CAN SPAM Act in general. In the *NPRM & FNPRM,* the Commission sought comment on the ability of senders to determine whether a message is a mobile service commercial electronic mail message, as well as different options and technologies that might enable the sender to make that determination. In addition, the *NPRM & FNPRM* sought comment on the following six issues or alternatives: (1) The scope of section 14 of the CAN SPAM Act, specifically what falls within the definition of mobile service commercial messages (MSCMs); (2) mechanisms to give consumers the ability to avoid MSCMs without relying upon the sender to determine whether a message is a mobile service message; (3) the requirements for obtaining express prior authorization; (4) whether commercial mobile radio service providers should be exempted from the obligation of obtaining express prior authorization before contacting their customers; (5) how wireless subscribers may electronically reject future MSCMs; and (6) how MSCM senders may generally comply with the CAN SPAM Act.

In 1991, the Telephone Consumer Protection Act (TCPA) was enacted to address certain telemarketing practices, including calls to wireless telephone numbers, which Congress found to be an invasion of consumer privacy and even a risk to public safety. The TCPA specifically prohibits calls using an automatic telephone dialing system or artificial or prerecorded message "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged." The CAN SPAM Act provides that "[n]othing in this Act shall be interpreted to preclude or override the applicability" of the TCPA.

In 2003, we released a *Report and Order* in which we reaffirmed that the TCPA prohibits *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. We concluded that this encompasses both voice calls and text calls, including Short Message Service (SMS) text messaging calls, to wireless phone numbers.

In the *NPRM & FNPRM,* we noted that the legislative history of the CAN SPAM Act suggests that section 14, in

conjunction with the TCPA, was intended to address wireless text messaging. We sought comment on whether the definition of an MSCM should include SMS messages.

This *Order* adopts a general prohibition against commercial electronic messages sent to any address using a domain name that appears on a list to be maintained by the Commission and available to the public. We believe these measures are the ones best suited to protect wireless subscribers from unwanted commercial messages and do not overburden carriers and legitimate businesses, especially small businesses.

In addition, this *Order* clarifies the delineation between the new rules implementing the CAN SPAM Act, and our existing rules concerning messages sent to wireless telephone numbers under the TCPA. Because this *Order* clarifies this delineation and does not modify any rules, there is no discussion of the TCPA included in this FRFA. All remaining TCPA issues, raised in the *NPRM & FNPRM,* will be addressed in a separate *Order* issued by the Commission at a later date.

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

There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

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

The rules adopted in this *Order,* concerning the prohibition of sending electronic commercial mail messages, apply to a wide range of entities, including the myriad of businesses throughout the nation that use electronic messaging to advertise. In the IRFA we identified, with as much specificity as possible, all business entities that might be affected by this *Order.* In *Order* to assure that we have covered all possible entities we included general categories, such as Wireless Service Providers and Wireless Communications Equipment Manufacturers, while also including more specific categories, such as Cellular Licensees and Common Carrier Paging. Similarly, for completeness, we have also included descriptions of small entities in various categories, such as 700 MHz Guard Band Licenses, who may potentially be affected by this *Order* but who would not be subject to regulation simply because of their membership in that category.

Sometimes when identifying small entities we provide information describing auctions' results, including the number of small entities that were winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants do not provide business size information, nor does the Commission track subsequent business size, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.

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

Telemarketers. SBA has determined that "telemarketing bureaus" with $6 million or less in annual receipts qualify as small businesses. For 1997, there were 1,727 firms in the "telemarketing bureau" category, total, which operated for the entire year. Of this total, 1,536 reported annual receipts of less than $5 million, and an additional 77 reported receipts of $5 million to $9,999,999. Therefore, the majority of such firms can be considered to be small businesses.

Wireless Service Providers. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

Internet Service Providers. The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others." Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999. Thus, under this size standard, the great majority of firms can be considered small entities.

Wireless Communications Equipment Manufacturers. The Commission has not developed special small business size standards for entities that manufacture radio, television, and wireless communications equipment. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to "Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing." Examples of products that fall under this category include "transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment" and may include other devices that transmit and receive Internet Protocol enabled services, such as personal digital assistants. Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%, so

the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the great majority of wireless communications equipment manufacturers are small businesses.

Radio Frequency Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Radio Frequency Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to "Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing." Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

Paging Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Paging Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to "Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing." Under that standard, firms are considered small if they have 750 or fewer employees. Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments in this category. Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. Thus, under this size standard, the majority of establishments can be considered small entities.

Telephone Equipment Manufacturers. The Commission has not developed a special small business size standard applicable to Telephone Equipment Manufacturers. Therefore, the applicable small business size standard is the definition under the SBA rules applicable to "Telephone Apparatus Manufacturing." Under that standard, firms are considered small if they have 1,000 or fewer employees. Census Bureau data indicates that for 1997 there were 598 establishments that manufacture telephone equipment. Of those, there were 574 that had fewer than 1,000 employees, and an additional 17 that had employment of 1,000 to 2,499. Thus, under this size standard, the majority of establishments can be considered small.

As noted in paragraph [8], we believe that all small entities affected by the rules contained in this Order will fall into one of the large SBA categories described above. In an attempt to provide as specific information as possible, however, we are providing the following more specific categories.

Cellular Licensees. The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

Common Carrier Paging. The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications." Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony

carriers. The SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to the most recent *Trends in Telephone Service data,* 719 carriers reported that they were engaged in the provision of wireless telephony. We have estimated that 294 of these are small under the SBA small business size standard.

Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

Narrowband Personal Communications Services. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is "entrepreneur," which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

Upper 700 MHz Band Licenses. The Commission released a Report and Order, authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order,* we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

Specialized Mobile Radio. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won

263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

There are two distinct types of compliance requirements associated with this *Order*. First, wireless providers that provide wireless messaging service must provide to the Commission a list of all their domain names used for wireless messages. The record indicates that this list for each service provider is thought to be relatively static and of manageable size. We expect service providers to provide this list electronically and do not expect production of such a list by a business, even a small business, to be expensive or time consuming.

As a result of this mandate, businesses wishing to send commercial electronic messages must avoid sending messages to addresses that reference the domain names for wireless devices unless they have obtained the subscriber's express prior authorization. To do this, senders may check the list of domain names. Thus, prior to sending a commercial message to that address, businesses must also obtain express authorization from any subscriber whose e-mail address includes a domain name that appears on the list. This express authorization may be obtained either by oral or written means and must be obtained only once until the subscriber revokes such authorization. Because the list of domain names is expected to be small, we do not anticipate the compliance burden of checking such a list to be great.

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

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

Initially, we note that the rules are intended to protect subscribers, including small businesses, from unwanted mobile service commercial messages. Congress found these unwanted messages to be costly and time-consuming for wireless subscribers. The rules adopted in this *Order* will benefit small businesses by reducing cost and time burdens on small businesses that receive such messages.

One alternative considered by the Commission was a registry of individual e-mail addresses. This list would have been similar to the national "do-not-call" registry; however, after careful consideration of the costs and benefits of creating a national do-not-e-mail registry, including consideration of the burden on small businesses, we believe that the disadvantages of such a system outweigh the possible advantages. We would expect such a system to contain millions of records, which unlike the "do-not-call" registry would each be unique in length and type of characters, making searching and scrubbing of such a list difficult and time consuming, perhaps inordinately so for small businesses. Therefore, we instead chose to adopt rules requiring the registering of domain names used for mobile service with the Commission.

Unlike individual e-mail addresses, the list of domain names is limited and manageable. The record indicates that it is already wireless providers' practice to use certain domain names and that the establishment of such a list would not burden carriers, presumably not even small carriers, and would place the burden of complying with the CAN SPAM Act on the senders of commercial messages. No commercial e-mail can be sent to an address that contains one of the domain names that has been on the list for 30 days or the that sender otherwise knows to be for wireless service, unless the sender has obtained express authorization from the subscriber. The list of domain names will be available without cost from the Commission in an electronic format. While senders of commercial messages will not be required to provide proof that they consulted the wireless domain name list or that they consulted it at a particular time, any person or entity may use as a "safe harbor" defense the fact that a specific domain name was not on the list more than 30 days before the offending message was initiated. This "safe harbor" defense shall not excuse any willful violation—if the sender otherwise know the e-mail address to be protected—of the ban on sending unwanted messages to wireless subscribers. We expect that global searches of senders' electronic mail lists to identify the domain names will be easy and inexpensive.

A second alternative considered by the Commission was in the area of obtaining express authorization. The Commission has declined to require that the express authorization be in writing. Senders, who must obtain this authorization before sending commercial electronic messages, are permitted to obtain such authorization by oral or written means. including electronic methods. Although not alleviating the entire burden on small businesses, the record would suggest that there is less of a burden if authorizations can be made orally instead of in writing. If the authorization is in writing, it may be obtained in a variety of ways—including paper form or electronic mail. By

allowing a variety of methods for authorization, the Commission is allowing senders of commercial messages, including any small businesses, to choose the method that works best for them. It is expected that this ability to choose will result in greater efficiencies and less cost for small businesses while still allowing them to comply with the CAN SPAM Act.

Report to Congress

The Commission will send a copy of the *Order*, including this Final Regulatory Flexibility Analysis (FRFA), in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register.**

Ordering Clauses

Accordingly, pursuant to authority contained in sections 1–4, 222, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 222, 227, and 303(r); and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Public Law 108–187, 117 Statute 2699; 15 U.S.C. 7701–7712, the *Order* in CG Docket Nos. 04–53 and 02–278 *is adopted* and Part 64 of the Commission's rules, 47 CFR Part 64, *is amended* as set forth in Appendix B.

The requirements of this *Order* shall become effective October 18, 2004. The rules in 47 CFR 64.3100 that contain information collection requirements under the PRA are not effective until approved by OMB. Once these information collections are approved by OMB, the Commission will release a public notice and publish a document in the **Federal Register** announcing the effective date of these rules.

The Commission delegates to the Consumer & Governmental Affairs Bureau the authority to amend the rules to reflect any updates in the time-frames adopted under this *Order* that are dependent upon the Federal Trade Commission's rules under the CAN SPAM Act, as discussed herein, and to amend the definitions dependent on the Federal Trade Commission's rules under the CAN SPAM Act, as discussed herein.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Communications common carriers and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

■ 2. Subpart BB is added with the Subpart Heading to read as follows:

Subpart BB—Restrictions on Unwanted Mobile Commercial Service Messages

■ 3. Section 64.3100 is added to read as follows:

§ 64.3100 Restrictions on mobile service commercial messages.

(a) No person or entity may initiate any mobile service commercial message, as those terms are defined in paragraph (c)(7) of this section, unless:

(1) That person or entity has the express prior authorization of the addressee;

(2) That person or entity is forwarding that message to its own address;

(3) That person or entity is forwarding to an address provided that

(i) The original sender has not provided any payment, consideration or other inducement to that person or entity; and

(ii) That message does not advertise or promote a product, service, or Internet website of the person or entity forwarding the message; or

(4) The address to which that message is sent or directed does not include a reference to a domain name that has been posted on the FCC's wireless domain names list for a period of at least 30 days before that message was initiated, provided that the person or entity does not knowingly initiate a mobile service commercial message.

(b) Any person or entity initiating any mobile service commercial message must:

(1) Cease sending further messages within ten (10) days after receiving such a request by a subscriber;

(2) Include a functioning return electronic mail address or other Internet-based mechanism that is clearly and conspicuously displayed for the purpose of receiving requests to cease the initiating of mobile service commercial messages and/or commercial electronic mail messages, and that does not require the subscriber to view or hear further commercial content other than institutional identification;

(3) Provide to a recipient who electronically grants express prior authorization to send commercial electronic mail messages with a functioning option and clear and conspicuous instructions to reject further messages by the same electronic means that was used to obtain authorization;

(4) Ensure that the use of at least one option provided in paragraphs (b)(2) and (b)(3) of this section does not result in additional charges to the subscriber;

(5) Identify themselves in the message in a form that will allow a subscriber to reasonably determine that the sender is the authorized entity; and

(6) For no less than 30 days after the transmission of any mobile service commercial message, remain capable of receiving messages or communications made to the electronic mail address, other Internet-based mechanism or, if applicable, other electronic means provided by the sender as described in paragraph (b)(2) and (b)(3) of this section.

(c) *Definitions.* For the purpose of this subpart:

(1) *Commercial Mobile Radio Service Provider* means any provider that offers the services defined in 47 CFR Section 20.9.

(2) *Commercial electronic mail message* means the term as defined in the CAN SPAM Act, 15 U.S.C. Section 7702. The term is defined as "an electronic message for which the primary purpose is commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." The term "commercial electronic mail message" does not include a transactional or relationship message.

(3) *Domain name* means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(4) *Electronic mail address* means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox and a reference to an Internet domain, whether or not displayed, to which an electronic mail message can be sent or delivered.

(5) *Electronic mail message* means a message sent to a unique electronic mail address.

(6) *Initiate,* with respect to a commercial electronic mail message, means to originate or transmit such messages or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message. For purposes of this paragraph, more than one person may be considered to have initiated a message. "Routine conveyance" means the transmission, routing, relaying, handling, or storing, through an automatic technical process, or an electronic mail message for which another person has identified the recipients or provided the recipient addresses.

(7) *Mobile Service Commercial Message* means a commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of a commercial mobile service (as such term is defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)) in connection with such service. A commercial message is presumed to be a mobile service commercial message if it is sent or directed to any address containing a reference, whether or not displayed, to an Internet domain listed on the FCC's wireless domain names list. The FCC's wireless domain names list will be available on the FCC's website and at the Commission headquarters, 445 12th St., SW., Washington, DC 20554.

(8) *Transactional or relationship message* means any electronic mail message the primary purpose of which is:

(i) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) To provide:

(A) Notification concerning a change in the terms or features of;

(B) Notification of a change in the recipient's standing or status with respect to; or

(C) At regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(D) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(E) To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

(d) *Express Prior Authorization* may be obtained by oral or written means, including electronic methods.

(1) Written authorization must contain the subscriber's signature, including an electronic signature as defined by 15 U.S.C. 7001 (E–Sign Act).

(2) All authorizations must include the electronic mail address to which mobile service commercial messages can be sent or directed. If the authorization is made through a website, the website must allow the subscriber to input the specific electronic mail address to which commercial messages may be sent.

(3) Express Prior Authorization must be obtained by the party initiating the mobile service commercial message. In the absence of a specific request by the subscriber to the contrary, express prior authorization shall apply only to the particular person or entity seeking the authorization and not to any affiliated entities unless the subscriber expressly agrees to their being included in the express prior authorization.

(4) Express Prior Authorization may be revoked by a request from the subscriber, as noted in paragraph (b)(2) and (b)(3) of this section.

(5) All requests for express prior authorization must include the following disclosures:

(i) That the subscriber is agreeing to receive mobile service commercial messages sent to his/her wireless device from a particular sender. The disclosure must state clearly the identity of the business, individual, or other entity that will be sending the messages;

(ii) That the subscriber may be charged by his/her wireless service provider in connection with receipt of such messages; and

(iii) That the subscriber may revoke his/her authorization to receive MSCMs at any time.

(6) All notices containing the required disclosures must be clearly legible, use sufficiently large type or, if audio, be of sufficiently loud volume, and be placed so as to be readily apparent to a wireless subscriber. Any such disclosures must be presented separately from any other authorizations in the document or oral presentation. If any portion of the notice is translated into another language, then all portions of the notice must be translated into the same language.

(e) All CMRS providers must identify all electronic mail domain names used to offer subscribers messaging specifically for wireless devices in connection with commercial mobile service in the manner and time-frame described in a public notice to be issued by the Consumer & Governmental Affairs Bureau.

(f) Each CMRS provider is responsible for the continuing accuracy and completeness of information furnished for the FCC's wireless domain names list. CMRS providers must:

(1) File any future updates to listings with the Commission not less than 30 days before issuing subscribers any new or modified domain name;

(2) Remove any domain name that has not been issued to subscribers or is no longer in use within 6 months of placing it on the list or last date of use; and

(3) Certify that any domain name placed on the FCC's wireless domain names list is used for mobile service messaging.

[FR Doc. 04–20901 Filed 9–15–04; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2844, MB Docket No. 04–189, RM–10962]

Digital Television Broadcast Service; Anchorage, AK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Alaska Public Telecommunications, Inc., Channel 2 Broadcasting Company, and Smith Television License Holding, Inc., licensees of stations KAKM, KTUU and KIMO, substitutes DTV channels *8c, 10c, and 12c, respectively, at Anchorage, Alaska. *See* 69 FR 30856, June 1, 2004. DTV channels *8c, 10c, and 12c can be allotted to Anchorage, Alaska, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 61–25–22 N. and 149–52–20 with a power of 50, 21, 41

respectively, HAAT of 240 meters and with a DTV service population of 264 thousand for each station. With this action, this proceeding is terminated.

DATES: Effective October 25, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–189, adopted September 1, 2004, and released September 9, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 301–816–2820, facsimile 301–816–0169, or via e-mail *joshir@erols.com*.

This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Commission will send a copy of this [Report & Order etc.] in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

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

PART 73—[AMENDED]

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

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

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Alaska, is amended by removing DTV channels 18, *24 and 30 and adding DTV channels *8c, 10c, and 12c at Anchorage.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–20905 Filed 9–15–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2861, MB Docket No. 02–66, RM–10252]

Digital Television Broadcast Service; Rutland, VT

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Vermont ETV, Inc., substitutes DTV channel *9 for DTV channel *56 at Rutland, Vermont. *See* 67 FR 15768, April 3, 2002. DTV channel *9 can be allotted to Rutland in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 43–39–32 N. and 73–06–25 W. with a power of 15, HAAT of 411 meters and with a DTV service population of 595 thousand. Since the community of Rutland is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government was obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective October 25, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 02–66, adopted September 2, 2004, and released September 10, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 301–816–2820, facsimile 301–816–0169, or via e-mail *joshir@erols.com*.

This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Commission will send a copy of this Report & Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

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

PART 73—[AMENDED]

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

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

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Vermont, is amended by removing DTV channel *56 and adding DTV channel *9 at Rutland.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–20903 Filed 9–15–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2860; MB Docket No. 03–247, RM–10831]

Radio Broadcasting Services; Bald Knob and Greenbrier, AK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Crain Media Group, LLC, licensee of FM Station KKSY, Bald Knob, Arkansas, deletes Bald Knob, Arkansas, from the FM Table of Allotments, and allots Channel 296C3 at Greenbrier, Arkansas, as the community's first local FM service, and modifies the license of FM Station KKSY to specify operation on Channel 296C3 at Greenbrier. Channel 296C3 can be allotted to Greenbrier, Arkansas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.8 km (5.5 miles) northeast of Greenbrier. The coordinates for Channel

296C3 at Greenbrier, Arkansas, are 35–17–28 North Latitude and 92–19–14 West Longitude.

DATES: Effective October 25, 2004.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 03–247, adopted September 1, 2004, and released September 3, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW, Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

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

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by removing Bald Knob, Channel 296C3 and by adding Greenbrier, Channel 296C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–20902 Filed 9–15–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 040910259–4259–01; I.D. 091004A]

RIN 0648–AS60

Fisheries of the Exclusive Economic Zone Off Alaska; Chiniak Gully Research Area for Vessels Using Trawl Gear

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

ACTION: Final rule.

SUMMARY: NMFS is rescinding the trawl closure in the Chiniak Gully Research Area. This action is necessary to allow vessels using trawl gear to participate in directed fishing for groundfish in the Chiniak Gully Research Area after the completion of NMFS research on September 8, 2004.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 11, 2004, through 2400 hrs, A.l.t., December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The Chiniak Gully Research Area was closed to vessels using trawl gear from August 1 to a date no later than September 20 under regulations at § 679.22(b)(3)(ii)(A). This closure was in support of a research project to evaluate the effect of commercial fishing activity on the prey availability of pollock to Steller sea lions.

The regulations at § 679.22(b)(3)(ii)(B) provide that the Regional Administrator, Alaska Region, NMFS, (Regional Administrator) may rescind the trawl closure prior to September 20. As of September 8, 2004, the research has been completed in the Chiniak Gully Research Area. Therefore, the Regional Administrator is rescinding the closure of the Chiniak Gully Research Area. All other closures remain in full force and effect.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from immediately implementing this action in order to allow the participation of vessels using trawl gear in the Chiniak Gully Research Area. The research in the Chiniak Gully Research Area was completed as of September 8, 2004. Therefore, it is no longer necessary to keep this area closed. Allowing for prior notice and an opportunity for public comment would prevent the fisheries from realizing the economic benefits of this action. In addition, this rule is not subject to a 30–day delay in the effective date pursuant to 5 U.S.C. 553(b)(B) because it relieves a restriction. This action would reopen the Chiniak Gully Research Area to vessels using trawl gear and allow these vessels to participate in directed fishing for groundfish.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

This action has been determined to be not significant for purposes of EO 12866.

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

Dated: September 10, 2004.

Rebecca Lent,

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

[FR Doc. 04–20808 Filed 9–10–04; 3:37 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031125292–4061–02 ; I.D, 090904C]

Fisheries of the Economic Exclusive Zone Off Alaska; Shallow-Water Species Fishery by Vessels Using Trawl Gear in the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for species that comprise the shallow-water species fishery by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary because the fourth seasonal apportionment of the 2004 Pacific halibut bycatch allowance specified for the shallow-water species fishery in the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 10, 2004, through 1200 hrs, A.l.t., October 1, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2004 final harvest specifications for groundfish of the GOA (69 FR 9261, February 27, 2004), established the fourth seasonal apportionment of the halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA for the period 1200 hrs, A.l.t., September 1, 2004, through 1200 hrs, A.l.t., October 1, 2004, as 150 metric tons.

In accordance with § 679.21(d)(7)(i), the Administrator, Alaska Region, NMFS, has determined that the fourth seasonal apportionment of the 2004 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA has been reached. Consequently, NMFS is prohibiting directed fishing for the shallow-water species fishery by vessels using trawl gear in the GOA. The species and species groups that comprise the shallow-water species fishery are pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, and "other species."

This closure does not apply to fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA open to directed fishing for pollock.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the trawl shallow-water species fishery in the GOA.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: September 10, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–20807 Filed 9–10–04; 3:37 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031125292–4061–02; I.D. 090904A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620 of the Gulf of Alaska

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

ACTION: Modification of a closure.

SUMMARY: NMFS is opening directed fishing for pollock in Statistical Area 620 of the Gulf of Alaska (GOA). This action is necessary to fully use the 2004 C season total allowable catch (TAC) of pollock specified for Statistical Area 620.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 11, 2004, through September 15, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for pollock in Statistical Area 620 of the GOA under § 679.20(d)(1)(iii) on August 29, 2004 (69 FR 53364, September 1, 2004).

NMFS has determined that, approximately 2,226 mt of pollock remain in the 2004 C season directed fishing allowance. Therefore, in accordance with 679.25(a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the 2004 C season TAC of pollock specified for Statistical Area 620, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 620 of the GOA effective 1200 hrs, A.l.t., September 11, 2004.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the fishery under the pollock 2004 C season TAC in Statistical Area 620.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of

prior notice and opportunity for public comment.

This action is required by section 679.20 and is exempt from review under Executive Order 12866.

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

Dated: September 10, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–20806 Filed 9–10–04; 3:37 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031125292–4061–02; I.D. 090904B]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock In Statistical Area 630 of the Gulf of Alaska

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

ACTION: Modification of a closure.

SUMMARY: NMFS is opening directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA). This action is necessary to fully use the 2004 C season total allowable catch (TAC) of pollock specified for Statistical Area 630.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 12, 2004, through September 15, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for pollock in Statistical Area 630 of the GOA under § 679.20(d)(1)(iii) on August 29, 2004 (69 FR 53364, September 1, 2004).

NMFS has determined that, approximately 2,168 mt of pollock remain in the 2004 C season directed fishing allowance. Therefore, in accordance with 679.25(a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the 2004 C season TAC of pollock specified for Statistical Area 630, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 630 of the GOA effective 1200 hrs, A.l.t., September 12, 2004.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the fishery under the pollock 2004 C season TAC in Statistical Area 630.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by section 679.20 and is exempt from review under Executive Order 12866.

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

Dated: September 10, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–20805 Filed 9–10–04; 3:37 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 179
Thursday, September 16, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 110

[3150–AH44]

Export and Import of Nuclear Equipment and Radioactive Materials: Security Policies

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations pertaining to the export and import of nuclear equipment and radioactive materials. This proposed rule is intended to reflect recent changes to the nuclear and radioactive material security policies of the Commission and the Executive Branch, for the import and export of radioactive material. A specific license will be required for the import and export of high-risk radioactive material.

DATES: Submit comments by November 30, 2004. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number RIN 3150–AH44 in the subject line of your comments. Comments on rulemakings submitted in writing or in electronic form will be made available to the public in their entirety on the NRC rulemaking Web site. Personally identifiable information, such as your home e-mail address, will not be removed from your comments.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: *SECY@nrc.gov*. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415–1966. You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov*. Address questions about our rulemaking Web site to Carol Gallagher (301) 415–5905; e-mail *cag@nrc.gov*. Comments can also be submitted via the Federal Rulemaking Portal *http://www.regulations.gov*.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays. (Telephone (301) 415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415–1101.

Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at *http://ruleforum.llnl.gov*.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Suzanne Schuyler-Hayes, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington DC. 20555–0001, telephone (301) 415–2333, e-mail: *ssh@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Background

As a result of the terrorist attacks in the United States on September 11, 2001, the Nuclear Regulatory Commission has undertaken a comprehensive review of nuclear and radioactive material security requirements, with particular focus on high-risk radioactive material. This material, including certain quantities of cobalt-60, cesium-137, iridium-192 and americium-241 isotopes, has the potential to be used in a radiological dispersal device (RDD) or a radiological exposure device (RED) in the absence of proper security measures. This review takes into consideration the changing domestic and international threat environments and related U.S. Government supported international initiatives in the nuclear security area, particularly activities conducted by the International Atomic Energy Agency (IAEA).

Recently, the Commission issued a series of domestic Orders concerning security measures applicable to high-risk radioactive material. These Orders include enhanced security requirements which are also known as "Additional Security Measures," or ASMs. The ASMs have been issued to domestic licensees of the NRC and Agreement States, under the Commission's exclusive authority to provide for the common defense and security. They have not been made available to the general public because they contain sensitive security information that is protected for public disclosure as Safeguards information in accordance with section 147 of the Atomic Energy Act. The ASMs include several provisions that pertain to export and import shipments, particularly concerning security during transportation and advance notice of proposed shipments. It is anticipated that these orders may be reflected in the U.S. Code of Federal Regulations covering radioactive material (primarily revisions to 10 CFR Parts 30–36 and 70).

The Commission has also supported U.S. Government efforts to establish common international guidance for safety and security measures for radioactive sources. This effort resulted in a major revision to the IAEA Code of Conduct on the Safety and Security of Radioactive Sources (Code of Conduct or Code). The revised Code of Conduct was approved by the IAEA Board of Governors in September 2003, and is available on the IAEA Web site at *http://www.iaea.org/Publications/Standards/index.html*. Following approval of the current Code of Conduct, the Commission has played a key role in multilateral meetings of technical and legal experts convened by

the IAEA to develop guidance under the Code relating to export and import of high-risk radioactive material. It is expected that the draft "Guidance for the Import and Export of Radioactive Sources in Accordance with the IAEA Code of Conduct on the Safety and Security of Radioactive Sources" (IAEA Export/Import Guidance) developed by those experts will be submitted to the IAEA Board of Governors for approval at its September 2004 meeting and subsequently published by the IAEA.

The Code of Conduct provides guidance for the export and import of Category 1 and 2 radioactive sources described in Table 1 of Annex 1 of the Code, as discussed below. Table 1 includes a list of high-risk radionuclides with activities corresponding to thresholds of concern that is essentially identical to the list found in the proposed Appendix P to be added to 10 CFR Part 110. While the radionuclides and threshold quantities are the same, the proposed Part 110 appendix uses the more encompassing term "radioactive material" rather than "sources." Therefore, unlike the Code of Conduct, the proposed rule encompasses the import and export shipments of bulk radioactive material, in addition to sealed sources.

The U.S. Government has formally written to the IAEA Director General expressing its non-legally binding political commitment to work toward following the guidance contained in the Code of Conduct. In addition, the IAEA Export/Import Guidance is virtually the same, with relatively few modifications, as the export/import guidance text endorsed earlier by President Bush and 28 other Leaders at the 2004 G–8 Sea Island and U.S.-European Union Shannon Summits. Although the Code and the supporting IAEA Export/Import Guidance are not legally binding on IAEA Member States, the Commission nevertheless believes it essential for Commission to update its export/import regulations to reflect the guidance in the Code of Conduct and the Export-Import Guidance consistent with our responsibilities under the Atomic Energy Act, and the Commission's mission of promoting the common defense and security, as well as for achieving a globally harmonized approach to ensure a level playing field for commerce. This proposed rule is intended to accomplish these objectives.

Discussion

The Nuclear Regulatory Commission proposes requiring specific licenses for the export and import of high-risk radioactive material as identified above. This proposed rule follows the guidance contained in the IAEA's Code of Conduct and is consistent with the Code's section on "Import and Exports of Radioactive Sources" (paragraphs 23–29). This section of the Code is intended to guide countries in the development and harmonization of policies and laws on exports and imports of high-risk radioactive sources to ensure that such sources are only exported to authorized end-users in countries with adequate regulatory controls and that sources are not diverted for illicit use. Under the sections of the Code of Conduct relating to exports and imports of radioactive sources, exports and imports of such radioactive sources should take place with the awareness of the exporting country authority and with the prior notification of the importing country authority. Additionally, exports of Category 1 quantities of such material require the consent of the importing country. While prior notification to the importing government authority, may originate from either the exporting licensee or exporting government authority, consents to the import of Category 1 sources must be provided on a government to government basis.

The Code of Conduct provides that, unless there are exceptional circumstances, a country should authorize the import or export of high-risk radioactive material only if it is satisfied that the recipient is authorized to receive and possess the radioactive material and the importing country has the technical and administrative capability, resources and regulatory structure needed to ensure that the radioactive source will be managed in a manner consistent with the provisions of the Code.

The specific radioactive material and amounts covered by this rule are listed in the proposed Appendix P to Part 110 and are essentially identical to the list of high-risk radioactive materials in Categories 1 and 2 in Table 1 of the Code of Conduct. With the exception of plutonium, the high-risk radioactive materials listed in Appendix P are categorized as byproduct material as defined in the Atomic Energy Act of 1954, as amended. Although Radium-226 is encompassed by the Code of Conduct, it is not listed in Appendix P or covered by the proposed regulation because radium, as a naturally occurring radioactive material, is not subject to Commission's licensing authority. However, radium-226 is subject to export/import controls administered by the Department of Commerce. It should be noted that, in response to NRC's request for information, to date no NRC or Agreement State licensee reported possessing, importing, or exporting Category 1 or 2 amounts of radium. The proposed rule requirements described in this notice would apply to all identified licensees, both NRC and Agreement State.

Exports. Under the Atomic Energy Act and 10 CFR Part 110, the principal criterion for approving exports of the materials listed in Appendix P is a finding that the export is not inimical to the common defense and security of the United States. The non-inimicality finding is relevant to both the nuclear proliferation significance of exports and the related security concerns of high-risk radioactive material falling into the hands of non-state organizations, including terrorist groups. In making its inimicality determination, the Commission will, consistent with the Code's guidance, consider whether the importing country has the technical and administrative capability and the resources and regulatory structure to manage the high-risk radioactive material in a safe and secure manner, and has authorized the recipient to receive and possess this material. Under the proposed rule, the Commission will require the applicant for the export license to provide the NRC with pertinent documentation demonstrating that the recipient of the radioactive material has the necessary authorization under the laws and regulations of the importing country to import, receive, and possess the material. For proposed exports of Category 1 amounts of high-risk radioactive material listed in Appendix P, the Commission will also assess whether the government of the importing country has provided its consent to the import. Consistent with the Code, in cases where a recipient may lack the necessary authorization to receive and possess the radioactive material or where a receiving state may be lacking in technical and administrative capability, resources, or regulatory structure, the NRC may, in exceptional circumstances, also consider as part of its overall inimicality determination whether an alternative arrangement has been or can be made to manage the radioactive material in a safe and secure manner. In examining these and other factors that may be pertinent to assessing whether the proposed export will be inimical to the U.S. common defense and security, the Commission may seek the advice of the Executive Branch and will take into account information it receives as part of regular interactions with its foreign regulatory counterparts, the International Atomic Energy Agency, and the Executive Branch. The Commission anticipates that further

guidance on what constitutes "exceptional circumstances" and other aspects of the Code will be set forth in the IAEA Export/Import Guidance discussed above, and will consider that guidance in preparation of the final rule. If, after considering the above information the Commission authorizes the export, then export licensees will be required to provide prior notification to the importing country authority and to the NRC of individual shipments.

Imports. For imports, the licensing criteria are non-inimicality to the U.S. common defense and security and a finding that the import does not constitute an unreasonable risk to the public health and safety. Since all recipients in the U.S. must be properly authorized by the NRC, an Agreement State or the Department of Energy to possess such radioactive material, the proposed changes to Part 110 for imports under NRC's licensing authority of high-risk radioactive material will simply require (1) that the U.S. recipient is authorized to receive and possess the radioactive material and (2) prior notification to the NRC of individual shipments. The Commission will expect the applicant for the import license to provide the Commission with pertinent documentation that each recipient of the radioactive material has the necessary authorization to receive and possess this material. For proposed imports into the U.S. of Category 1 amounts of high-risk radioactive material and for proposed imports allowed under provisions for exceptional circumstances, the Commission will also be responsible for providing the necessary formal U.S. Government consent to the export authority of the exporting country.

Conclusion. The proposed criteria discussed above for approving specific export and import licenses for high-risk radioactive material will provide the Commission with the necessary flexibility to process each application on a case by case basis. For example, the Commission may wish to limit exports to new recipients or to a State with limited experience with its regulatory infrastructure to single shipments of radioactive material. On the other hand, in States with mature regulatory infrastructures with known and competent recipients, the Commission intends to use the provisions of § 110.31(e) by issuing broad specific export and import licenses for multiple radionuclides, shipments, and destinations and with authorizations for up to five years or more. The duration of the import or export authorization will be consistent with the expiration date of the recipient's authorization to possess or use the radioactive material. However, each shipment under these export/import licenses that meets or exceeds the Category 2 limits in Appendix P will require prior notification as discussed above.[1]

Implementing Date

The final rule will have an implementation date which will allow a period of six months for exporters and importers to apply for and receive required specific export and import licenses.

Summary

The proposed changes to the Commission's export/import regulations in Part 110 apply to a small number of high-risk radioactive materials when exported or imported in amounts exceeding clearly defined limits. They also provide the Commission with flexibility to treat each export and import license application on a case-by-case basis, with the ability to accommodate the still evolving domestic and international security measures for high-risk radioactive material.

Section by Section Analysis

Subpart C—Licenses. Proposed changes would indicate that all exports and imports of high-risk radioactive material listed in a new Appendix P to this Part require specific licenses if amounts involved meet or exceed that set out in that appendix.

In § 110.23, changes would be made to paragraph (a)(3) clarifying that individual export shipments of americium-241 under a general license must be less than the amounts specified in Category 2 of Appendix P to this Part. (Currently, this section authorizes individual shipments of several 20 curie quantities of americium-241 to most countries as long as the 200 curie per country limit is not exceeded.)

In § 110.23, a new paragraph would require that individual export shipments of the high-risk radioactive material listed in a new Appendix P to this Part and conducted under the general license provisions of this paragraph be below the amounts indicated for Category 2.

In § 110.27, a new paragraph would require that individual import shipments of high-risk radioactive material listed in a new Appendix P to this Part and conducted under the general license provisions of this paragraph be below the amounts indicated for Category 2.

[1] The more restrictive requirements for the export of plutonium 238 and 239 contained in § 110.21 will continue to be the limiting controls.

In § 110.32, a new paragraph (g) is added to clarify documentation requirements accompanying an export license application for radioactive material listed in proposed new Appendix P.

Subpart D—Review of License Applications. Proposed changes would indicate licensing criteria for high-risk radioactive material exports and imports.

In § 110.42 a new paragraph would specify the licensing criteria for the export of high-risk radioactive material listed in a new Appendix P to this Part in amounts indicated for Categories 1 and 2.

In § 110.43 a new paragraph would specify the licensing criteria for the import of high-risk radioactive material listed in a new Appendix P to this Part in amounts indicated for Categories 1 and 2.

In § 110.45 a new paragraph would describe the requirements for issuing import licenses for high-risk radioactive material listed in a new Appendix P to this Part in amounts specified in Categories 1 and 2.

Subpart E—License Terms and Related Provisions. Proposed changes would clarify that transportation issues are covered by NRC's domestic regulations.

In § 110.50, a new paragraph is added covering advance notification requirements. Also, the word "transport" would be added after "use" in paragraph (a)(3); and the term "71" would be added after "70" in (renumbered) paragraph (b)(5). This would clarify that "transportation" is not covered directly in Part 110 and to indicate that 10 CFR Part 71 of NRC's domestic regulations cover transportation.

A new Appendix P to Part 110 would list the high-risk radioactive material and quantities requiring specific export and import licenses.

Voluntary Consensus Standards

The National Technology Transfer Act of 1995, Pub. L. 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. There are no voluntary consensus standards addressing this subject matter.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an

environmental impact statement nor an environmental assessment has been prepared for this rule.

Paperwork Reduction Act Statement

This proposed rule contains information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule has been submitted to OMB for review and approval of the information collection requirements.

The burden to the public for these information collections is estimated to average 2.4 hours per application, 15 minutes per notification, and 15 minutes per recipient's certification to the licensee including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in the proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden 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?

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden, to the Records and FOIA/Privacy Services Branch (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by Internet electronic mail to INFOCOLLECTS@nrc.gov; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–10202 (3150–0036 and 3150–0027), Office of Management and Budget, Washington, DC 20503.

Comments to OMB on the collections of information or on the above issues should be submitted by October 18, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

The Commission has prepared a regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The regulatory analysis is available for inspection in the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852. Single copies of the analysis may be obtained from the Office of International Programs, U.S. Nuclear Regulatory Commission, at 301–415–2333 or by e-mail at *ssh@nrc.gov*. The Commission requests public comment on the regulatory analysis. Comments on the analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this proposed rule does not have a significant impact on a substantial number of small entities. This rule is necessary to reflect the nuclear and radioactive material security policies of the Executive Branch and to comply with evolving international agreements to which the U.S. Government subscribes.

Backfit Analysis

The NRC has determined that the backfit analysis is not required for this rule because these amendments do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I.

List of Subjects in 10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalties, Exports, Imports, Incorporation by reference, Intergovernmental relations, Nuclear and radioactive materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; notice is hereby given that the NRC is proposing to adopt the following amendments to 10 CFR Part 110.

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

1. The authority citation for part 110 continues to read as follows:

Authority: Secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2071, 2073, 2074, 2077, 2092–2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154–2158, 2201, 2231–2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 5, Pub. L. 101–575, 104 Stat. 2835 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sections 110.1(b)(2) and 110.1(b)(3) also issued under Pub. L. 96–92, 93 Stat. 710 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c and 57d, 88 Stat. 473, 475 (42 U.S.C. 2074). Section 110.27 also issued under sec. 309(a), Pub. L. 99–440. Section 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Section 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Sections 110.80–110.113 also issued under 5 U.S.C. 552, 554. Sections 110.130–110.135 also issued under 5 U.S.C. 553. Sections 110.2 and 110.42(a)(9) also issued under sec. 903, Pub. L. 102–496 (42 U.S.C. 2151 *et seq.*).

2. In § 110.23, paragraph (a)(3) is revised and a new paragraph (a)(7) is added to read as follows:

§ 110.23 General license for the export of byproduct material.

(a) * * *

(3) For americium-241, exports of any country listed in 110.29 must not exceed one curie (308 milligrams) per shipment or 100 curies (30.8 grams) per year and must be contained in industrial process control equipment or petroleum exploration equipment. Exports to countries other than those listed in 100.28 or 110.29 must be contained in industrial process control equipment or petroleum exploration equipment and individual shipments must be less than the amounts specified in Category 2 of Appendix P to this Part.

* * * * *

(7) Individual export shipments of byproduct material must be less than the amounts specified in Category 2 of Appendix P to this Part.

* * * * *

3. In § 110.27, the introductory text of paragraph (a) is revised and paragraph (f) is added to read as follows:

§ 110.27 General license for import.

(a) Except as provided for in paragraphs (b), (c), and (f) of this section, a general license is issued to any person to import byproduct, source, or special nuclear material if the consignee is authorized to possess the material under:

* * * * *

(f) Individual import shipments of radioactive material must be less than

the amounts specified in Category 2 of Appendix P to this Part.

4. In § 110.32, a new paragraph (g) is added to read as follows:

§ 110.32 Information required in an application for a specific license/NRC Form 7.

* * * * *

(g) For proposed exports of material listed in Appendix P to this part, pertinent documentation that the recipient of the material has the necessary authorization under the laws and regulations of the importing country to import, receive, and possess the material.

5. In § 110.42, new paragraphs (e) and (f) are added to read as follows:

§ 110.42 Export licensing criteria.

* * * * *

(e) In making its findings under paragraphs (a)(8) and (c) of this section for proposed exports of radioactive material listed in Appendix P to this Part, the NRC shall consider whether:

(1) The receiving country has the appropriate technical and administrative capability, resources and regulatory structure to manage the material in a secure manner; and

(2) The foreign recipient is authorized to receive and possess the material; or

(3) In exceptional circumstances, that an alternative arrangement has been made to manage the material in a safe and secure manner.

(f) For proposed exports of Category 1 amounts of radioactive material listed in Appendix P to this Part, the receiving country consents to the import of the material.

7. In § 110.43, a new paragraph (e) is added to read as follows:

§ 110.43 Import licensing criteria.

* * * * *

(e) With respect to the import of radioactive material listed in Appendix P to this Part, the U.S. recipient is authorized to possess the material under a contract with the Department of Energy or a license issued by the Commission or a State with which the Commission has entered into an agreement under Section 274b. of the Atomic Energy Act.

8. In § 110.45, a new paragraph (b)(5) is added to read as follows:

§ 110.45 Issuance or denial of license.

* * * * *

(b) * * *

(5) With respect to a proposed import of radioactive material listed in Appendix P to this Part, the U.S. recipient is authorized to possess the material under a contract with the Department of Energy or a license issued by the Commission or a State with which the Commission has entered into an agreement under Section 274b. of the Atomic Energy Act.

* * * * *

9. § 110.50 is amended as follows:

a. In paragraph (a)(3), add the word "transport" after the word "use,"

b. Paragraphs (b)(4) and (b)(5) are redesignated as (b)(5) and (b)(6),

c. Add the number "71" after "70" in the newly redesignated paragraph (b)(5), and

d. Add a new paragraph (b)(4) to read as follows:

§ 110.50 Terms.

* * * * *

(b) * * *

(4) A licensee authorized to export or import material listed in Appendix P to this Part is responsible for notifying NRC and the importing country in advance of each shipment. A list of points of contacts in importing countries is available at NRC's Office of International Programs (see § 110.4). The NRC office responsible for receiving advance notifications for all export and import shipments will be specified on each specific export and import license. Notifications must be made at least 24 hours in advance of each shipment, and to the extent practical, 10 days in advance of each shipment. Notifications may be electronic or in writing and should contain the following information:

(i) A copy of the authorization applicable to export shipments as required by § 110.42, paragraph (e)(2),

(ii) Estimated dates of when the shipment is to begin and end,

(iii) Exporting or importing facility,

(iv) Recipient,

(v) Radioactive material and specific activity,

(vi) Aggregate activity level, and

(vii) Number of radioactive sources and their unique identifiers (such as the manufacturer, model number and serial number). If the unique identifiers are not available, a description of the radioactive source shall be provided.

* * * * *

10. A new Appendix P to part 110 is added to read as follows:

APPENDIX P TO PART 110.—HIGH RISK RADIOACTIVE MATERIAL

Radioactive material	Category 1		Category 2	
	Terabequerels (TBq)	Curies (Ci)	Terabequerels (Tbq)	Curies (Ci)
Americium-241	60	2,000	.6	20
Americium-241/Be	60	2,000	.6	20
Californium-252	20	500	.2	5
Curium-244	50	1,000	.5	10
Cobalt-60	30	800	.3	8
Cesium-137	100	3,000	1	30
Gadolinium-153	1,000	30,000	10.0	300
Iridium-192	80	2,000	.8	20
Plutonium-238[1]	60	2,000	.6	20
Plutonium-239/Be[1]	60	2,000	.6	20
Promethium-147	40,000	1,000,000	400.0	10,000
Selenium-75	200	5,000	2.0	50
Strontium-90	1,000	30,000	10.0	300
Thulium-170	20,000	500,000	200.0	5000
Ytterbium-169	300	8,000	3.0	80

[1] The limits for Pu-238 and Pu-239/Be in this table apply for imports to the U.S. The limits for exports of Pu-238 and Pu-239/Be can be found in § 110.21.

Dated at Rockville, Maryland, this 10th day of September, 2004.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 04–20855 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1

[REG–169135–03]

RIN 1545–BC99

Treatment of Certain Nuclear Decommissioning Funds for Purposes of Allocating Purchase Price in Certain Deemed and Actual Asset Acquisitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations relating to the treatment of certain nuclear decommissioning funds in the allocation of purchase price in deemed and actual asset acquisitions under sections 338 and 1060. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments must be received by December 15, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–169135–03), room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–169135–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at *http://www.irs.gov/regs*, or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS—REG–169135–03).

FOR FURTHER INFORMATION CONTACT: Richard Starke at (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend 26 CFR 1 relating to sections 338 and 1060. The temporary regulations affect the treatment of certain nuclear decommissioning funds in the allocation of purchase price in deemed and actual asset acquisitions under sections 338 and 1060. The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person timely submitting written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Nevertheless, the IRS and Treasury Department request comments from small entities that believe they might be adversely affected by these regulations. This certification is based on the fact that the regulations provide relief to purchasers of nuclear power plants, which are generally not small businesses. Therefore, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of these regulations.

Drafting Information

The principal author of these regulations is Richard Starke, Office of the Associate Chief Counsel (Corporate).

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

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

Par. 2. Section 1.338–6 is amended by adding paragraph (c)(5) to read as follows:

§ 1.338–6 Allocation of ADSP and AGUB among target assets.

[The proposed text of this section is the same as the text of § 1.338–6T(c)(5) published elsewhere in this issue of the **Federal Register**].

Par. 3. Section 1.1060–1 is amended by revising paragraph (c)(3) to read as follows:

§ 1.1060–1 Special allocation rules for certain asset acquisitions.

[The proposed text of this section is the same as the text of § 1.1060–1T(c)(3) and (e)(1)(ii)(C) published elsewhere in this issue of the **Federal Register**].

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–20915 Filed 9–15–04; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[RME Docket Number R08–OAR–2004–CO–0001; FRL–7813–4]

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Denver Revised Carbon Monoxide Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to take direct final action approving a State Implementation Plan (SIP) revision submitted by the State of Colorado. On October 15, 2003, the Governor of Colorado submitted a revised maintenance plan for the Denver-Boulder metropolitan (hereafter, Denver) carbon monoxide (CO) maintenance area for the CO National Ambient Air Quality Standard (NAAQS). The revised maintenance plan also contained a revised transportation conformity budget for the year 2013. EPA is proposing approval of the Denver CO revised maintenance plan and revised transportation conformity budget. This action is being

taken under section 110 of the Clean Air Act. In the "Rules and Regulations" section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of the rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Written comments must be received on or before October 18, 2004.

ADDRESSES: Submit your comments, identified by RME Docket Number R08–OAR–2004–CO–0001, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Agency Web site: *http://docket.epa.gov/rmepub/index.jsp* Regional Materials in EDOCKET (RME), EPA's electronic public docket and comment system for regional actions, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *long.richard@epa.gov* and *russ.tim@epa.gov*.
- Fax: (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- Mail: Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466.
- Hand Delivery: Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone (303) 312–6479, and e-mail at: *russ.tim@epa.gov*.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations Section of this **Federal Register**.

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

Dated: September 3, 2004.

Robert E. Roberts,

Regional Administrator, Region VIII.

[FR Doc. 04–20794 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[MD001–1001b; FRL–7813–7]

Approval of Section 112(l) Authority for Hazardous Air Pollutants; Maryland Equivalency by Permit Provisions; NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a request from the Maryland Department of the Environment (MDE) for authority to implement and enforce State permit terms and conditions in place of those of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, subpart MM, with respect to the operations of MeadWestvaco Company's Luke Mill, located in Luke, Maryland. Thus, the EPA is proposing to grant the MDE the authority to implement and enforce alternative requirements in the form of Clean Air Act (CAA) Title V permit terms and conditions after EPA has approved the State's alternative requirements. In the Final Rules section of this **Federal Register**, EPA is approving the State's submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by October 7, 2004.

ADDRESSES: Submit your comments, identified by MD001–1001, by one of the following methods:

A. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. E-mail: *Campbell.Dave@epa.gov*

C. Mail: David J. Campbell, Chief, Permits and Technical Assessment Branch, Mailcode 3AP11, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. MD001–1001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The Federal regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Copies of all comments should also be sent to the Maryland Department of the Environment. Copies of written comments should be sent to Thomas C. Snyder, Director, Air and Radiation Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, Maryland 21230. Copies of electronic comments should be sent to *tsnyder@mde.state.md.us*. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Paresh R. Pandya, (215) 814–2167, or by e-mail at *pandya.perry@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action approving the Maryland Department of the Environment's request for "up-front" approval of an Equivalency by Permit program under which the MDE may establish and enforce alternative State requirements for MeadWestvaco Company's Luke Mill in lieu of those of the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, found at 40 CFR part 63, subpart MM, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: September 7, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–20897 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 69, No. 179
Thursday, September 16, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Board for International Food and Agricultural Development, One Hundred and Forty-Second Meeting; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of the one hundred and forty-second meeting of the Board for International Food and Agricultural Development (BIFAD). The meeting will be held from 1 p.m. to 6 p.m. on October 13, 2004 in the Marriott Hotel, 7th and Grand Avenue, Des Moines, Iowa. The meeting is being held in conjunction with the World Food Prize events scheduled for October 14–15 in Des Moines.

The BIFAD will interact with Mid-West representatives from the U.S. university, Collaborative Research Support Programs (CRSPs), agribusiness and private sector communities along with international agriculture leaders from Africa and the Middle East. Themes will focus on building capacity for agriculture led growth, human and institutional capacity building, emerging issues in international development, and other items of general interest.

The meeting is free and open to the public. Those wishing to attend the meeting or obtain additional information about BIFAD should contact John Swanson, the Designated Federal Officer for BIFAD. Write him in care of the U.S. Agency for International Development, Ronald Reagan Building, Office of Agriculture and Food Security, 1300 Pennsylvania Avenue, NW., Room 2.11–06, Washington DC, 20523–2110 or telephone him at (202) 712–5602 or fax (202) 216–3010.

John Swanson,
USAID Designated Federal Officer for BIFAD, Office of Agriculture and Food Security, Bureau for Economic Growth, Agriculture & Trade.

[FR Doc. 04–20841 Filed 9–15–04; 8:45 am]
BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 04–029N]

Codex Alimentarius Commission: Meeting of the Codex Ad Hoc Intergovernmental Task Force on Fruit and Vegetable Juices

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting, request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, United States Department of Agriculture, and the Center for Food Safety and Applied Nutrition (CFSAN), and the Food and Drug Administration (FDA), are sponsoring a public meeting on September 15, 2004, to provide information and receive public comments on agenda items that will be discussed at the Fourth Session of the Codex ad hoc Intergovernmental Task Force on Fruit and Vegetable Juices, which will be held in Fortaleza, Brazil, October 11–15, 2004. The Under Secretary and CFSAN recognize the importance of providing interested parties with information about the Intergovernmental Task Force on Fruit and Vegetable Juices of the Codex Alimentarius Commission and to address items on the Agenda for the 4th Session of the Task Force.

DATES: The public meeting is scheduled for Wednesday, September 15, 2004 from 1 p.m. to 3 p.m.

ADDRESSES: The public meeting will be held in Room 1B–042 of the FDA Harvey Wiley Building, 5100 Paint Branch Parkway, College Park, Maryland. To receive copies of the documents referenced in this notice, contact the FSIS Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 102, Cotton Annex, 300 12th Street, SW., Washington, DC 20250–3700. The documents will also be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net.*

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by any of the following methods:

- Mail, including floppy disks or CD–ROM's, and hand-or courier-delivered items: Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 300 12th Street, SW., Room 102, Cotton Annex, Washington, DC 20250.

All submissions received must include the Agency name and docket number 04–029N.

All comments submitted in response to this notice, as well as research and background information used by FSIS in developing this document, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. The comments also will be posted on the Agency's Web site at *http://www.fsis.usda.gov/OPPDE/rdad/FRDockets.htm.*

FOR FURTHER INFORMATION CONTACT: Edith E. Kennard, Staff Officer, U.S. Codex Office, Food Safety and Inspection Service, Room 4861, South Building, 1400 Independence Avenue, SW., Washington, DC 20250, Phone: (202) 205–7760, Fax: (202) 720–3157.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission was established in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the major international organization to facilitate fair international trade in food and protect the health and economic interests of consumers. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementations by governments, Codex seeks to ensure that the world's food supply is sound, wholesome, free from adulteration, and correctly labeled and packaged. In the United States, USDA, FDA, and the Environmental Protection Agency (EPA) manage and carry out U.S. Codex.

The Codex ad hoc Intergovernmental Task Force on Fruit and Vegetable Juices was established by the 23rd Session of the Codex Alimentarius Commission to revise and consolidate the existing Codex standards and guidelines for fruit and vegetable juices and related products; and revise and update the methods of analysis and sampling for these products. The ad hoc Task Force is chaired by Brazil.

Issues To Be Discussed at the Public Meeting

The provisional agenda items to be discussed during the public meeting:

Consideration of Draft Codex Standards and Related Texts at Step 7

(a) Draft Code General Standard for Fruit Juices and Nectars.

(b) Draft Minimum Brix Level for Reconstituted Juice and Reconstituted Puree and Minimum Juice and/or Puree Content for Fruit Nectars—grape, guava, mandarine/tangerine, mango, passion fruit and tamarind juices.

Consideration of Proposed Draft Codex Standards and Related Texts at Step 4

(a) Proposed Draft Minimum Brix Level for Reconstituted Juice and Reconstituted Puree and Minimum Juice and/or Puree Content for Fruit Nectars—lemon, lime, orange and pineapple juices.

Public Meeting

At the September 15th public meeting, the agenda items will be described, discussed, and attendees will have the opportunity to pose questions and offer comments. Comments may be sent to the FSIS Docket Room (see **ADDRESSES**). Written comments should state that they relate to activities of the 4th a0d hoc Task Force for Fruit and Vegetable Juices (04–029N).

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

Done at Washington, DC on: September 14, 2004.

F. Edward Scarbrough,

U.S. Manager for Codex Alimentarius.

[FR Doc. 04–20961 Filed 9–14–04; 1:38 pm]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Seminole Electric Cooperative, Inc.; Notice of Finding of No Significant Impact

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of finding of no significant impact.

SUMMARY: Notice is hereby given that the Rural Utilities Service (RUS), an agency delivering the U.S. Department of Agriculture's Rural Development Utilities Programs, has made a finding of no significant impact with respect to a request from Seminole Electric Cooperative for financing assistance from RUS to construct a 310 megawatt, simple-cycle combustion turbine electric generating facility at its Payne Creek Generation Station located in Hardee and Polk Counties, Florida.

FOR FURTHER INFORMATION CONTACT: Bob Quigel, Engineering and Environmental Staff, RUS, Stop 1571, 1400 Independence Avenue, SW., Washington, DC 20250–1571, telephone (202) 720–0468, e-mail *bob.quigel@usda.gov*.

SUPPLEMENTARY INFORMATION: Seminole Electric Cooperative's proposed electric generation project will involve the construction and operation of nominal 310 MW of simple-cycle combustion turbine electric generating units and associated support facilities at its existing 1,300-acre Payne Creek Generating Station site in Hardee and Polk Counties, Florida. The proposed electric generating facilities will consist of five Pratt & Whitney (P&W) FT8–3 Twin Pac aeroderivative combustion turbine units. Each Twin Pac unit will consist of two simple-cycle combustion turbines coupled with one common electric generator with a nominal generating capacity of 62 MW. The proposed combustion turbine units and associated substation will be constructed in an approximately 8-acre area located adjacent to the east of the existing Payne Creek Generating Station units. A small (*i.e.*, 0.15-acre), isolated freshwater marsh wetland, which will be impacted by construction of the proposed project, is present in the southern portion of the area.

The Payne Creek Generating Station site is located approximately 9 miles northwest of the city of Wauchula, 16 miles south-southwest of the city of Bartow, and 40 miles east of the Tampa Bay area. The site is bordered on the east by County Road 663, a CSX Railroad line, and the CF Industries Hardee Complex phosphate mine.

The simple-cycle combustion turbines will be fired primarily with natural gas via gas pipeline systems which currently provide natural gas for the existing Payne Creek Generating Station units. Low-sulfur distillate fuel oil will serve as backup fuel. The proposed project will require the construction of a new, aboveground, 1.4-million-gallon fuel oil storage tank to be located adjacent to the existing 1.4-million-gallon storage tank within an expanded spill containment area.

To facilitate interconnection of the proposed project with the Florida power grid, the existing 8-mile-long 230 kV transmission line extending from the Payne Creek Generating Station site to the Vandolah Substation will be upgraded. The line upgrade will consist of replacing the existing conductors with higher current-carrying conductors. Also, both the associated transmission line terminals and switches will be upgraded. These upgrades will not require any additional right-of-way, replacement of any transmission line structures, or any expansion of the Vandolah substation.

Copies of the Finding of No Significant Impact are available from RUS at the address provided herein or from James Frauen, Seminole Electric Cooperative, PO Box 272000, Tampa, Florida 33688–2000, telephone (813) 739–1213.

Dated: September 13, 2004.

James R. Newby,

Acting Assistant Administrator, Electric Program.

[FR Doc. 04–20889 Filed 9–15–04; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–506]

Certain Porcelain–On-Steel Cookware from the People's Republic of China: Initiation of New Shipper Antidumping Duty Review

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

EFFECTIVE DATE: September 16, 2004.

FOR FURTHER INFORMATION CONTACT: Anya Naschak at (202) 482–6375 or Benjamin Kong at (202) 482–7907; Office of China/NME Antidumping Duty Enforcement Group, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

SUPPLEMENTARY INFORMATION:

Background

The Department received a timely request from Shanghai Watex Metal Products Co., Ltd. ("Watex") in accordance with 19 CFR 351.214(c), for a new shipper review of the antidumping duty order on porcelain on steel cookware ("POS") from the People's Republic of China ("PRC"), which has a December annual anniversary month and a June semiannual anniversary month. *See Antidumping Duty Order; Porcelain–on-Steel Cooking Ware from the People's Republic of China*, 51 FR 43414 (December 2, 1986). In its request, Watex identified itself as both the producer and exporter of POS. As required by 19 CFR 351.214(b)(2)(i) and (iii)(A), Watex certified that it did not export POS to the United States during the period of investigation ("POI"), and that it has never been affiliated with any exporter or producer which exported POS during the POI. Furthermore, Watex has also certified that its export activities are not controlled by the central government of the PRC, satisfying the requirements of 19 CFR 351.214(b)(2)(iii)(B). Pursuant to the Department's regulations at 19 CFR 351.214(b)(2)(iv), Watex submitted documentation establishing the date on which the subject merchandise was first entered for consumption in the United States, the volume of that first shipment and any subsequent shipment, and the date of the first sale to an unaffiliated customer in the United States.

On August 26, 2004, and August 27, 2004, the Department issued pre–initiation supplemental questionnaires to Watex to clarify information submitted in its request for a new shipper review. The Department also requested that Watex clarify whether the merchandise exported by Watex and entered during the period of review was in fact subject merchandise (due to the proprietary nature of this information, it is discussed in greater detail in the Letter from the Department dated August 27, 2004, which is on the record in this review and is on file in the Central Records Unit ("CRU") located in room B–099 of the Main Commerce Building). In Watex's supplemental questionnaire response, dated August 31, 2004, Watex responded to the Department's request for clarification and provided additional documentation as requested.

The Department conducted U.S. Customs and Border Protection ("CBP") database queries to determine whether Watex's shipment had entered the United States. In addition, the Department confirmed through research on the internet and through Dunn and Bradstreet reports that Watex and the importer of record appear to be bona fide companies.

Scope

Imports covered by this review are shipments of POS cooking ware, including tea kettles, which do not have self–contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. The merchandise is currently classifiable under the Harmonized Tariff Schedule ("HTS") item 7323.94.00. HTS items numbers are provided for convenience and customs purposes. The written description of the scope remains dispositive.

Initiation of Review

In accordance with section 751(a)(2)(B) of the Act, as amended, and 19 CFR 351.214(d)(1) of the Department's regulations, and based on information on the record, we are initiating a new shipper review for Watex. *See* Memorandum to the File through James C. Doyle, New Shipper Review Initiation Checklist, dated September 9, 2004. We intend to issue the preliminary results of this review not later than 180 days after the date on which this review was initiated, and the final results of this review within 90 days after the date on which the preliminary results were issued.

Pursuant to 19 CFR 351.214(g)(1)(i)(B) of the Department's regulations, the period of review ("POR") for a new shipper review initiated in the month immediately following the anniversary month will be the six–month period immediately preceding the semi–annual anniversary month. Therefore, the POR for this new shipper review is:

Antidumping Duty Proceeding	Period to be Reviewed
Exporter/Producer: Shanghai Watex Metal Products Co., Ltd.	12/01/03 - 05/31/04

It is the Department's practice in cases involving non–market economies to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country–wide rate to provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. *See e.g., Notice of Preliminary Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China*, 68 FR 33099 (June 3, 2003); *Notice of Final Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China*, 68 FR 62053 (October 31, 2004) (unchanged in the final results). Accordingly, we will issue a questionnaire to Watex concerning separate rates. The review will proceed if the responses provide sufficient indication that Watex is not subject to either *de jure* or *de facto* government control with respect to their exports of POS. However, if Watex does not demonstrate its eligibility for a separate rate, then it will be deemed not separate from other companies in the PRC that exported during the POI and the new shipper review will be rescinded.

In accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e), we will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a single entry bond or security in lieu of a cash deposit for certain entries of the merchandise exported by Watex. Specifically, since Watex has identified itself as both the producer and exporter of the subject merchandise for the sale under review, we will instruct CBP to limit the bonding option only to entries of

merchandise exported by Watex that were also produced by Watex.

Interested parties that need access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a)(2)(B) of the Act (19 U.S.C. 1675(a)(2)(B)) and 19 CFR 351.214(d) of the Department's regulations.

Dated: September 9, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–2221 Filed 9–15–04; 8:45 am]

BILLING CODE

DEPARTMENT OF COMMERCE

International Trade Administration

President's Export Council: Meeting of the President's Export Council

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

ACTION: Notice of an open meeting.

SUMMARY: The President's Export Council (PEC) will hold a full Council meeting to discuss topics related to export expansion. The meeting will include discussion of trade priorities and initiatives, PEC subcommittee activity and proposed letters of recommendation. The PEC was established on December 20, 1973, and reconstituted May 4, 1979, to advise the President on matters relating to U.S. trade. It was most recently renewed by Executive Order 13316.

DATES: September 29, 2004. Time: 9 a.m. to 11 a.m.

ADDRESSES: Capitol Hill, room to be determined, Washington, DC. This program is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be submitted no later than September 20, 2004, to J. Marc Chittum, President's Export Council, Room H–4043, Washington, DC 20230 (telephone: 202–482–1124). Seating is limited and will be on a first come, first served basis.

FOR FURTHER INFORMATION CONTACT: J. Marc Chittum, President's Export Council, Room 4043, Washington, DC 20230 (telephone: 202–482–1124), or visit the PEC Web site, *http://www.ita.doc.gov/td/pec.*

Dated: September 13, 2004.

J. Marc Chittum,

Staff Director and Executive Secretary, President's Export Council.

[FR Doc. E4–2222 Filed 9–15–04; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No. 040909257–4257–01]

Solicitation of Applications for the Minority Business Development Center (MBDC) Program

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency publishes this notice to announce an extension of the closing date for a competitive application for the Miami/Ft. Lauderdale Minority Business Development Center (MBDC) Program due to the disaster recovery efforts throughout the state of Florida caused by Hurricane Frances. The closing date September 21, 2004 as originally published in the **Federal Register** Notice (69 FR 51064) on August 17, 2004 has been changed to October 8, 2004. No other changes to the program requirements have been made. Please see the original notice for program information and application requirements.

DATES: The new closing date for submittals pertaining to MBDC Application Award Number 04–10–05001–01 is October 8, 2004. Completed applications for the Miami/Ft. Lauderdale MBDC must be received by MBDA no later than 5 p.m. Eastern Daylight Savings Time at the address below. Applications received after the closing date and time will not be considered.

Anticipated time for processing of applications is one hundred twenty (120) days from the date of publication of this notice.

MBDA anticipates that awards for the MBDC program will be made with an anticipated start date of January 1, 2005.

ADDRESSES: If the application is mailed by the applicant or its representative, they must submit one (1) signed original plus two (2) copies of the application. Completed application packages must be mailed to: Office of Business Development, Office of Executive Secretariat, HCHB, Room 5063, Minority Business Development Agency, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

If the application is hand-delivered by the applicant or his/her representative, one (1) signed original plus two (2) copies of the application must be delivered to: U.S. Department of Commerce, HCHB, Room 1874, Entrance #10, 15th Street, NW., Washington, DC, located between Pennsylvania and Constitution Avenues.

If applying on-line at *http://www.mbda.gov*, all sections of the application (Program Narrative, SF–424, SF–424A, SF–424B, SF-LLL, CD–346, and CD–511) must be completed in order for the application to be considered. In addition to applying on-line, you must also hand-deliver or mail one original plus two (2) copies of only the pages that require original signatures by the closing date and time stated above.

FOR FURTHER INFORMATION CONTACT: For a copy of the Federal Funding Opportunity Announcement as well as further information (including Frequently Asked Questions/Answers, Pre-Application teleconference, etc.), please visit MBDA's Minority Business Internet Portal (MBDA Portal) at *http://www.mbda.gov* or contact the appropriate regional office listed below. A printed application package can also be obtained by contacting the specified MBDA National Enterprise Center (NEC) for the geographic service area in which the project will be located (see Geographic Service Area in this notice).

Regional Agency Contacts:

1. *MBDC Application:* Miami/Ft. Lauderdale. Robert Henderson, Regional Director, Atlanta National Enterprise Center, Minority Business Development Agency, U.S. Department of Commerce, 401 W. Peachtree Street, NW., Suite 1715, Atlanta, GA 30308–3516, 404–730–3300.

SUPPLEMENTARY INFORMATION:

Electronic Access

The full text Federal Funding Opportunity Announcement for the MBDC program is available via Web site at *http://www.mbda.gov* or by contacting the MBDA representative identified above. An abbreviated announcement is also available through Grants.gov at *http://www.Grants.gov.*

Applicants for the Miami/Ft. Lauderdale MBDC are encouraged to submit their proposal electronically via the Internet and mail or hand-deliver only the pages that require original signatures by the closing date and time, as stated in this Notice. Applicants may submit their applications on the MBDA

Portal located at *http://www.mbda.gov*. All required forms are located at this Web address. However, the following paper forms must be submitted with original signatures in conjunction with any electronic submissions by the closing date and time stated in this Notice: (1) SF–424, Application for Federal Assistance; (2) SF–424B, Assurances—Non-Construction Programs; (3) SF–LLL (Rev.7–97) (if applicable), Disclosure of Lobbying Activities; (4) Department of Commerce Form CD–346 (if applicable), Application for Funding Assistance; and, (5) CD–511, Certifications Regarding Debarment, Suspension and Other Responsibility Matters: Drug-Free Workplace Requirements and Lobbying.

Dated: September 10, 2004.

Ronald N. Langston,

National Director, Minority Business Development Agency.

[FR Doc. 04–20846 Filed 9–15–04; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072204G]

Endangered Species; File No. 1420

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Dr. Douglas Peterson, Warnell School of Forest Resources Fisheries Division, University of Georgia, Athens, GA 30602 has been issued a permit to conduct scientific research on shortnose sturgeon (*Acipenser brevirostrum*).

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Jennifer Jefferies or Dr. Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: On March 10, 2003, notice was published in the **Federal Register** (68 FR 11533) that a request for a scientific research permit to take shortnose sturgeon had been submitted by Dr. Douglas Peterson. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

In order to provide critical data on stock status, life history, and survival rates as well as to identify specific habitat requirements of the various life stages of the shortnose sturgeon in the Altamaha River, Georgia, Dr. Peterson will be authorized to capture up to 200 adult fish annually from via gill and trammel netting. Fish will be measured, weighed, PIT and Carlin tagged, tissue and pectoral fin ray sampled, and subsequently released. Additionally, up to 30 of the fish captured over the course of the permit will also receive an internal radio-sonic transmitter and be tracked. Dr. Peterson will also be authorized to deploy artificial substrate samplers from February to mid-March to collect up to 100 shortnose sturgeon eggs annually.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: September 2, 2004.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–20810 Filed 9–15–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 083104B]

Marine Mammals; Permit No. 782–1708–00

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

ACTION: Receipt of application for amendment.

SUMMARY: Notice is hereby given that the NMFS, National Marine Mammal Laboratory (NMML), has requested an amendment to scientific research Permit No. 782–1708–00.

DATES: Written, telefaxed, or e-mail comments must be received on or before October 18, 2004.

ADDRESSES: The amendment request 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; phone (301)713–2289; fax (301)713–0376; and

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249;

Written comments or requests for a public hearing on this request should be submitted 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 amendment request would be appropriate.

Comments may also 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.

Comments may also be submitted by e-mail. The mailbox address for providing email comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: Permit No. 782–1708–00.

FOR FURTHER INFORMATION CONTACT: Ruth Johnson or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 782–1708–00, issued on August 28, 2003 (68 FR 52906) is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

Permit No. 782–1708 authorizes the permit holder to conduct scientific research on northern fur seals (*Callorhinus ursinus*). Seals may be captured, tagged, sampled and incidentally harassed during annual censuses on the Pribilof Islands. The objectives of this work are to: (1) monitor the status and trends of the northern fur seal population, (2) evaluate the condition of animals from each cohort (health and strength of year-class), (3) monitor the diet, and (4) document the movement patterns, foraging behavior, and essential foraging

habitat of various age and sex classes of fur seals. The information collected under this permit is important for assessing the recovery of this depleted species and for evaluating management actions.

The current knowledge base regarding reasons for the continued decline of the northern fur seal population would benefit from direct longitudinal studies on mother pup pairs and comparative studies on habitat use and success of individuals from the decreasing Pribilof Islands population and the increasing Bogolof Island population. In this regard, the Holder is requesting an amendment to the Permit to: collect a blubber sample, use tritiated water on 70 of the adult females already authorized to be taken, and to hold them up to 2.5 hours; include gastric intubation, use of deuterated water on 60 pups already authorized to be taken, recapture them twice, and hold pups for up to 2.5 hours. Both isotope procedures would be conducted simultaneously on mother-pup pairs. After the final blood sample, pairs would be released together. The proposed amendment would allow research that will contribute information needed for long term studies of adult female fur seals through their pupping, lactation, and annual migration periods. When combined with studies of their pups throughout the lactation period, this would provide important insight into female/pup body condition, female reproductive success, and habitat use during the breeding season and the winter migration. The differences in population trends, foraging locations, and diets between the Pribilof Island and Bogoslof Island populations will be addressed in the proposed study.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination (dated August 28, 2004) has been made that the Permitted activities are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

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: September 10, 2004.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–20887 Filed 9–15–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 04–15]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Pub. L. 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 04–15 with attached transmittal and policy justification.

Dated: September 9, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

7 SEP 2004

In reply refer to:
I-04/006795

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 04-15, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance (LOA) to Israel for defense articles and services estimated to cost $99 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

JEFFREY B. KOHLER
LIEUTENANT GENERAL, USAF
DIRECTOR

Enclosures:
1. **Transmittal No. 04-15**
2. **Policy Justification**

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 04-15

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Israel**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ 0 million
Other	$99 million
TOTAL	$99 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 103 Textron troop carrier armored vehicles, testing, spare and repair parts, support equipment, contractor engineering and technical support, and other related elements of program support.**

(iv) **Military Department: Army (ZCB)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: none**

(viii) **Date Report Delivered to Congress:** 7 SEP 2004

*** as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Israel – Troop Carrier Armored Vehicles

The Government of Israel has requested a possible sale of 103 Textron troop carrier armored vehicles, testing, spare and repair parts, support equipment, contractor engineering and technical support, and other related elements of program support. The estimated cost is $99 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

Israel plans to upgrade its fleet of armored vehicles and requires a smaller, more maneuverable vehicle for use in urban settings. These vehicles were selected after an evaluation of proposals from several manufacturers. Israel, which already has light armored vehicles in its inventory, will have no difficulty absorbing these additional vehicles.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Textron Corporation of Providence, Rhode Island. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of up to three contractor representatives to Israel for a period of one year or more.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 04–20814 Filed 9–15–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 04–16]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Pub. L. 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/OPS–ADMIN, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 04–16 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: September 9, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

7 SEP 2004

In reply refer to:
I-04/006889

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 04-16, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance (LOA) to Brazil for defense articles and services estimated to cost $250 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

JEFFREY B. KOHLER
LIEUTENANT GENERAL, USAF
DIRECTOR

Enclosures:
1. Transmittal No. 04-16
2. Policy Justification
3. Sensitivity of Technology

Same ltr to: House Committee on International Relations
Senate Committee on Foreign Relations
House Committee on Armed Services
Senate Committee on Armed Services
House Committee on Appropriations
Senate Committee on Appropriations

Transmittal No. 04-16

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser: Brazil**

(ii) **Total Estimated Value:**

Major Defense Equipment*	$160 million
Other	$ 90 million
TOTAL	$250 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 10 UH-60L BLACK HAWK helicopters with T-700-GE-701C engines, 25 spare T-700-GE-701C engines, 22 7.62mm M134 Mini guns, search and rescue equipment, litters and hoists, spare and repair parts, tools and support equipment, publications and technical data, personnel training and training equipment, contractor engineering and technical support services and other related elements of logistics support.**

(iv) **Military Department: Army (UTZ)**

(v) **Prior Related Cases, if any: none**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** 7 SEP 2004

* **as defined in Section 47(6) of the Arms Export Control Act.**

POLICY JUSTIFICATION

Brazil - UH-60L BLACK HAWK Helicopters

The Government of Brazil has requested a possible sale of 10 UH-60L BLACK HAWK helicopters with T-700-GE-701C engines, 25 spare T-700-GE-701C engines, 22 7.62mm M134 Mini guns, search and rescue equipment, litters and hoists, spare and repair parts, tools and support equipment, publications and technical data, personnel training and training equipment, contractor engineering and technical support services and other related elements of logistics support. The estimated cost is $250 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been, and continues to be, an important force for political stability and economic progress in South America.

Brazil needs these aircraft to fulfill its strategic commitments for search and rescue and self-defense within the region without being dependent upon assistance of other countries. This procurement will upgrade its air mobility capability and provide for the defense of vital installations and close air support for ground forces. Brazil will have no difficulty absorbing these helicopters into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The principle contractors will be: Sikorsky Aircraft of Stratford, Connecticut and General Electric of Lynn, Massachusetts. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Brazil.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 04-16

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The UH-60L BLACK HAWK helicopter is Unclassified. The highest level of classified information required to be released for training, operation and maintenance of the BLACK HAWK is Confidential. The highest level which could be revealed through reverse engineering or testing of the end item is Confidential.

2. The UH-60L BLACK HAWK helicopter will include the following classified or sensitive components:

a. The AN/APR-39A(V)3 Radar Signal Detecting Set automatically detects, identifies, determines bearing, and determines modes of operation of radar emitters. Specific design requirements of the system are to: detect and display modern threat radars, higher longer range detection of threats, higher pulse density, to identify pulse Doppler emitters, detect and display CW emitters and low probability of intercept emitters, to reduce radar ambiguities and to incorporate an EW management systems to control and coordinate other ASE components. The hardware is classified Confidential; releasable technical performance data is classified Secret.

b. The AN/ALQ-144A(V)1 Countermeasures Set is an active continuous operating, omni directional, lamp-based, electrically fired infrared countermeasure system designed to confuse or decoy threat infrared missile systems in conjunction with low reflective paint and engine suppressors. The omni directional unit is manually activated and starts radiating after a 90-second warm up time. Once activated, no other pilot actions are required. Additionally, the system does not require any input from a missile warning system to direct the infrared energy. The hardware is classified Confidential; releasable technical performance data is classified Secret.

c. The M-130 General Purpose Dispenser (Chaff) is a multipurpose system which dispenses decoy objects to confuse threat radar devices. Radar cross-section and frequency coverage are sensitive elements. The hardware and releasable technical publications for the AVUM/AVIM levels are Unclassified. Aircraft optimization is the critical element; reverse engineering is not a major concern.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware or software in this proposed sale, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advance capabilities.

4. A determination has been made that Brazil can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

[FR Doc. 04–20815 Filed 9–15–04; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Defense Department Advisory Committee on Women in the Services (DACOWITS)

AGENCY: Department of Defense

ACTION: Notice.

SUMMARY: Pursuant to Section 10(a), Public Law 92–463, as amended, notice is hereby given of a forthcoming meeting of the Defense Department Advisory Committee on Women in the Services (DACOWITS). The purpose of the Committee meeting is to discuss embedded media, sexual assault procedures, and retention. The meeting is open to the public, subject to the availability of space.

Interested persons may submit a written statement for consideration by the Committee and make an oral presentation of such. Persons desiring to make an oral presentation or submit a written statement to the Committee must notify the point of contact listed below no later than 5 p.m., September 27, 2004. Oral presentations by members of the public will be permitted only on Tuesday, October 5, 2004, from 4:45 p.m. to 5 p.m. before the full Committee. Presentations will be limited to two minutes. Number of oral presentations to be made will depend on the number of requests received from members of the public. Each person desiring to make an oral presentation must provide the point of contact listed below with one (1) copy of the presentation by 5 p.m., September 27, 2004 and bring 35 copies of any material that is intended for distribution at the meeting. Persons submitting a written statement must submit 35 copies of the statement to the DACOWITS staff by 5 p.m. on September 27, 2004.

DATES: October 4, 2004, 1:15 p.m.–3:30 p.m., October 5, 2004, 8:30 a.m.–5:30 p.m.

Location: Doubletree Hotel Crystal City National Airport, 300 Army Navy Drive, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: MSgt Gerald T. Posey, USAF, DACOWITS, 4000 Defense Pentagon, Room 2C548A, Washington, DC 20301–4000. Telephone (703) 697–2122. Fax (703) 614–6233.

SUPPLEMENTARY INFORMATION: Meeting agenda.

Monday, October 4, 2004 1:15 p.m.–3:30 p.m.

Report (1:15 p.m.–3:30 p.m.)

Tuesday October 5, 2004 8:30 a.m.–5:30 p.m.

Report.
Public Forum (3:30–3:45 p.m.)
Note: Exact order may vary.

Dated: September 10, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–20812 Filed 9–15–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 18, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: September 10, 2004.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: New.
Title: Mathematics and Science Partnerships Program Frequency: Annually.
Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Not-for-profit institutions.
Reporting and Recordkeeping Hour Burden:
Responses: 350.
Burden Hours: 6,650.
Abstract: Title II, Part B of No Child Left Behind (NCLB), The Mathematics and Science Partnerships program (MSP), is a formula grants program to the states designed to support professional development programs in math and science for teachers, P–12. State education agencies are required to conduct a competition to award grants to partnerships between departments of mathematics, science and/or engineering within institutions of higher education, and high need school districts. Other organizations may also be a part of the project. Projects funded by the states are required to submit annual evaluation reports to the Secretary describing their progress in increasing teachers' content knowledge and improving student achievement.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2587. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at 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. E4–2197 Filed 9–15–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 18, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: September 10, 2004.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of the Undersecretary

Type of Review: Revision.

Title: 21st Century Community Learning Centers Annual Performance Report.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 1,400.

Burden Hours: 36,400.

Abstract: Originally authorized under Title X, Part I, of the Elementary and Secondary Education Act, the program was initially administered through the U.S. Department of Education, which provided grants directly to over 1,825 grantees. With the reauthorization of the program under the No Child Left Behind Act, direct administration of the program was transferred to state education agencies (SEA) to administer their own grant competitions. Preliminary data shows that states have awarded approximately 1,400 grants to support more than 4,700 centers in every state in the country. The purpose of the 21st Century Community Learning Centers program (21st CCLC) program, as reauthorized under Title IV, Part B, of the No Child Left Behind Act of 2001, 4201 et seq., (20 U.S. Code 7171 *et seq.*), is to provide expanded academic enrichment opportunities for children attending low-performing schools. To reflect the changes in the authorization and administration of the 21st CCLC program and to comply with its reporting requirements, the Education Department (ED) is requesting authorization for the collection of data through Web-based, data-collection modules, the Annual Performance Report, the Grantee Profile, the Competition Overview, and the State Activities module, which collectively will be housed in an application called the 21st CCLC Profile and Performance Information Collection System (PPICS). The data will continue to be used to fulfill ED's requirement under the Government Performance and Results Act (GPRA) to report to Congress annually on the implementation and progress of 21st CCLC projects and the use of state administrative and technical assistance funds allocated to the states to support the program. The data collection will also provide SEA liaisons with needed descriptive data about their grantees and allow SEA liaisons to conduct performance monitoring and identify areas of needed technical assistance.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2579. When you access the information collection, click on "Download Attachments "to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW, Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at 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. E4–2198 Filed 9–15–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–555–001]

Black Marlin Pipeline Company; Notice of Tariff Filing

September 10, 2004.

Take notice that on September 3, 2004, Black Marlin Pipeline Company (Black Marlin) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1 Twelfth Revised Sheet No. 4, with an effective date of October 1, 2004.

Black Marlin states that the filing is being made to reflect a decrease in the annual charge adjustment (ACA) charge in the usage portion of Black Marlin's rates with a proposed effective of October 1, 2004. Black Marlin states that this filing supersedes the filing which it made on August 31, 2004, which Black Marlin has withdrawn.

Black Marlin states that copies of the filing were served upon the Black Marlin's jurisdictional customers, interested State Commissions and other interested persons.

Any person desiring to protest this filing must file in accordance with Rule

211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2216 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–428–001]

Dominion Cove Point LNG, LP; Notice of Compliance Filing

September 10, 2004.

Take notice that on September 7, 2004, Dominion Cove Point LNG, LP (Cove Point) submitted a compliance filing pursuant to the Commission's "Order Accepting Tariff Sheets Subject to Condition and Establishing a Technical Conference" issued August 27, 2004, in Docket No. RP04–428–000.

Cove Point's revised tariff language provides for inventory transfer requests to be submitted via e-mail or through Cove Point's electronic bulletin board. Also, Cove Point proposes to continue its two business day approval requirement unless the Commission subsequently requires a change as a result of the technical conference. Cove Point states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2215 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–398–002]

East Tennessee Natural Gas LLC; Notice Of Compliance Filing

September 10, 2004.

Take notice that, on September 3, 2004, East Tennessee Natural Gas, LLC (East Tennessee), formerly East Tennessee Natural Gas Company, tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 21 to become effective prospectively as of the date specified by the Commission in its order accepting this compliance filing without refund or condition.

East Tennessee states that the purpose of the filing is to comply with the Commission's order issued on August 4, 2004 in Docket Nos. CP01–415–016 and RP04–398–000 (August 4 Order). In accordance with this order, East Tennessee is filing a revised tariff sheet reflecting lost-and-unaccounted-for gas percentages for four East Tennessee expansion projects.

East Tennessee states that copies of the filing have been served on all customers of East Tennessee and interested state commissions, as well as on all parties on the official service list in the captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2213 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP04–386–000, CP04–400–000, CP04–401–000, CP04–402–000]

Golden Pass LNG Terminal LP, Golden Pass Pipeline LP; Notice of Applications

September 10, 2004.

Take notice that on July 29, 2004, supplemented on September 3, 2004, Golden Pass LNG Terminal LP (Golden Pass LNG) filed in Docket No. CP04–386–000 an application seeking authorization to site, construct and operate a liquefied natural gas (LNG) receiving terminal and associated facilities to be located approximately 10 miles south of Port Arthur, Texas and two miles northeast of the town of Sabine Pass, Texas. The LNG terminal will provide LNG tanker terminal services to third party shippers who would be importing LNG. Golden Pass LNG made the request to site, construct and operate the LNG terminal pursuant to section 3(a) of the Natural Gas Act and part 153 of the Commission's regulations. Golden Pass LNG also requests the approval of the Golden Pass LNG terminal as the place of entry for the imported LNG supplies.

Also take notice that on August 20, 2004, Golden Pass Pipeline LP (Golden Pass Pipeline) filed in Docket No. CP04–400–000 a companion application seeking a certificate of public convenience and necessity, pursuant to section 7(c) of the NGA and part 157, Subpart A of the Commission's regulations, to construct and operate approximately 120 miles of 36-inch and two miles of 24-inch pipeline and related facilities to transport natural gas on an open access basis. Golden Pass Pipeline is an affiliate of Golden Pass LNG. Also, in Docket No. CP04–401–000, Golden Pass Pipeline requests a blanket certificate under section 7(c) of the NGA and part 157, subpart F of the Commission's regulations to perform routine activities in connection with the future construction, operation and maintenance of the proposed pipeline. Finally, Golden Pass Pipeline requested authorization in Docket No. CP04–402–000 to provide the natural gas transportation services on a firm and interruptible basis pursuant to section 7(c) of the NGA and part 284 of the Commission's Regulations.

These applications are on file with the Commission and open to public inspection. These filings are 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 for TTY, contact (202) 502–8659. Any initial questions regarding these applications should be directed to James K. Hanrahan, 800 Bell Street, Houston, Texas, 77002. Phone: (713) 656–8602.

Golden Pass Pipeline will conduct 60-day open season for the purpose of obtaining binding commitments for firm transportation capacity. Golden Pass Pipeline says that the construction and operation of its pipeline will enable new competitively priced supplies of natural gas imported through the Golden Pass LNG terminal to reach markets all across the U.S.

Golden Pass LNG and Golden Pass Pipeline have provided the minimal amount of cultural resources information necessary for staff to begin the traditional scoping process under the National Environmental Policy Act (NEPA). For projects such as this one that use the traditional authorization process, a Draft Environmental Impact Statement (DEIS) is typically issued for public comment about 8 to 10 months from the filing date of the application. However, the Commission staff can complete and issue the DEIS only after the remaining cultural resources information is submitted.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments 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: September 30, 2004.

Magalie Salas,

Secretary.

[FR Doc. E4–2220 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–584–000]

KO Transmission Company; Notice of Tariff Filing

September 10, 2004.

Take notice that on September 7, 2004, KO Transmission Company (KOT) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Fifteenth Revised Sheet No. 10,

requesting a proposed effective date of October 1, 2004.

KOT states that the purpose of the filing is to reflect the new Annual Charge Adjustment (ACA) surcharge to be applied to rates commencing October 1, 2004, of $0.0019 per dekatherm.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2207 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–405–001]

Northern Natural Gas Company; Notice of Compliance Filing

September 10, 2004.

Take notice that on September 3, 2004, Northern Natural Gas Company (Northern) tendered for filing to become part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Substitute Ninth Revised Sheet No. 259 and Original Sheet No. 259A, with an effective date of August 19, 2004.

Northern states that it is filing the above-referenced tariff sheets in compliance with the Commission's August 19, 2004 Order in this docket, which provides for establishment of nontelemetered operational zone delivery points.

Northern further states that copies of the filing have been mailed to each of its customers and interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2214 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–581–000]

Overthrust Pipeline Company; Notice of Proposed Changes In FERC Gas Tariff

September 10, 2004.

Take notice that on September 7, 2004, Overthrust Pipeline Company (Overthrust) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1–A, the following tariff sheets, to become effective October 7, 2004:

Twelfth Revised Sheet No. 1,
Tenth Revised Sheet No. 4,
Seventh Revised Sheet No. 5,
Fourth Revised Sheet No. 20,
Fifteenth Revised Sheet No. 30,
Sixth Revised Sheet No. 35A,
Eighth Revised Sheet No. 36,
Eighth Revised Sheet No. 37,
Sixth Revised Sheet No. 37A,
Fifth Revised Sheet No. 47,
Sixth Revised Sheet No. 49B,
Third Revised Sheet No. 49C,
Sixth Revised Sheet No. 50,
Sixth Revised Sheet No. 51,
Fifth Revised Sheet No. 52A,
Seventh Revised Sheet No. 67B,
First Revised Sheet No. 67F,
First Revised Sheet No. 67H,
First Revised Sheet No. 67K,
Fifth Revised Sheet No. 68,
Fifth Revised Sheet No. 69,
Tenth Revised Sheet No. 70,
Third Revised Sheet No. 78K.

Overthrust states it is proposing to clarify specific aspects of its tariff language.

Overthrust states that copies of the filing have been served upon Overthrust's customers and the public service commissions of Utah and Wyoming.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or

protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2217 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–477–007]

Tennessee Gas Pipeline; Notice of Compliance Filing

September 10, 2004.

Take notice that on September 8, 2004, Tennessee Gas Pipeline Company, (Tennessee) submitted a compliance filing pursuant to the Commission's August 9, 2004 Order on Rehearing and Compliance at Docket No. RP00–477–004, *et al.*

Tennessee states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2212 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–582–000]

Transcontinental Gas Pipe Line Corporation; Notice of Refund Report

September 10, 2004.

Take notice that, on August 20, 2004, Transcontinental Gas Pipe Line Corporation (Transco) submitted pursuant to section 3.4 of Transco's Rate Schedule PAL and section 7 of Transco's Rate Schedule ICTS a Report of Refund detailing PAL and ICTS revenue sharing refunds totaling $90,893.24 of principal and interest. Transco states that the refund report is for the annual periods May 1, 2001, through April 30, 2003.

Transco states that copies of the filing were served on affected parties and State commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2218 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–583–000]

Transcontinental Gas Pipe Line Corporation; Notice of Refund Report

September 10, 2004.

Take notice that on September 7, 2004 Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing a report reflecting the flow through of refunds received from Dominion Transmission, Inc.

Transco states that on September 2, 2004, in accordance with section 4 of its

Rate Schedule LSS and section 3 of its Rate Schedule GSS, Transco refunded to its LSS and GSS customers $1,006,425.00 resulting from the refund of Dominion Transmission, Inc. in Docket No. IN04–2–000.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Intervention and Protest Date: 5 p.m. Eastern Time on September 17, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2219 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2114–120]

Progressive Hydro LLC, Complainant, v. Public Utility District No. 2 of Grant County, WA, Respondent; Notice of Complaint

September 10, 2004.

Take notice that on September 1, 2004, Progressive Hydro LLC, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.206 (2004), filed a Complaint against Public Utility District No. 2 of Grant County, Washington (Grant PUD), licensee for the Priest Rapids Hydroelectric Project, FERC Project No. 2114.

Progressive Hydro alleges that Grant PUD violated the Commission's November 21, 2002, order directing Grant PUD "to remove Section 8 from the Surplus Sales Contract and Section 7, clauses (d), (f), and (g) from the Reasonable Portion Contract." Progressive Hydro further alleges that after November 21, 2002, in power-sales negotiations with new potential purchaser or purchasers, Grant PUD insisted that the specified clauses be inserted in new power purchase contracts. Progressive Hydro also alleges that Grant PUD violated a separate requirement to remove the provisions when the Commission issued its Order Denying Rehearing on April 16, 2003. Progressive Hydro claims that as a result of these actions Grant PUD successfully prevented competition for the new license for the Priest Rapids Hydroelectric Project, for the deadline for filing competing applications for the new license was October 31, 2003.

Progressive Hydro requests that the Commission find that, as a result of Grant PUD's conduct that the Commission must: (1) Refuse to issue a new license to Grant PUD; (2) declare that the Priest Rapids Project is an "orphaned" project; and (3) solicit applications for a new license from all interested entities except Grant PUD.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on September 30, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2208 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Tapoco Project No. 2169–020]

Alcoa Power Generating, Inc.; North Carolina/Tennessee; Notice of Availability of Final Environmental Assessment

September 10, 2004.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR Part 380, the Office of Energy Projects (staff) has reviewed the application for a new major license for the Tapoco Project, located on the Little Tennessee and Cheoah Rivers in Graham and Swain Counties, North Carolina and Blount and Monroe Counties, Tennessee, and prepared a final environmental assessment (FEA) for the project. The project affects federal lands of the U.S. Forest Service and the National Park Service.

The FEA contains staff's analysis of the potential environmental effects of

the existing project and concludes that licensing the project, with staff's recommended measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the FEA and application 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. Register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

The Commission strongly encourages electronic filings. Comments 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.

For further information, please contact Randy Yates by e-mail at *lorance.yates@ferc.gov* or phone (770) 452–3784.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2209 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM01–8–000, ER02–2001–000]

Electric Quarterly Reports; Notice of Electric Quarterly Reports Users Workshop

September 9, 2004.

This notice announces a two-day EQR Users Group Workshop in Washington, DC on September 21 and 22, 2004. All interested parties are invited to attend. The meeting will be held in the Commission Meeting Room at FERC headquarters, 888 First Street, NE., Washington, DC. For those unable to attend in person, access to some of the workshop sessions will be available by teleconference. These sessions are intended to be interactive meetings with considerable discussion of detailed elements of the EQR. The agenda for the Workshop is posted on FERC's Web site at *http://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=1270&CalType=%20&Date=9%2f21%2f2004&CalendarID=0.*

The teleconferenced Users Group Meeting will run from 1 p.m. to 5 p.m. (e.s.t.) on Tuesday, September 21, and from 11 a.m. to 12:30 p.m. (e.s.t.) on Wednesday, September 22. There will be informal working sessions which will not be available via teleconference as follows: (1) Tuesday morning, from 9 a.m. until 12 p.m., (2) Wednesday, from 9:30 a.m. to 11 a.m.; and (3) Wednesday, from 1:30 p.m. to 3:45 p.m. Those interested in participating in person or via teleconference are asked to register online by Friday, September 17, 2004, at *http://www.ferc.gov/whats-new/registration/eqr-0921-form.asp.* There is no registration fee.

Interested parties wishing to file comments may do so under the above-captioned Docket Numbers. Those filings will be 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 via phone at (866) 208–3676 (toll-free). For TTY, contact (202) 502–8659.

For additional information, please contact Mark Blazejowski of FERC's Office of Market Oversight & Investigations at (202) 502–6055 or by e-mail, *mark.blazejowski@ferc.gov.*

Magalie R. Salas,

Secretary.

[FR Doc. E4–2211 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Erie Boulevard Hydropower, L.P.; Project No. 7387–019—New York, Piercefield Hydroelectric Project; Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places

September 10, 2004.

Rule 2010 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding.[1] The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect to the phase or issue in the proceeding for which the list is established.

The Commission staff is consulting with the New York State Historic Preservation Officer (New York SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to the Council's regulations, 36 CFR Part 800, implementing section 106 of the National Historic Preservation Act, as amended, (16 U.S.C. Section 470 f), to prepare and execute a programmatic agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places at Project No. 5334–019.

The Programmatic Agreement, when executed by the Commission, and the New York SHPO would satisfy the Commission's section 106 responsibilities for all individual undertakings carried out in accordance with the license until the license expires or is terminated (36 CFR 800.13[e]). The Commission's responsibilities pursuant to section 106 for the Piercefield Hydroelectric Project would be fulfilled through the Programmatic Agreement, which the Commission proposes to draft in consultation with certain parties listed below. The executed Programmatic Agreement would be incorporated into any Order issuing a license.

Erie Boulevard Hydropower, L.P., as Licensee for Project No. 7387, and the Saint Regis Mohawk Tribe are invited to participate in consultation to develop the Programmatic Agreement.

For purposes of commenting on the programmatic agreement, we propose to restrict the service list for the aforementioned projects as follows:

Dr. Laura Henley Dean Advisory Council on Historic Preservation The Old Post Office Building, Suite 803 1100 Pennsylvania Avenue, NW., Washington, DC 20004

Sheree Bonaparte Tribal Historic Preservation Officer Saint Regis Mohawk Tribe 412 State Route 37 Akwesasne, NY 13655

Ruth L. Pierpont, Director New York State Office of Parks, Recreation and Historic Preservation Historic Preservation Field Services Bureau Peebles Island P.O. Box 189 Waterford, NY 12188–0189

Mr. Jerry L. Sabattis, P.E., Licensing Coordinator Erie Boulevard Hydropower, L.P. 225 Greenfield Parkway Liverpool, NY, 13088

Mr. Samuel S. Hirschey, P.E., Manager, Licensing, Compliance, and Project

[1] 18 CFR Section 385.2010.

Properties 225 Greenfield Parkway Liverpool, NY, 13088

Any person on the official service list for the above-captioned proceeding may request inclusion on the restricted service list, or may request that a restricted service list not be established, by filing a motion to that effect within 15 days of this notice date. In a request for inclusion, please identify the reason(s) why there is an interest to be included. If no such motions are filed, the restricted service list will be effective at the end of the 15 day period. Otherwise, a further notice will be issued ruling on any motion or motions filed within the 15 day period.

An original and 8 copies of any such motion must be filed with Magalie R. Salas, the Secretary of the Commission (888 First Street, NE., Washington, DC 20426) and must be served on each person whose name appears on the official service list. The first page of the motion should clearly show the project number, P–7387–019. Your response 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 (*http://www.ferc.gov*) under the "e-Filing" link. The Commission strongly encourages electronic filings. Register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–2210 Filed 9–15–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OA–2003–0007; FRL–7814–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Annual Reporting Form for State Small Business Stationary Source Technical and Environmental Compliance Assistance Program (SBTCP), EPA ICR Number 1748.03, OMB Control Number 2060–0337

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. 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 October 18, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OA–2003–0007, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *http://www.epa.gov/docket,* or by mail to: EPA Docket Center, Environmental Protection Agency, Office of Environmental Information (OEI) 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: Karen V. Brown, Office of Policy, Economics and Innovation, National Center for Environmental Innovation, Office of Business and Community Innovation, Small Business Division 1807T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–2816; fax number: (202) 566–2848; e-mail address: *brown.karen@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 November 13, 2004 (68 *FR* 219), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No: OA–2003–0007, 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 OEI 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: Annual Reporting Form for State Small Business Stationary Source Technical and Environmental Compliance Assistance Programs (SBTCPs).

Abstract: As part of the Clean Air Act Amendments of 1990, the U.S. Congress included, as part of Section 507, the requirement that each state establish a Small Business Stationary Source Technical and Environmental Compliance Assistance Program (SBTCP) to assist small businesses in complying with the Act. EPA must provide the Congress with periodic reports from the EPA Small Business Ombudsman on these programs, including their effectiveness, difficulties encountered, and other relevant information. Each state assistance program will submit requested information to EPA for compilation and summarization.

Information collection includes number of full time employees, annual budgets, activities provided and number of small businesses assisted by the SBTCP. Small business case studies and

success stories are also requested by EPA. Response to the collection is not required to obtain or retain a benefit. Information in the annual Report to Congress is aggregated and is not of a confidential nature. None of the information collected by this action results in or requests sensitive information of any nature from the states.

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 record keeping burden for this collection of information is estimated to average 40 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: States.

Estimated Number of Respondents: 53.

Frequency of Response: Annually.

Estimated Total Annual Hour Burden: 2,120.

Estimated Total Annual Cost: $93,216 includes $0 annualized capital or O&M costs. Changes in the Estimates: Since there is no increase or decrease, the burden hour remains at 2,120.

Dated: September 4, 2004.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 04–20907 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[OECA–2004–0021; FRL–7814–2]

Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NSPS for Phosphate Rock Plants (Renewal), ICR Number 1078.07, OMB Number 2060–0111

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act, 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 is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. 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 October 18, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OECA–2004–0021, to (1) EPA online using EDOCKET (our preferred method), by email to *docket.oeca@epa.gov,* or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, EPA West, Mail Code 2201T, 1200 Pennsylvania Avenue, 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: Gregory Fried, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7016; fax number: (202) 564–0050; e-mail address: *fried.gregory@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 May 25, 2004, (69 *FR* 29718), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2004–0021, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, 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 Enforcement and Compliance Docket and Information Center 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. When 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, Confidential Business Information (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: NSPS for Phosphate Rock Plants (40 CFR part 60, subpart NN) (Renewal)

Abstract: Particulate matter emissions from phosphate rock plants cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Therefore,

NSPS were promulgated for this source category.

The control of emissions of particulate matter from phosphate rock plants requires not only the installation of properly designed equipment, but also the operation and maintenance of that equipment. Emissions of particulate matter from phosphate rock plants are the result of operation of the calciners, dryers, grinders, and ground rock handling and storage facilities. These standards rely on the capture of particulate emissions by a baghouse or wet scrubber.

In order to ensure compliance with these standards, adequate reporting and recordkeeping is necessary. In the absence of such information, enforcement personnel would be unable to determine whether the standards are being met on a continuous basis, as required by the Clean Air Act.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. Notifications are used to inform the Agency or delegated authority when a source becomes subject to the standard. The reviewing authority may then inspect the source to check if the pollution control devices are properly installed and operated. Performance test reports are needed as these are the Agency's record of a source's initial capability to comply with the emission standard and note the operating conditions (flow rate and pressure drop) under which compliance was achieved. Quarterly reports are used for problem identification, as a check on source operation and maintenance, and for compliance determinations. The standard also requires semiannual reporting of deviations from monitored scrubber pressures or opacity, as these are good indicators of the source's compliance status.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, 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 55.2 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: Phosphate Rock Plants.

Estimated Number of Respondents: 13.

Frequency of Response: Initially and semiannually.

Estimated Total Annual Hour Burden: 1,602 hours.

Estimated Total Annual Costs: $226,245, which includes $12,000 annualized capital/startup costs, $112,000 annual O&M costs, and $102,245 annual labor costs.

Changes in the Estimates: There is decrease of 1,400 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to a decrease in the estimated number of existing affected sources and a decrease in the predicted growth rate of the industry.

Dated: September 5, 2004.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 04–20908 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OECA–2004–0010; FRL–7814–3]

Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NSPS for Small Industrial-Commercial-Institutional Steam Generating Units, (Renewal) ICR Number 1564.06, OMB Number 2060–0202

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act, 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 is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2004. 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 October 18, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OECA–2004–0010, to (1) EPA online using EDOCKET (our preferred method), by email to *docket.oeca@epa.gov*, or by mail to: Environmental Protection Agency, EPA Docket Center (EPA/DC), Enforcement and Compliance Docket and Information Center, EPA West, Mail Code 2201T, 1200 Pennsylvania Avenue, 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: Dan Chadwick, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7054; fax number: (202) 564–0050; e-mail address: *chadwick.dan@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 May 25, 2004, (69 *FR* 29718), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2004–0010, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, 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 Enforcement and Compliance Docket and Information Center 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. When 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, confidential business information (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: NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (40 CFR part 60, subpart Dc) (Renewal).

Abstract: The New Source Performance Standards (NSPS) for small industrial-commercial-institutional steam generating units, published at 40 CFR part 60, subpart Dc, were proposed on June 9, 1989, and promulgated on September 12, 1990. These standards apply to industrial-commercial-institutional steam generating units with maximum design heat input capacity of 29 megawatts (MW) (100 million Btu/hr) or less, but greater than or equal to 2.9 MW (10 million Btu/hr), commencing construction, modification, or reconstruction after June 9, 1989. The standards limit the emissions of sulfur dioxide (SO_2) and particulate matter (PM). For the purposes of this document, new units are those affected units that have had construction, modification, or reconstruction within the last three years. This information is being collected to assure compliance with 40 CFR part 60, subpart Dc.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all sources subject to NSPS.

Any owner or operator subject to the provisions of this part shall maintain a file of these measurements, and retain the file for at least two years following the date of such measurements, maintenance reports, and records. All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the United States Environmental Protection Agency (EPA) regional office. Once received by the authority, reports are reviewed and the data is entered, analyzed, and maintained in the Air Facility System (AFS). Information from these reports can be used by any of the regions, states, agencies or offices with access to AFS and may be used in determining where inspections and enforcement actions may be necessary.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, 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 287 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: Owners or operators of small industrial-commercial-institutional steam generating units commencing construction, modification, or reconstruction after June 9, 1989.

Estimated Number of Respondents: 235.

Frequency of Response: Initially; Semi-annually; On occasion.

Estimated Total Annual Hour Burden: 156,610 hours.

Estimated Total Annual Costs: $19,653,054, which includes $1,491,005 annualized capital/startup costs, $7,955,140 annual O&M costs, and $10,206,909 annual labor costs.

Changes in the Estimates: There is a decrease of 276,157 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is primarily due to a decrease in the expected number of new sources over the next three years and the resulting decrease in the burden associated with submitting notifications.

Dated: September 5, 2004.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 04–20909 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7813–2]

Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended by the Superfund Amendments and Reauthorization Act; 38th Street Radiation Removal Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice, request for public comments.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(h)(1), notice is hereby given of a proposed Administrative Order on Consent ("AOC, Region 9 Docket No. 2004–00015) pursuant to section 122(h)(1) of CERCLA concerning the 38th Street Radiation Removal Site (the "Site"), located in San Diego, California. The respondent to the AOC is California Department of Transportation ("Cal-Trans"). The AOC provides Cal-Trans with a covenant not to sue and contribution protection for the removal action at the Site. To date, EPA has incurred approximately $967,836.00 in response costs related to the Site. Cal-Trans is reimbursing $84,301.53 of the incurred response costs to EPA, consistent with EPA's determination of $84,301.53 Cal-Trans' ability to pay. For

thirty (30) days following the date of publication of this Notice, the Agency will receive written comments relating to the proposed AOC. The Agency's response to any comments will be available to public inspection at EPA's Region IX offices, located at 75 Hawthorne Street, San Francisco, California 94105.

DATES: Comments must be submitted on or before October 18, 2004.

ADDRESSES: The proposed Agreement may be obtained from Judith Winchell, Environmental Protection Specialist, telephone (415) 972–3124. comments regarding the proposed Agreement should be addressed to Judith Winchell (SFD–7) at EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and should reference the 38th Street Radiation Removal Site, San Diego, California and USEPA Docket No. 2004–008.

FOR FURTHER INFORMATION CONTACT: Andrew Helmlinger, Office of Regional Counsel, telephone (415) 972–3904, USEPA Region IX, 75 Hawthorne Street, San Francisco, California 94105.

Dated: September 8, 2004.

Pete Guria,

Acting Chief, Response, Planning, and Assessment Branch.

[FR Doc. 04–20895 Filed 9–15–04; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7813–8]

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities; Notice

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed general permit modification.

SUMMARY: Today's action proposes modification of permit conditions specific to construction activities covered under EPA's National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities. The general permit is available for use where EPA is the NPDES permitting authority in EPA Regions 1–3 and 5–10. Coverage under the general permit authorizes the discharge of storm water from construction activities consistent with the terms of the permit. The proposed revisions clarify that permit noncompliance only applies to sites with permit coverage. In addition, this proposed modification includes correction of a typographical error in the permit and a corresponding error in the fact sheet.

DATES: Comments on today's proposed modifications must be received no later than October 18, 2004.

FOR FURTHER INFORMATION CONTACT: Jack Faulk, (202) 564–0768; *faulk.jack@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. How Can I Get Copies of the Proposed Permit Modification and Related Materials?

1. *Docket.* EPA has established an official public docket for the Construction General Permit: Docket ID No. OW–2002–0055.

The official public docket consists of the documents specifically referenced in the Construction General Permit, any public comments received, proposed modifications, and other information related to the permit. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B135, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI, and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.A. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered in paper to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket, visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not

required to consider these late comments in formulating a final decision. If you wish to submit CBI or information that is otherwise protected by statute, please contact the person listed in **FOR FURTHER INFORMATION CONTACT.** Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as described below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in the appropriate Docket ID No. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to: *ow-docket@epa.gov*, Attention Docket ID No. (please use appropriate Docket ID number). In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section I.B:2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send four copies of your comments (disk or paper copies) to: Water Docket, Environmental Protection Agency, Mail code: #4101T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. (please use appropriate Docket ID number).

3. *By Hand Delivery or Courier.* Deliver four sets of your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. (please use appropriate Docket ID number). Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.A.1.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

D. What Authority Does EPA Have To Take This Action?

EPA issues NPDES permits under the authority of Clean Water Act (CWA) section 402, 33 U.S.C. 1342. The NPDES regulations, at 40 CFR 124.5(a) specify that permits may be modified at the request of any interested person (including the permittee) or upon the Director's (in this instance, EPA's) initiative; however, permits may only be modified for reasons specified in 40 CFR 122.62. Correction of technical mistakes such as errors in calculation, or mistaken interpretations of law are among the acceptable reasons for permit modification. 40 CFR 122.62(a)(15). The proposed permit and fact sheet modifications being proposed are consistent with this criterion.

E. Why Is This Information Being Published in the Federal Register?

Where EPA decides to modify a permit under 40 CFR 122.62, a draft permit, incorporating the proposed changes, must be prepared and public noticed consistent with 40 CFR 124.10. During the public comment period, any interested person may submit written comments on the draft permit and may request a public hearing. Any request for public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments will be considered in making the final decision with responses documented in the administrative record and available to the public. This **Federal Register** notice soliciting comments is being published consistent with the 40 CFR 124.10 requirements.

F. Which Permit Is Proposed for Modification?

On July 1, 2003, EPA noticed in the **Federal Register** (68 FR 29087) issuance of the final NPDES General Permit for Storm Water Discharges Associated with Construction Activities (hereinafter called the "construction general permit" or "CGP") for activities located in EPA Regions 1–3 and 5–10. (All references in this notice to the CGP also include the construction general permit issued in the State of Massachusetts on August 4, 2003. 68 FR 45817.) The CGP and accompanying fact sheet are available on EPA's Internet Web site at: *http://www.epa.gov/npdes/cgp*. Operators of both large (> 5 acres) and small (1–5 acres) construction sites may be eligible to obtain coverage under the CGP for allowable storm water and non-storm water discharges. The CGP is available only in those areas where EPA is the NPDES permitting authority. A number of parties filed suit in response to EPA's July 1, 2003 issuance of the CGP. This proposed modification is, in part, the result of a settlement agreement with certain petitioners in that suit. To that end, the July 1, 2003 CGP is the permit for which modifications are being proposed herein.

G. What Permit Modifications Are Being Proposed?

The following modifications are proposed:

1. On page 7, in section 2.3.D of the CGP, Late Notifications, third sentence, strike the phrase "or permit noncompliance" so that section 2.3.D now reads: "Late Notifications: Operators are not prohibited from submitting NOIs after initiating clearing, grading, excavation activities, or other construction activities. When a late NOI is submitted, authorization for discharges occurs consistent with Subpart 2.1. The Agency reserves the right to take enforcement action for any unpermitted discharges that occur between the commencement of construction and discharge authorization."

2. On page D–3 in Appendix D of the CGP, section D.3, second sentence, strike the phrase "or permit noncompliance" so that section D.3 of Appendix D now reads: "Late Notifications: Operators are not prohibited from submitting waiver certifications after initiating clearing, grading, excavation activities, or other construction activities. The Agency reserves the right to take enforcement for any unpermitted discharges that occur between the time construction commenced and waiver authorization is granted."

3. On page D–3 in Appendix D of the CGP, in the paragraph following section D.3, third sentence, strike the phrase "or permit noncompliance" so that section D.3 of Appendix D now reads: "Submittal of a waiver certification is an optional alternative to obtaining permit coverage for discharges of storm water associated with small construction activity, provided you qualify for the waiver. Any discharge of storm water associated with small construction activity not covered by either a permit or a waiver may be considered an unpermitted discharge under the Clean Water Act. As mentioned above, EPA reserves the right to take enforcement for any unpermitted discharges that occur between the time construction commenced and either discharge authorization is granted or a complete and accurate waiver certification is submitted. EPA may notify any operator covered by a waiver that they must apply for a permit. EPA may notify any operator who has been in non-compliance with a waiver that they may no longer use the waiver for future projects. Any member of the public may petition EPA to take action under this provision by submitting written notice along with supporting justification."

4. On page 11, in section 3.11.B, strike the phrase "the discharges" so that section 3.11.B now reads: "The SWPPP must be amended if during inspections or investigations by site staff, or by local, State, tribal, or Federal officials, it is determined that the SWPPP is ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site."

H. What Fact Sheet Modifications Are Being Proposed?

The following editorial correction is proposed for the accompanying CGP fact sheet: In the second paragraph of section 3.11, strike the phrase "discharges are" and replace it with "SWPPP is" so that the sentence now reads: "The plan must also be amended if inspections or investigations by site staff, or by local, State, tribal, or Federal officials determine that the SWPPP is ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site."

I. What Is the Rationale for the Proposed Changes?

Proposed changes described in G.1, G.2, and G.3 above are identical in scope. As written, the CGP suggests that construction site operators may be liable for permit noncompliance even in those instances when the operator is not covered, or not yet covered, by that permit (*e.g.*, before the operator submits a Notice of Intent (NOI) to be covered).

Under the CGP, permit coverage commences at the time of discharge authorization. In the case of the CGP, this is typically after a seven-day waiting period subsequent to an operator's submission of an NOI to EPA. As established in the CGP, to obtain permit coverage, operators are required to meet certain eligibility criteria (*e.g.*, development of a site-specific storm water pollution prevention plan). However, failure of the operator to take necessary actions to be eligible for permit coverage does not constitute permit noncompliance. Rather, an operator that fails to meet all applicable eligibility provisions is not authorized for permit coverage. Thus, failure to meet certain eligibility provisions may be indicative of other types of noncompliance (*e.g.*, violation of CWA section 402 for discharging without a permit or violation of 40 CFR 122.21(c)(1) for failure to submit a permit application at least 90 days before the date on which construction is to commence). The permit requirements do not apply prior to submission of an NOI and prior to the operator's obtaining authorization to discharge storm water. In addition, any operator is free to apply for coverage under an individual permit.

Proposed changes described in G.4 and H above are purely editorial. EPA identified these two changes as part of a routine review of the permit and fact sheet. EPA considers these edits logical revisions of existing language, simply correcting the use of incorrect terminology.

J. What Are the Limitations on Commenting on the Draft Permit?

Pursuant to 40 CFR 124.5(c)(2), when a permit is modified, only the conditions subject to modification are reopened. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. As such, EPA will review and consider comments submitted in response to the modifications proposed in this **Federal Register** notice but is not obligated to respond to comments on other, unrelated permit conditions or fact sheet language. All comments are due to EPA by October 18, 2004.

Signed and issued this 8th day of September, 2004.
Joanna Jerison,
Acting Director, Office of Ecosystem Protection, Region I.

Signed and issued this 8th day of September, 2004.
Walter Mugdan,
Director, Division of Environmental Planning and Protection, Region II.

Signed and issued this 8th day of September, 2004.
Carl Soderberg,
Director, Caribbean Environmental Protection Division, Region II.

Signed and issued this 7th day of September, 2004.
Jon M. Capacasa,
Director, Water Protection Division, Region III.

Signed and issued this 8th day of September, 2004.
Jo Lynn Traub,
Director, Water Division, Region V.

Signed and issued this 8th day of September, 2004.
William K. Honker,
Acting Director, Water Quality Protection Division, Region VI.

Signed and issued this 8th day of September, 2004.
Leo J. Alderman,
Director, Water, Wetlands, and Pesticides Division, Region VII.

Signed and issued this 7th day of September, 2004.
Judy Wong,
Director, Water Program, Region VIII.

Signed and issued this 7th day of September, 2004.
Alexis Strauss,
Director, Water Division, Region IX.

Signed and issued this 8th day of September, 2004.
Robert R. Robichaud,
Associate Director, Office of Water, Region X.

[FR Doc. 04–20896 Filed 9–15–04; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

September 9, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before October 18, 2004. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0360.
Title: Section 80.409, Station Logs.
Form No.: N/A.
Type of Review: Revision of a currently approved collection.
Respondents: Business or other for-profit, not-for-profit institutions, state, local or tribal government.
Number of Respondents: 24,660.
Estimated Time Per Response: 27.3—95 hours.
Frequency of Response: Recordkeeping requirement.
Total Annual Burden: 677,380 hours.
Total Annual Cost: N/A.
Privacy Act Impact Assessment: N/A.
Needs and Uses: The Commission is revising this information collection to consolidate two recordkeeping requirements into one comprehensive collection. Both information collections were under 47 CFR 80.409 (approved by OMB under OMB Control Numbers 3060–0360 and 3060–0364). The Commission will retain OMB Control Number 3060–0360 as the active control number.

The recordkeeping requirements in Section 80.409 are necessary to document the operation and public correspondence service of public coast radiotelegraph, public coast radiotelephone stations and Alaska-public fixed stations, ship radiotelegraph, ship radiotelephone and applicable radiotelephone including the logging of distress and safety calls where applicable.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.

[FR Doc. 04–20900 Filed 9–15–04; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–2596]

Audit of Operational Status of Licenses in the Paging and Radiotelephone Service and 929–930 MHz Band on Exclusive Channels

AGENCY: Federal Communications Commission.

ACTION: Notice; correction.

SUMMARY: The Federal Communications Commission (Commission) published a document in the **Federal Register** on September 8, 2004, announcing an audit of the operational status of stations authorized in the paging and radiotelephone service (part 22) and stations authorized on 929–930 MHz private carrier paging exclusive channels (part 90) which encourages licensees to verify the mailing address for each license held and to register with the Commission Registration System (CORES).

FOR FURTHER INFORMATION CONTACT: Denise D. Walter, Mobility Division, at 202–418–0620.

Correction

1. In the **Federal Register** of September 8, 2004, in FR Doc. 04–20361, on page 54290, in the third column, correct the "proceeding title" to read: Audit of Operational Status of Licenses in the Paging and Radiotelephone Service and 929–930 MHz Band on Exclusive Channels

2. In the **Federal Register** of September 8, 2004, in FR Doc. 04–20361, on page 54290, in the first paragraph, correct the "Summary" text to read:

SUMMARY: In this document the Wireless Telecommunications Bureau (Bureau) announces a license audit of the operational status of all site-specific licenses operating under part 22, Paging and Radiotelephone Service, with a "CD" radio service code and all site-specific licenses operating in the 929–930 MHz band on exclusive channels, part 90, with a "GS" radio service code. Licensees are asked to verify their mailing address on record in the Universal Licensing System for each license held and, where appropriate, update the information. Licensees are also asked to verify they have registered with the Commission Registration System (CORES) and associated their FCC Registration Number (FRN) with each license held. The audit is scheduled to begin the week of September 27, 2004. Licensees will be required to respond to the audit electronically, via the internet, within forty-five (45) calendar days from the date on the audit letter.

Dated: September 10, 2004.
Linda Chang,
Associate Chief, Mobility Division.

[FR Doc. 04–20899 Filed 9–15–04; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation of Written Comments on Proposed Definition of Bioactive Food Components

AGENCY: Office of Public Health and Science, Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Office of Disease Prevention and Health Promotion (ODPHP), Office of Public Health and Science, Department of Health and Human Services (HHS), acting on behalf of an ad hoc Federal working group, is soliciting written comments on a proposed definition of "bioactive food components."

DATES: Submit written or electronic comments by November 1, 2004.

ADDRESSES: Submit a single copy of electronic comments or two paper copies of any mailed comments to Leila G. Saldanha at *saldanhl@mail.nih.gov* or Department of Health and Human Services, c/o Office of Dietary Supplements, 6100 Executive Blvd., Rm 3B01, MSC 7517, Bethesda, MD 20892–7517.

FOR FURTHER INFORMATION CONTACT: Leila G. Saldanha, Department of Health and Human Services, 6100 Executive Blvd., Rm 3B01, MSC 7517, Bethesda, MD 20892–7517, Phone: 301–496–0168, Fax: 301–480–1845, e-mail: *saldanhl@mail.nih.gov*.

SUPPLEMENTARY INFORMATION:

Background: Foods provide numerous chemical constituents that may influence health and disease prevention, in addition to those usually characterized as essential nutrients. The physiological implications of these food components have been the subject of recent scientific inquiries and publications. Widespread scientific, governmental, and consumer attention to these components, referred to here as "bioactive food components," has sparked an interest about how they should be defined and how best to evaluate their significance in promoting health and disease prevention.

Bioactive food components exist not only in commonly consumed foods but also as ingredients in fortified foods and dietary supplements. Bioactive food components may have multiple sites of action, may interact with one or more dietary constituents, and may act directly or indirectly to produce the functional outcome. Some examples of these components include lycopene, long-chain omega-3 fatty acids, epigallocatechin gallate (EGCG), isoflavones, sulphorophane, and resveratrol. Food sources of these components include, respectively, tomatoes, fatty fish, green tea, soybeans, broccoli, and red grapes, but other foods may be significant sources of bioactive food components.

An ad hoc Federal working group that includes representatives from the Departments of Health and Human Services (HHS), Defense, and Agriculture, and agencies within these departments such as the National Institutes of Health, Centers for Disease Control and Prevention, and Food and Drug Administration, is interested in establishing a definition for "bioactive food components" as a first step toward developing approaches that might be used to assess their health effects. Currently, there is no generally accepted definition about what should be classified as a bioactive food component. Further, there are no generally accepted approaches for evaluating the health effects resulting from consuming these components. Establishing a definition for bioactive food components may help in guiding and encouraging future research with these components. An approach to assess the health effects of bioactive food components may need to take into account the complex nature of this category of components. In addition, it may provide science-based information to help guide public health policy on how Americans may choose diets that promote good health.

Written Comments: By this notice, ODPHP, on behalf of the ad hoc Federal working group, is soliciting submission of written comments on the following proposed definition of "bioactive food components:'

Bioactive food components are constituents in foods or dietary supplements, other than those needed to meet basic human nutritional needs, that are responsible for changes in health status.

In making comments on the proposed definition, please provide the rationale for your comments. Comments are specifically requested on the following questions:

(1) What categories/classes of compounds should be considered as bioactive food components?

(2) What categories/classes of compounds should *not* be considered as bioactive food components? How should the definition be modified to reflect exclusion of these compounds?

(3) Should essential nutrients be included as bioactive food components?

(4) Should synthetically derived components used in fortified foods and dietary supplements be considered under this definition?

Written comments received in response to this notice will be reviewed by the ad hoc Federal working group and considered in refining the proposed definition of "bioactive food components" and in future plans involving the use of this definition.

(Authority: 42 U.S.C. 300u.)

Dated: September 10, 2004.

Cristina V. Beato,

Acting Assistant Secretary for Health, Department of Health and Human Services.

[FR Doc. 04–20892 Filed 9–15–04; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04064 (Supplemental)]

ADAPT: Adopting and Demonstrating the Adaptation of Prevention Techniques Amendment

A notice announcing the availability of supplemental fiscal year (FY) 2004 funds for a cooperative agreement entitled, "ADAPT: Adopting and Demonstrating the Adaptation of Prevention Techniques" was published in the **Federal Register** Monday, August 23, 2004, volume 69, number 162, pages 51847–51851. The notice is amended as follows:

- On page 51849, column two, the Funding Restrictions section, please note funds provided by the ADAPT supplement can only be used for the adaptation of the intervention being implemented with the original PA 04064 funding. Adaptation activities include formative activities, monitoring and evaluation of the processes used to adapt the intervention, and evaluation of the adapted intervention and not for implementation of the intervention.
- On page 51847, column two, the Activities section, please note preference for ADAPT supplemental funding will no longer be given to Many Men, Many Voices. The following interventions will be equally considered for ADAPT supplemental funding:

1. Community Promise
2. Healthy Relationships
3. Holistic Harm Reduction
4. Many Men, Many Voices
5. Mpowerment
6. Partnership for Health
7. Popular Opinion Leader
8. Real AIDS Prevention Project
9. Safety Counts
10. SISTA
11. Street Smart
12. Teens Link to Care
13. VOICES/VOCES

- On page 51848, column one, Eligibility section, please note the sample size listed in letter *b* should be amended. The sample size should be similar to the original study. However, when this is not possible, the applicants who propose the largest sample sizes

may be given preference. A minimum sample size of 200 is desirable but not required.

Dated: September 10, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–20875 Filed 9–15–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0401]

Agency Information Collection Activities; Proposed Collection; Comment Request; Customer/Partner Service Surveys

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 proposed 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 voluntary customer satisfaction service surveys to implement Executive Order 12862.

DATES: Submit written or electronic comments on the collection of information by November 15, 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 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

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.

Customer/Partner Service Surveys (OMB Control Number 0910–0360)—Extension

Under section 903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393), FDA is authorized to conduct research and public information programs about regulated products and responsibilities of the agency. Executive Order 12862, entitled, "Setting Customer Service Standard," directs Federal agencies that "provide significant services directly to the public" to "survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services." FDA is seeking OMB clearance to conduct a series of surveys to implement Executive Order 12862. Participation in the surveys is voluntary. This request covers customer/partner service surveys of regulated entities, such as the following: Food processors; cosmetic drug, biologic and medical device manufacturers; consumers; and health professionals. The request also covers "partner" (State and local governments) customer service surveys.

FDA will use the information from these surveys to identify strengths and weaknesses in service to customers/partners and to make improvements. The surveys will measure timeliness, appropriateness and accuracy of information, courtesy, and problem resolution in the context of individual programs.

FDA projects that approximately 15 customer/partner service surveys will be conducted per year, with a sample of between 50 and 6,000 customers, requiring an average of 18 minutes for review and completion for each survey. Some of these surveys will be repeats of earlier surveys, for purposes of monitoring customer/partner service and developing long-term data.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Type of Survey	Number of Respondents	Annual Frequency per Response	Hours per Response	Total Hours
Mail/telephone/fax/web-based	15,000	1	.30	4,500

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: September 9, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–20811 Filed 9–15–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committee on Special Studies Relating to the Possible Long-Term Health Effects of Phenoxy Herbicides and Contaminants (Ranch Hand Advisory Committee); Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Advisory Committee on Special Studies Relating to the Possible Long-Term Health Effects of Phenoxy Herbicides and Contaminants (Ranch Hand Advisory Committee).

General Function of the Committee: To advise the Secretary and the Assistant Secretary for Health concerning its oversight of the conduct of the Ranch Hand study by the U.S. Air Force and provide scientific oversight of the Department of Veterans Affairs (VA) Army Chemical Corps Vietnam Veterans Health Study, and other studies in which the Secretary or the Assistant Secretary for Health believes involvement by the committee is desirable.

Date and Time: The meeting will be held on September 22, 2004, 8 a.m. to 4:30 p.m.

Location: Food and Drug Administration, 5630 Fishers Lane, rm. 1066, Rockville, MD 20857.

Contact Person: Leonard Schechtman, National Center for Toxicological Research, Food and Drug Administration, 5600 Fishers Lane, rm. 16–85, Rockville, MD 20857, 301–827–6696, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512560. Please call the Information Line for up-to-date information on this meeting.

Agenda: The Air Force will present for review to The Ranch Hand Advisory Committee the following chapters from the ongoing study: Chapter 19, "Immunology;" chapter 8, "Covariates;" chapter 12, "Psychology;" chapter 16, "Hematology;" chapter 15, "Cardiovascular;" chapter 7, "Statistical Methods;" chapter 5, "Study Selection and Participation;" and chapter 18, "Endocrine."

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by September 20, 2004. Oral presentations from the public will be scheduled on September 22, 2004, between approximately 12:15 p.m. and 12:40 p.m. Time allotted for each presentation may be limited.

Those desiring to make formal oral presentations should notify the contact person before September 20, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Leonard Schechtman at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 13, 2004.

William K. Hubbard,

Associate Commissioner for Policy and Planning.

[FR Doc. 04–21009 Filed 9–14–04; 2:52 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Pilot Study Evaluating the Cross-Cultural Equivalency of the Tobacco Use Supplement to the Current Population Survey (TUS–CPS)

SUMMARY: In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the National Cancer 0Institute (NCI), 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 March 3, 2004 (vol. 51, number 226, pp. 42420–42422) and allowed 60 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, any information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB number.

Proposed Collection: *Title:* Pilot Study Evaluating the Cross-Cultural Equivalency of the Tobacco Use Supplement to the Current Population Survey (TUS–CPS). *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The primary purpose of this study is to evaluate the cross-cultural equivalency of the TUS–CPS in English, Spanish, Chinese, Korean, and Vietnamese. Each version of the questionnaire will be administered to 50 native speakers. The Chinese version will be administered to both Mandarin and Cantonese speakers. Each interview will be behavior coded to ensure that respondents are interpreting the items correctly and any translation problems are identified item by item. Twenty percent of respondents will be retrospectively debriefed on the interview to determine how well the items are understood and examine whether any translation issues exist. The findings will provide valuable information concerning the clarity of the survey period to full-scale administration.

Frequency of Response: One-time study. *Affected Public:* Individuals. *Type of Respondents:* Adults who are native Chinese (Mandarin and Cantonese), Korean, Vietnamese, and Spanish speakers. The annual reporting burden is as follows:

Data collection task	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimate total hour burden	Estimated total annual burden hours requested
Screener	2568	1	.167	429	429
TUS–CPS	300	1	1	300	300
Retrospective Debriefing	60	1	.50	30	30
Total	2568			759	759

The annualized cost to respondents is estimated at $12,144. There are no Capital Costs, Operating Costs, or Maintenance Costs to report.

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 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: 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 Dr. Deirdre Lawrence, Project Officer, National Cancer Institute, EPN 4005, 6130 Executive Boulevard, MSC 7344, Bethesda, MD 20892–7344, or call non-toll-free number (301) 594–3599, or fax your request to (301) 435–3710, or e-mail your request, including your address, to *DL177n@nih.gov.*

DATES: *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: September 8, 2004.

Rachelle Ragland Greene,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 04–20837 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Loan Repayment and Scholarship; Submission for OMB Review; Comment Request; National Institutes of Health Undergraduate Scholarship Program for Individuals From Disadvantaged Backgrounds

Summary: In compliance with the requirement of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of Loan Repayment and Scholarship, the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on June 10, 2004, and allowed 60 days for public comment. One public comment was received and responded to. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes 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: National Institutes of Health Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds (UGSP). *Type of Information Collection Request:* Extension of a previously approved collection (OMB No. 0925–0438, expiration date July 31, 2004). *Form Numbers:* NIH 2762–1, NIH 2762–2, NIH 2762–3, NIH 2762–4, and NIH 2762–5. *Need and Use of Information Collection:* The NIH makes available scholarship awards to students from disadvantaged backgrounds who are committed to careers in biomedical research. The scholarships pay for tuition and reasonable educational and living expenses up to $20,000 per academic year at an accredited undergraduate institution. In return, for each year of scholarship support, the recipient is obligated to serve as a full-time paid employee in an NIH research laboratory for 10 consecutive weeks during the months of June through August and for 1 year after graduation. If the recipient is enrolled in an undergraduate program or pursues a postgraduate degree (doctoral, medical, dental, or veterinarian school), the post-graduation service obligation may be deferred with the approval of the Secretary, Department of Health and Human Services. The information proposed for collection will be used by the Office of Loan Repayment and Scholarship to determine an applicant's eligibility for participation in the UGSP and a participant's eligibility to defer his or her service obligation. The UGSP is authorized by section 487D of the Public Health Service (PHS) Act (42 U.S.C. 288–2), as amended by the NIH Revitalization Act of 1993 (Pub. L. 103–43). *Frequency of Response:* Initial application and annual renewal application. *Affected Public:* Applicants (high school or undergraduate students), recommenders, undergraduate institution financial aid staff, participants wishing to defer their service obligation, and graduate or undergraduate registrar staff. The annual reporting burden estimates are as follows:

Type of respondent	Estimated number of respondents	Estimated number responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Applicant	300	1.0	3.167	950.10

Type of respondent	Estimated number of respondents	Estimated number responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Recommender	900	1.0	1.000	900.00
Financial Aid Staff	300	1.0	.500	150.00
UGSP Participant	40	1.0	.084	3.36
Registrar	40	1.0	.750	30.00
Totals	1,580			2,033.46

The annualized cost to respondents is estimated at $40,249.70. There are no capital costs, operating costs, or maintenance costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address 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 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 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: Alfred C. Johnson, Ph.D., Deputy Director, Office of Loan Repayment and Scholarship, National Institutes of Health, 2 Center Drive, Room 2E28 (MSC 0230), Bethesda, Maryland 20892–0230. Dr. Johnson can be contacted via e-mail at *ACJohnson@nih.gov* or by calling (301) 402–6425.

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: August 23, 2004.

Raynard S. Kington,

Deputy Director, NIH.

[FR Doc. 04–20838 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Behavioral Research in Cancer Control.

Date: October 25–26, 2004.

Time: 10:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Mary Jane Slesinski, PhD, Scientific Review Administrator, Special Review and Resources Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8045, Bethesda, MD 20892, 301/594–1566.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 9, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20826 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Prevention Research and Epidemiology.

Date: November 9–10, 2004.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Mary Jane Slesinski, PhD, Scientific Review Administrator, Special Review and Resources Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8045, Bethesda, MD 20892, 301/594–1566.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology

Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 9, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20827 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel Community Networks for Reducing Cancer Disparities.

Date: November 8–10, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Gerald G. Lovinger, PhD, Scientific Review Administrator, Special Review and Resources Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8101, Rockville, MD 20892–7405, (301) 496–7987.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 9, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20829 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, SBIR Topic 190 Phase II—A New Expression System for G-protein Coupled Receptors.

Date: September 17, 2004.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6130 Executive Blvd., Rockville, MD 20852. (Telephone conference call.)

Contact Person: Sherwood Githens, PhD, Scientific Review Administrator, Special Review and Logistics Branch, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8053, Bethesda, MD 20892. (301) 435–1822.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS.)

Dated: September 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20835 Filed 9–15–04; 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 Meetings

Pursuant to section 10(d) of the Federal Advsiory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions coudl disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Review of Conference Applications (R13s).

Date: October 4, 2004.

Time: 8 a.m. to 10 a.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.

Contact Person: Nancy L Di Fronzo, PhD, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, Bethesda, MD 20892, 301–435–0288, *difronzon@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Review of Clinical Investigator Awards (K08s) & Research Scientist Development Awards (K02s).

Date: November 30–December 1, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Zoe Huang, MD, Health Scientists Administrator, Review Branch, Room 7190, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, MSC 7924, Bethesda, MD 20892–7924, 301–435–0314.

(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: September 3, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20825 Filed 9–15–04; 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 provision set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Interagency Registry of Mechanical Circulatory Support for End-Stage Heart Failure.

Date: October 5, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: Sheraton Columbia Hotel, 10207 Wincopin Circle, Columbia, MD 21044.

Contact Person: Katherine M Malinda, Scientific Review Administrator, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7198, Bethesda, MD 20892, 301/435–0297.

(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; 93.829, Blood Disorders and Resources Research, National Institutes of Health, HHS)

Dated: September 3, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20832 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Dental and Craniofacial Research Council.

Date: September 28, 2004.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: Director's Report, Concept Clearances, Reports.

Place: National Institutes of Health, Building 31C, 31 Center Drive, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Closed: 12:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31C, 31 Center Drive, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Norman S. Braveman, Assistant to the Director, NIH–NIDCR, Building 31, Rm. 5B55, Bethesda, MD 20892, (301) 594–2089, *Norman.Braveman@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's Home page: *http://www.nidcr.nih.gov/about,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: September 9, 2004.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20828 Files 9–15–04 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Endocrine Disruption: Epidemiology, Genetics and Toxicology.

Date: October 18–19, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Contact Person: Leroy Worth, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30/Room 3171, Research Triangle Park, NC 27709, (919) 541–0670, *worth@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training, 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: Septebmer 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20830 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel SBRP Conference Support 2004–2005.

Date: September 16, 2004.

Time: 2:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Sally Eckert-Tilotta, PhD, National Inst. of Environmental Health Sciences, Office of Program Operations, Scientific Review Branch, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1446, *eckertt1@niehs.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: September 3, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20831 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Diesel Exhaust and Aggravation of Childhood Asthma.

Date: October 25–26, 2004.

Time: 7 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hawthorne Suites Hotel, 300 Meredith Drive, Research Triangle Park, NC 27713.

Contact Person: Leroy Worth, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30/Room 3171, Research Triangle Park, NC 27709, 919/541–0670, *worth@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: September 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20833 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Pathogenesis Mechanisms of Parkinson's Disease.

Date: November 4–5, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hawthorne Suites Hotel, 300 Meredith Drive, Research Triangle Park, NC 27713.

Contact Person: Leroy Worth, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30/Room 3171, Research Triangle Park, NC 27709. 919/541–0670. *worth@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS.)

Dated: September 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20834 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Cognitive Neuroscience Study Section, October 7, 2004, 8 a.m. to October 8, 2004, 4 p.m. Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on August 31, 2004, 69 FR 53082–53083.

The meeting will be held one day only October 7, 2004, from 8 a.m. to 5 p.m. The location remains the same. The meeting is closed to the public.

Dated: September 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20824 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel NSCF Members Special Emphasis Panel.

Date: September 30, 2004.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William N. Elwood, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3162, MSC 7770, Bethesda, MD 20892, (301) 435–1503, *elwoodwi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel CLHP Members Special Emphasis Panel ZRG1 HOP K 02.

Date: October 5, 2004.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bob Weller, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3160, MSC 7770, Bethesda, MD 20892, (301) 435–0694, *wellerr@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group Surgery, Anesthesiology and Trauma Study Section.

Date: October 6–7, 2004.

Time: 1 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Gerald L. Becker, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435–1170, *beckerg@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group Atherosclerosis and Inflammation of the Cardiovascular System Study Section.

Date: October 12–13, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: Larry Pinkus, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Genetic Variation and Evolution Study Section.

Date: October 14–16, 2004.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: David J. Remondini, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2210, MSC 7890, Bethesda, MD 20892, (301) 435–1038, *remondid@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Pregnancy and Neonatology Study Section.

Date: October 14–15, 2004

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group Genomics, Computational Biology and Technology Study Section.

Date: October 14–15, 2004.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Camilla E. Day, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1037, *dayc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Child Development Outcomes.

Date: October 14, 2004.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Thomas A. Tatham, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, (301) 594–6836, *tathamt@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.

Date: October 17–19, 2004.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: Julius Cinque, MS, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group Tumor Cell Biology Study Section.

Date: October 17–19, 2002.

Time: 6:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel, 1700 Tysons Boulevard, McLean, VA 22102.

Contact Person: Angela Y. Ng, PhD, MBA, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804 (For courier delivery, use MD 20817), Bethesda, MD 20892, (301) 435–1715, *nga@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel SSMI 10: Small Business Bioengineering and Physiology.

Date: October 18–19, 2004.

Time: 8 a.m. to 3 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: Pushpa Tandon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7854, Bethesda, MD 20892, (301) 435–2397, *tendonp@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group Cardiac Contractility, Hypertrophy, and Failure Study Section.

Date: October 18–19, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Russell T. Dowell, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, MSC 7814, Bethesda, MD 20892, (301) 435–1850, *dowellr@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Neurobiology of Motivated Behavior Study Section.

Date: October 18–19, 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: Gamil C. Dabbas, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7844, Bethesda, MD 20892, (301) 435–1018, *debbasg@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Molecular and Cellular Endocrinology Study Section.

Date: October 18–19, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Syed M. Amir, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892, (301) 435–1043, *amirs@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group Social Psychology, Personality and Interpersonal Processes Study Section.

Date: October 18–19, 2004.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Washington, 1221 22nd Street, NW., Washington, DC 20037.

Contact Person: Anna L. Riley, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, (301) 435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Integrative Nutrition and Metabolic Processes Study Section.

Date: October 18–19, 2004.

Time: 8:30 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Sooja K. Kim, PhD, RD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182, MSC 7892, Bethesda, MD 20892, (301) 435–1780, *kims@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Grop Genetics of Health and Diseases Study Section.

Date: October 18–19, 2004.

Time: 9 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Cheryl M. Corsaro, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435–1045, *corsaroc@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Auditory System Study Section.

Date: October 19–20, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Watergate, 2650 Virginia Avenue, NW., Washington, DC 20037.

Contact Person: Joseph Kimm, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892, (301) 435–1249, *kimmj@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group Hypersensitivity, Autoimmune, and Immune-Mediated Diseases.

Date: October 19–20, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Governor's House Hotel, 1615 Rhode Island Avenue, NW., Washington, DC 20036.

Contact Person: Bahiru Gametchu, DVM, MS PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, (301) 435–1225, *gametchb@csr.nih.gov.*

Name of Committee: Respiratory Sciences Integrated Review Group Respiratory Integrative Biology and Translational Research Study Section.

Date: October 19–20, 2004.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham City Center Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Contact Person: Everett E. Sinnett, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, (301) 435–1016, *sinnett@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel ZRG1 SSMI 50R: PA–02–125: Bioengineering Nanotechnology Initiative.

Date: October 19, 2004.

Time: 3 p.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: Pushpa Tandon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7854, Bethesda, MD 20892, (301) 435–2397, *tandonp@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group Neurodifferentiation, Plasticity, and Regeneration Study Section.

Date: October 20–21, 2004.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Jury's Washington Hotel, 1500 New Hampshire Ave. NW., Washington, DC.

Contact Person: Joanne T. Fujii, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5204, MSC 7850, Bethesda, MD 20892, (301) 435–1178, *fujiij@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel ZRG1 RES E–10B Pulmonary Science SBIR Applications.

Date: October 20, 1004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Gopal C. Sharma, DVM, MS, PhD, Diplomate American Board of Toxicology, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2184, MSC 7818, Bethesda, MD 20892, (301) 435–1783, *sharmag@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel ZRG1 SBIB G 02M: Member Conflict: Surgery, Anesthesiology and Trauma.

Date: October 20, 2004.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Paul F. Parakkal, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, (301) 435–1176, *parakkap@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Diagnostic Classifications of Eating Disorders.

Date: October 20, 2004.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

Contact Person: Deborah L. Young-Hyman, PhD, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7759, Bethesda, MD 20892, (301) 451–8008, *younghyd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 7, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–20836 Filed 9–15–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Notice of Availability for Public Viewing of a Final Programmatic Environmental Assessment and a Finding of No Significant Impact (FONSI) Relative to Customs and Border Protection's Gamma Imaging Inspection System for Use at Various Sea and Land Ports of Entry

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces the availability for public viewing of a Final Programmatic Environmental Assessment (PEA) and a Finding of No Significant Impact (FONSI) relative to the gamma imaging inspection system employed by the Bureau of Customs and Border Protection at various sea and land ports of entry. The Final PEA and FONSI are being issued and made available to the public in accordance with the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations for Implementing the NEPA.

DATES: The Final PEA and the FONSI will be available for public review for a 30-day period beginning on September 16, 2004.

ADDRESSES: Copies of the Final PEA and FONSI may be obtained by writing, telephoning, or e-mailing, respectively, as follows: U.S. Customs and Border Protection, Suite 1575, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, Attn: Mr. Thomas Nelson; (202) 344–2975; or *THOMAS.Nelson@associates.dhs.gov*; or by accessing the following Web site address (click on "Recent **Federal Register** Notices"): *http://www.cbp.gov/xp/cgov/toolbox/legal.*

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Nelson at (202) 344–2975 or at *THOMAS.Nelson@associates.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On May 12, 2004, U.S. Customs and Border Protection (CBP) published a general notice document in the **Federal Register** (69 FR 26400) entitled: "Notice of Availability for Public Viewing of a Draft Programmatic Environmental Assessment Concerning CBP's Use of the Vehicle and Cargo Inspection System (VACIS) at Various Sea and Land Ports of Entry." The May 2004 notice indicated that the draft Programmatic Environmental Assessment (PEA) had been prepared and made available to the public in accordance with the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality (CEQ) Regulations for Implementing the NEPA (40 CFR parts 1500–1508), and Department of the Treasury Directive 75–02 (Department of the Treasury Environmental Quality Program). The notice discussed the gamma imaging or radiation inspection system (referred to there as the VACIS system), briefly explained the applicable NEPA process, informed the public on how to obtain a copy of the draft PEA, and requested comments from the public on the draft PEA.

As set forth in the notice, the VACIS system employs a non-intrusive inspection technique that uses low energy gamma radiation technology and allows CBP inspectors to inspect for contraband without having to physically enter into or unload motor vehicles, containers, or other conveyances. Deployment of this technology is already underway and will continue at various land ports and sea ports of entry throughout the United States and Puerto Rico. Given the serious nature of CBP's mission to protect the nation's borders from terrorism, it is envisioned that all ports are candidates for deployment of this technology in the future.

The NEPA Process

NEPA requires that an agency evaluate for environmental implications any proposal of a major Federal action that significantly affects the quality of the human environment. Under § 1508.18(a) of the CEQ regulations (40 CFR 1508.18(a)), a major Federal action includes not only new activities but also continuing agency activities, such as the gamma imaging inspection system deployed by CBP. To meet the NEPA evaluation requirement, a Federal agency, in some instances, must produce an Environmental Impact Statement (EIS) that thoroughly examines the environmental implications (or impacts) of a major Federal action. In other instances, an agency need only prepare an Environmental Assessment (EA) that briefly analyzes the environmental impacts to assist the agency in decision

making. An EA is preliminary to production of either an EIS or a Finding of No Significant Impact (FONSI), depending on the preliminary analysis and findings of the EA. The effect of a FONSI is that an agency will not have to produce an EIS. In still other instances, a categorical exclusion may apply to the Federal action, in which case the agency need not produce either an EA or an EIS. A programmatic EA (or PEA) is one that evaluates a major Federal action on a broad, programmatic basis and is then followed by Supplemental Environmental Assessments (referred to as Supplemental Environmental Documents or SEDs in the draft PEA) that focus the evaluation on particular site-specific localities.

Comments

The comment period announced in the May 2004 notice ended on June 28, 2004. Only six comments were received. The comments have been reviewed and are addressed in the Final PEA document.

Further Action

Following issuance of the Final PEA and the FONSI, CBP will issue a draft SED relative to each affected port of entry and make them available for public review by issuance of a notice of availability in a local newspaper of general circulation in each affected locality. Each draft SED will address a local deployment site at a particular port, evaluating potential environmental impacts with respect to the particular conditions present at each locality. Each draft SED also will solicit public comment. CBP will review the comments and then determine whether a FONSI or an EIS is warranted. (CBP notes that while the draft PEA indicated that notice of availability of draft SEDs will be published in the **Federal Register**, this is not necessary under the NEPA process and the CEQ regulations. Accordingly, CBP will publish notice of availability in local newspapers of general circulation.)

Public Review

The Final PEA and FONSI announced in this document will be available for public review for a period of 30 days beginning on the date this document is published in the **Federal Register**. The Final PEA/FONSI can be obtained as follows: By written request submitted to Customs and Border Protection, Suite 1575, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, Attn: Mr. Thomas Nelson; by telephone at (202) 344–2975; by e-mail at: *THOMAS.Nelson@associates.dhs.gov*; or by accessing the following Web site address (click on "Recent **Federal Register** Notices"): *http://www.cbp.gov/xp/cgov/toolbox/legal.*

Dated: September 13, 2004.

Ira Reese,

Acting Assistant Commissioner, Office of Information and Technology.

[FR Doc. 04–20874 Filed 9–15–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4903–N–74]

Notice of Submission of Proposed Information Collection To OMB; Lender Application To Participate in Multifamily Accelerated Processing (MAP)

AGENCY: Office of the Chief Information Officer.

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 request is for reinstatement of a collection of information for which approval has expired. The collection is being revised to include a Quality Control Plan.

DATES: *Comments Due Date:* October 18, 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 (2502–0541) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins and at HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a survey instrument to obtain information from faith based and community organizations on their likelihood and success at applying for various funding programs. This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Lender Application to Participate in Multifamily Accelerated Processing (MAP).

OMB Approval Number: 2502–0541.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: FHA-approved multifamily lenders wishing to participate in Multifamily Accelerated Processing (MAP) must submit a MAP application package establishing the additional qualifications required of a MAP Lender. A Quality Control Plan is now required in the Lender application package. Current MAP Lenders will also be required to submit a Quality Control Plan.

Frequency Of Submission: On Occasion and Annually.

Reporting Burden:

	Number of respondents	Annual responses	×	Average hours per response	=	Burden hours
Application	25	1		20		500
Annual Certification	139	1		0.25		35

	Number of respondents	Annual responses	×	Average hours per response	=	Burden hours
Quality Control	114	(1)		10		11,400

[1] One-time.

Total Estimated Burden Hours: Average for three years: 915.

Status: Reinstatement, with change, of previously approved collection for which approval has expired.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 10, 2004.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E4–2196 Filed 9–15–04; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Renewal of Endangered Species Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt.

SUMMARY: The public is invited to comment on the following permit renewal to continue to conduct certain activities with endangered species.

DATES: Written data, comments, or requests must be received by October 18, 2004.

ADDRESSES: Documents and other information submitted with this renewal are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Endangered Species, 300 Westgate Center Drive, Hadley, Massachusetts 01035; fax 413–253–8482.

FOR FURTHER INFORMATION CONTACT: Diane Lynch, Regional Endangered Species Permits Coordinator, 413–253–8628.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following permit renewal to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*).

Applicant: Niagara Mohawk, A National Grid Company, Albany, Schenectady, Saratoga, and Warren Counties, New York, PRT–813745

The applicant requests renewal of a permit to take Karner blue butterfly (*Lycaeides melissa samuelis*) larvae and eggs as a result of conducting habitat management activities for the purpose of maintenance and enhancement of existing Karner blue butterfly metapopulations. This notification covers activities to be conducted over a two-year period.

Dated: August 31, 2004.

Marvin E. Moriarty,

Regional Director, Region 5.

[FR Doc. 04–20876 Filed 9–15–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications.

SUMMARY: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended.

DATES: To ensure consideration, written comments must be received on or before October 18, 2004.

ADDRESSES: Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 4102, Albuquerque, New Mexico 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW., Room 4102, Albuquerque, New Mexico. Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Chief, Endangered Species Division, (505) 248–6920.

SUPPLEMENTARY INFORMATION:

PERMIT NO. TE–092237

Applicant: Michelle Villafranca, Alvord, Texas

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys and nest monitoring activities for the black-capped vireo (*Vireo atricapillus*) and golden-cheeked warbler (*Dendroica chrysoparia*) within Oklahoma and Texas.

PERMIT NO. TE–030115

Applicant: Bureau of Land Management, Safford Field Office, Safford, Arizona

Applicant requests an amendment to an existing permit to allow educational display and captive propagation of desert pupfish (*Cyprinodon macularius*).

PERMIT NO. TE–092622

Applicant: Gabriel Valdes, El Paso, Texas

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys and nest monitoring activities for the following species within Arizona, California, New Mexico, and Texas: cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), California least tern (*Sterna antillarum browni*), least Bell's vireo (*Vireo bellii pusillus*), and southwestern willow flycatcher (*Empidonax traillii extimus*).

PERMIT NO. TE–820022

Applicant: PBS&J, Austin, Texas

Applicant requests an amendment to an existing permit to allow presence/absence surveys for the following species within Arizona, New Mexico, and Texas: cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), northern aplomado falcon (*Falco femoralis septentrionalis*), southwestern willow flycatcher (*Empidonax traillii extimus*), and Yuma clapper rail (*Rallus longirostris yumanensis*).

PERMIT NO. TE–092934

Applicant: James Montgomery. Jr., Roswell, New Mexico

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys and nest monitoring activities for the interior least tern (*Sterna antillarum*) within New Mexico.

PERMIT NO. TE–092933

Applicant: Eric White. Boulder City, Nevada

Applicant requests a new permit for research and recovery purposes to conduct *in situ* feeding, staging, and spawning studies for the bonytail chub (*Gila elegans*) and razorback sucker (*Xyrauchen texanus*) within Arizona and Nevada.

Authority: 16 U.S.C. 1531, *et seq.*

Dated: September 7, 2004.

Susan Detwiler,

Acting Assistant Regional Director, Ecological Services, Region 2, Albuquerque, New Mexico.

[FR Doc. 04–20877 Filed 9–15–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–130–1020–PH; GP4–0272]

Notice of Public Meeting, Eastern Washington 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) Eastern Washington Resource Advisory Council (RAC), will meet as indicated below.

DATES: The Eastern Washington Resource Advisory Council (EWRAC) will meet on October 7, 2004, at the Spokane District Office, Bureau of Land Management, 1103 North Fancher Road, Spokane, Washington, 99212–1275.

SUPPLEMENTARY INFORMATION: The meeting will start at 9 a.m. and adjourn about 4 p.m. Topics on the meeting agenda include:

- Fiscal Year 2004 Accomplishments.
- Fiscal Year 2005 Work Plan.

The RAC meeting is open to the public, and there will be an opportunity for public comments at 10:30 a.m.. Information to be distributed to Council members for their review is requested in written format 10 days prior to the Council meeting date.

FOR FURTHER INFORMATION CONTACT: Sandra Gourdin or Kathy Helm, Bureau of Land Management, Spokane District Office, 1103 N. Fancher Road, Spokane, Washington, 99212, or call (509) 536–1200.

Dated: September 10, 2004.

Joseph K. Buesing,

District Manager.

[FR Doc. 04–20878 Filed 9–15–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Environmental Impact Statement/ Fire Management Plan, Yosemite National Park, Mariposa, Madera and Tuolumne Counties, CA; Notice of Approval of Record of Decision

Summary: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended) and the implementing regulations promulgated by the Council on Environmental Quality (40 CFR part 1505.2), the Department of the Interior, National Park Service has prepared, and the Regional Director, Pacific West Region has approved, the Record of Decision for the Fire Management Plan for Yosemite National Park. The formal no-action period was officially initiated May 14, 2004, with the U.S. Environmental Protection Agency's **Federal Register** notification of the filing of the Final Environmental Impact Statement (EIS).

Decision: As soon as practicable the park will begin to implement as its updated Fire Management Plan the "Multiple Action" alternative (also described and analyzed as the Preferred Alternative (D) contained in the Draft and Final EIS. The selected plan features a deliberate, long-term strategy to restore most park ecosystems to their natural range of variability within 15–20 years. Aggressive and passive reduction techniques would be used on 6,425 acres located within ¼ mile of six wildland-urban-interface areas. Any actions deemed essential to occur within Wilderness would be executed only after first determining the "minimum tool" appropriate to accomplish the necessary work. As documented in the EIS, this plan was also deemed to be the "environmentally preferred" alternative.

This course of action and three alternatives were identified and analyzed in the Final EIS, and previously in the Draft EIS (the latter was distributed in May 2002). The full spectrum of foreseeable environmental consequences was assessed, and appropriate mitigation measures identified, for each alternative. Beginning with early scoping, through the preparation of the Draft and Final EIS, numerous public meetings were conducted and newsletter updates were regularly provided. Approximately 140 written comments responding to the Draft EIS were received and duly considered. Key consultations which aided in preparing the Draft and Final EIS involved (but were not limited to) the U.S. Fish and Wildlife Service, State Historic Preservation Office, native American Tribes, air quality management districts, adjoining land managing agencies, and U.S. Geological Survey. Local communities, county and city officials, and interested organizations were contacted extensively during initial scoping and throughout the fire planning process.

Copies: Interested parties desiring to review the Record of Decision may obtain a complete copy by contacting the Superintendent, Yosemite National Park, P.O. Box 577, Yosemite, CA 95389; or via telephone request at (209) 372–0200.

Dated: August 1, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 04–20840 Filed 9–15–04; 8:45 am]

BILLING CODE 4312–F4–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before August 21, 2004. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed

comments should be submitted by October 1, 2004.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ARIZONA

Cochise County

Evergreen Cemetery, Old Douglas Rd., Bisbee, 04001071

Gila County

Ox Bow Inn, 607 W. Main St., Payson, 04001073

Pima County

Deep Wel Ranch, 13001 E. Redington Rd., Tucson, 04001072

ARKANSAS

Poinsett County

Hubbard Rice Dryer, (Cotton and Rice Farm History and Architecture in the Arkansas Delta MPS), 15015 Senteney Rd., Weiner, 04001070

Woodruff County

Fitzhugh Snapp Company, (Cotton and Rice Farm History and Architecture in the Arkansas Delta MPS), Jct. of Cty Rd. 140 and Cty Rd. 165, Fitzhugh, 04001069

CALIFORNIA

Alpine County

Alpine County Courthouse, 14777 CA 89, Markleeville, 04001074

Los Angeles County

Building at 816 South Grand Avenue, 816 S. Grand Ave., Los Angeles, 04001075
Southern Pacific Railroad Depot, Whittier, 7333 Greenleaf Ave., Whittier, 04001105

CONNECTICUT

Hartford County

Bridge No. 455, CT 159 at Stony Brook, Suffield, 04001094

Litchfield County

Bridge No. 560, CT 7 and Ct 4 over Housatonic River, Cornwall, 04001090
Reynolds Bridge, Waterbury Rd. at Naugatuck R, Thomaston, 04001095

Middlesex County

Arrawanna Bridge, Berlin St. at Coginchaug R., Middletown, 04001092
Bridge No. 1132, CT 80 at Hammonsasset River, Killingworth, 04001091

New Haven County

Washington Bridge, US 1 at Housatonic R, Milford, 04001093

DELAWARE

New Castle County

Holladay—Harrington House, 3705 Kennett Pike, Greenville, 04001077

Sussex County

Fort Miles Historic District, At the confluence of the Atlantic Ocean and Delaware Bay, Lewes, 04001076

INDIANA

Floyd County

Simpson Memorial United Methodist Church, 9449 Harrison St., Greenville, 04001098

Fulton County

Hillcrest Country Club, 6098 Fall Creek Rd., Indianapolis, 04001099

Lake County

Bailey, Louis J., Branch Library—Gary International Institute, 1501 W. Madison St., Gary, 04001102

Marion County

Central Court Historic District, 3529–3575 Central Ave., 515–551 E. 36th St. and Central Ct., Indianapolis, 04001101

Monroe County

Millen House, 112 N. Bryan Ave., Bloomington, 04001104

Morgan County

Hall School, 5955 W. Hurt Rd., Monrovia, 04001100

Newton County

Goodland—Grant Township Public Library, 111 S. Newton St., Goodland, 04001103

IOWA

Johnson County

Brown Street Historic District (Boundary Increase) (Iowa City, Iowa MPS AD), 500–800 blks of E. Ronalds St., Iowa City, 04001096
Jefferson Street Historic District, (Iowa City, Iowa MPS AD), Portions of 100–400 blks of E. Jefferson St., Iowa City, 04001097

LOUISIANA

Bossier Parish

Bossier High School, 777 Bearcat Dr., Bossier City, 04001078

Caddo Parish

Wiener, Samuel, House, 615 Longleaf Rd., Shreveport, 04001079

Lincoln Parish

Hedgepeth Mounds, Address Restricted, Vienna, 04001080

Webster Parish

Yellow Pine School, 432 Yellow Pine Rd., Sibley, 04001081

MASSACHUSETTS

Middlesex County

Robin Hill Cemetery, Donald Lynch Blvd., Marlborough, 04001083

Nantucket County

Maplewood Cemetery, Pleasant St., Marlborough, 04001082

MONTANA

Flathead County

First Presbyterian Church of Whitefish, 301 Central Ave., Whitefish, 04001085

Missoula County

Catholic block Historic District, 400, 420 and 430 W. Pine St., 435 W. Spruce St., Missoula, 04001084

NEBRASKA

Cheyenne County

Sidney Historic Business District (Boundary Increase), Roughly bounded by Hickory and King Sts. and 9th and 12 Aves., Sidney, 04001086

SOUTH CAROLINA

Lee County

Bishopville High School, 600 N. Main St., Bishopville, 04001087
Lynchburg Presbyterian Church, SC 341, South Lynchburg, 04001088

WYOMING

Teton County

Snake River Ranch, 5700 Snake River Ranch Rd., Wilson, 04001089

A request for Removal has been made on the following resources:

CALIFORNIA

Los Angeles County

Souther Pacific Railroad Station, 11825 Bailey St., Whittier 78000701

MINNESOTA

Morrison County

Clough Township Hall, CR 206, Randall Vicinity, 85001985

[FR Doc. 04–20816 Filed 9–15–04; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before August 28, 2004.

Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written

or faxed comments should be submitted by October 1, 2004.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ALASKA

Matanuska-Susitna Borough-Census Area, Whitney Section House, 3400 W. Neuser Dr., Wasilla, 04001106

ARKANSAS

Mississippi County

Violet Cemetery, Area bounded by W. Johnson Ave., Semmes Ave., Pecan St., Osceola, 04001108

Randolph County

Rice—Upshaw House, AR 93, 2 mi. S of Dalton, Dalton, 04001107

CALIFORNIA

Los Angeles County

Pomona City Stable, 636 W. Monterey Ave., Pomona, 04001109

COLORADO

Arapahoe County

Knight—Wood House, 1860 W. Littleton Blvd., Littleton, 04001111

Delta County

Mathews House, 40647 Matthews Ln., Paonia, 04001110

Weld County

Anderson Barn, (Ornamental Concrete Block Buildings in Colorado MPS) 5255 CO 60, Johnstown, 04001112

LOUISIANA

Webster Parish

Miller Farmstead, 224 LA 518, Minden, 04001113

MASSACHUSETTS

Middlesex County

Rocklawn Cemetery, Stevens St., Marlborough, 04001115
Spring Hill Cemetery, High and Brown Sts., Marlborough, 04001114

NEW YORK

Chemung County

Woodlawn Cemtery and Woodlawn National Cemetery, Walnut and Davis Sts., West Hill and Bancroft Rds., Elmira, 04001117

OHIO

Jefferson County

Toronto World War I Momument, 208 Market St. at Third St., Toronto, 04001116

UTAH

Cache County

Bell—Johnson House, (Richmond, Utah MPS), 12 North 200 East, Richmond, 04001118
Bullen, Newell and Anna S., House, (Richmond, Utah MPS), 211 South 100 East, Richmond, 04001119
Burnham, James and Amy, Farmstead, (Richmond, Utah MPS), 533 S. State St., Richmond, 04001120
Christensen, Carl F. and Sophia, House, (Richmond, Utah MPS) 208 North 200 East, Richmond, 04001121
Hendricks Confectionery Building, (Richmond, Utah MPS), 19 W. Main St., Richmond, 04001122
Hendricks, Layfayette and Elizabeth W., House, (Richmond, Utah MPS), 109 S. State St., Richmond, 04001123
Hendricks, William S. and Margaret R., House, (Richmond, Utah MPS), 112 W. Main St., Richmond, 04001124
Hobson—Hill House, (Richmond, Utah MPS), 108 South 100 West, Richmond, 04001125
Knapp, Morgan A. and Clarissa R., House, (Richmond, Utah MPS) 106 South 100 East, Richmond, 04001126
Merrill, Louis Edgar and Clara H., House, (Richmond, Utah MPS) 244 W. Main St., Richmond, 04001127
Morrison, Hattie Merrill, Farmstead, (Richmond, Utah MPS) 1367 S. State St., Richmond, 04001128
Plant Auto Company Building, (Richmond, Utah MPS) 38 South 200 West (UT 91), Richmond, 04001129
Richmond City Grandstand and Recreation Park, (Richmond, Utah MPS) Approx. 50 S. State St., Richmond, 04001130
Webb, S. Milton and Alba C., House, (Richmond, Utah MPS) 143 S. State St., Richmond, 04001131

VERMONT

Chittenden County

Burlington Traction Company, 662 Riverside Ave., includes 321–343 N. Winooski Ave., Burlington, 04001133
Sutton Farm, (Shelburne, Vermont MPS) 1592 Dorset St., Shelburne, 04001132

WISCONSIN

Clark County

Neilsville Masonic Temple Lodge No. 163, 316 Hewett St., Neillsville, 04001134

[FR Doc. 04–20817 Filed 9–15–04; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0124

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for Revegetation: Standards for Success, required for surface mining activities and underground mining activities at 30 CFR 816.116 and 817.116, has been forwarded to the Office of Management and Budget (OMB) for review and comment. The information collection request describes the nature of the information collection and the expected burden and cost.

DATES: OMB has up to 60 days to approve or disapprove the information collections but may respond after 30 days. Therefore, public comments should be submitted to OMB by October 18, 2004, in order to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection request, explanatory information and related form, contact John A. Trelease at (202) 208–2783, or electronically to *jtreleas@osmre.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies information collections at 30 CFR 816.116 and 817.116 that OSM will be submitting to OMB.

OSM previously received approval for collection activities for 30 CFR parts 816 and 817. They were assigned clearance number 1029–0047. However, OSM inadvertently omitted in the clearance request existing collection requirements for §§ 816.116 and 817.116. These sections require State regulatory authorities to develop success standards and statistically valid sampling techniques, and for operators to document revegetation success for Phase III bond release. OSM requested and received an emergency clearance from OMB for the collection activities in §§ 816.116 and 817.116. They were assigned clearance number 1029–0124. Now, OSM is seeking a 3-year term of approval for these collections.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1029–0124. However, upon approval by OMB, OSM will submit a correction to OMB requesting that this collection be incorporated into the collection authority for 30 CFR parts 816 and 817 (1029–0047).

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on this collection of information was published on April 20,

2004 (69 FR 21158). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

Title: Revegetation: Standards for Success, 30 CFR 816.116 and 817.116.

OMB Control Number: 1029–0124.

Summary: Section 515 and 516 of the surface Mining Control and Reclamation Act of 1977 provides that permittees conducting coal mining operations shall meet all applicable performance standards of the Act. The information collected is used by the regulatory authority in inspecting surface and underground coal mining reclamation activities to ensure that they are revegetated in accordance with applicable State requirements.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Coal mining operators and State regulatory authorities.

Total Annual Responses: 882.

Total Annual Burden Hours: 70,600.

Total Annual Non-Wage Costs: $44,000.

Send comments on the need for the collection of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collection; and ways to minimize the information collection burdens on respondents, such as use of automated means of collections of the information, to the following addresses. Please refer to the appropriate OMB control number in all correspondence.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of Interior Desk Officer, by telefax at (202) 395–6566 or via e-mail to *OIRA_Docket@omb.eop.gov* Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and enforcement, 1951 Constitution Ave, NW., Room 210–SIB, Washington, DC 20240, or electronically to *jtreleas@osmre.gov*.

Dated: June 28, 2004.

Sarah E. Donnelly,

Acting Chief, Division of Regulatory Support.

[FR Doc. 04–20884 Filed 9–15–04; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day emergency notice of information collection under review: Used body armor wear and care questionnaire.

The Department of Justice, Office of Justice Programs, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by September 24, 2004. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulation Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until November 15, 2004.

During the first 60 days of this same review period, a regular review of this informaiton collection is also being undertaken. All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to James W. Wong, Visiting Scientist, National Institute of Justice, Office of Justice Programs, Department of Justice, 810 7th Street, NW., Washington, DC 20531, or facsimile (202) 307–9907.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) *Type of information collection:* New collection.

(2) *The title of the form/collection:* Used Body Armor Wear and Care Questionnaire.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection: Form Number:* N/A. National Institute of Justice, Office of Justice Programs, United States Department of Justice is sponsoring the collection.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State, Local, or Tribal Government. *Other:* Federal Government. *Abstract:* Pursuant to the Attorney General's Body Armor Safety Initiative, NIJ is collecting samples of used body armor to determine the cause of ballistic resistance degradation in body armor. The information collected in the questionnaire concerns the usage of each unit of body armor submitted for testing and will contribute to an analysis of the causes of ballistic resistance degradation.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take each of the 500 respondents approximately 15 minutes to complete the questionnaire.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden to complete the certification form is 125 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: September 10, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–20818 Filed 9–15–04; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,350]

Boden Store Fixtures, Inc. Portland, OR; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 2, 2004 in response to a petition filed by a company official on behalf of workers at Boden Store Fixtures, Inc., Portland, Oregon.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 24th day of August, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20872 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,199] and [TA–W–55,199A]

Brown City Wire Company ADP TotalSource, a Subsidiary of KenSa LLC, Formerly Known as Clements Manufacturing LLC, Harbor Beach, Michigan and Deckerville Wire, Inc. ADP TotalSource, a Subsidiary of KenSa LLC, Formerly Known as Clements Manufacturing LLC, Harbor Beach, Michigan, Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 12, 2004, applicable to workers of Brown City Wire Company, a subsidiary of Clements Manufacturing LLC, Harbor Beach, Michigan and Deckerville Wire, Inc., a subsidiary of Clement Manufacturing LLC, Harbor Beach, Michigan. The notice was published in the **Federal Register** on August 3, 2004 (69 FR 46575).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce automobile wire harnesses.

The company reports that as of September 1, 2004, KenSa LLC, formerly known as Clements Manufacturing LLC, is the parent firm of Brown City Wire Company and Deckerville Wire, Inc. The company also reports that in January, 2004, employees of Brown City Wire Company and Deckerville Wire Company became employees and ADP TotalSource and that worker wages are reported under the Unemployment Insurance tax accounts for Brown City Wire Company, ADP TotalSource and Deckerville Wire, Inc., ADP TotalSource.

Accordingly, the Department is amending the certification to properly reflect these matters.

The intent of the Department's certification is to include all workers of the subject firms adversely affected by a shift in production to Mexico.

The amended notice applicable to TA–W–55,199 and TA–W–55,199A are hereby issued as follows:

"All workers of Brown City Wire Company, ADP TotalSource a subsidiary of KenSa LLC, formerly known as Clements Manufacturing LLC, Harbor Beach, Michigan (TA–W–55,199) and Deckerville Wire, Inc., ADP TotalSource, a subsidiary of KenSa LLC, formerly known as Clements Manufacturing LLC, Harbor Beach, Michigan (TA–W–55,199A), who became totally or partially separated from employment on or after August 23, 2004, through July 12, 2006, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974."

Signed at Washington, DC this 2nd day of September 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20871 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,935]

Bush Industries, Inc., Erie, PA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Bush Industries, Inc., Erie, Pennsylvania. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–54,935; Bush Industries, Inc., Erie, Pennsylvania (September 9, 2004).

Signed at Washington, DC this 10th day of September 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20868 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,645B and TA–W–41,645C]

Deckerville Wire Company, ADP TotalSource, A subsidiary of Clements Manufacturing LLC, Harbor Beach, Michigan; Brown City Wire Company, ADP TotalSource, A subsidiary of Clements Manufacturing LLC, Harbor Beach, Michigan; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 22, 2002, applicable to workers of Deckerville Wire Company, a subsidiary of Clements Manufacturing LLC, Harbor Beach, Michigan and Brown City Wire Company, a subsidiary of Clements Manufacturing LLC, Harbor Beach, Michigan. The notice was published in the **Federal Register** on September 10, 2002 (67 FR 57456).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce automobile wire harnesses.

The company reports that in January 2004, employees of Deckerville Wire Company and Brown City Wire Company became employees of ADP TotalSource and that worker wages are reported under the Unemployment Insurance tax accounts for Deckerville Wire Company, ADP TotalSource and Deckerville Wire Company, ADP TotalSource.

Accordingly, the Department is amending the certification to reflect this matter.

The intent of the Department's certification is to include all workers of the subject firms adversely affected by increased imports.

The amended notice applicable to TA–W–41,645B and TA–W–41,645C are hereby issued as follows:

All workers of Deckerville Wire Company, ADP TotalSource, Harbor, Beach, Michigan, a subsidiary of Clements Manufacturing, headquartered in Sterling Heights, Michigan

TA–W–41,645B and Brown City Wire Company, ADP TotalSource, Harbor Beach, Michigan a subsidiary of Clements Manufacturing, headquartered in Sterling Heights, Michigan (TA–W–41,645C), who became totally or partially separated from employment on or after May 15, 2001, through August 22, 2004, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed in Washington, DC, this 2nd day of September, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20864 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,494]

Jones and Vining, Inc., Lewiston, ME; Notice of Revised Determination

The State of Maine requested administrative reconsideration regarding Alternative Trade Adjustment Assistance (ATAA). The request was made because the Department certified the workers of the subject firm regarding only eligibility to apply for worker adjustment assistance. The certification was signed on April 13, 2004. The notice was published in the **Federal Register** on May 24, 2004 (69 FR 29578).

The Department issued the limited certification because it did not investigate if workers met the eligibility requirement of Alternative Trade Adjustment Assistance (ATAA), since a copy of the request for determination of eligibility to apply for the ATAA program for Older Workers was not attached to the petition.

Because the State provided documentation that a request for ATAA consideration was properly submitted, an investigation was conducted to determine if workers are eligible to apply for ATAA.

The investigation revealed that a significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable and that competitive conditions within the industry are adverse.

Conclusion

After careful review of the additional facts obtained on reconsideration, I conclude that the requirements of Section 246 of the Trade Act of 1974, as amended, have been met for workers at the subject firm.

In accordance with the provisions of the Act, I make the following certification:

"All workers of Jones and Vining, Inc., Lewiston, Maine, who became totally or partially separated from employment on or after March 10, 2003 through April 13, 2006, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974."

Signed in Washington, DC this 7th day of September 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20865 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,620]

NVF Company Fabrication Division Wilmington, DE; Notice of Negative Determination on Reconsideration

On August 9, 2004, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The Department's notice was published in the **Federal Register** on August 17, 2004 (69 FR 51106). Workers produce insulating materials and breaking systems and are not separately identifiable by product line.

The Department denied Trade Adjustment Assistance (TAA) and Alternate Trade Adjustment Assistance (ATAA) to workers of the subject firm because there were neither increased imports nor shifts of production of either insulating materials or braking systems during 2002, 2003, or January–February 2004.

In the request for reconsideration, the petitioner alleges that the subject facility is a "downstream (Fabricating) plant" and infers that the subject worker group should be eligible to apply for TAA because they fabricate articles from material produced at two affiliated plants: NVF Company, Yorklyn, Delaware and NVF Company, Kennett Square, Pennsylvania (TA–W–53,878 and TA–W–53,878A, signed February 3, 2004).

NVF Company, Yorklyn, Delaware produced vulcanized fiber. NVF Company, Kennett Square, Pennsylvania produced high-pressure laminates. Both products are made with asbestos produced at each location.

As a result of the reconsideration investigation, it was determined that the subject firm is not a downstream producer (a firm that performs additional, value-added production processes such as assembly or finishing) to a firm or subdivision that employed a group of workers who received TAA certification and that production at the subject facility is not related to the articles that was the basis for the certification.

The reconsideration investigation revealed that the subject worker group performed no additional, value-added production processes on the vulcanized rubber and high-pressure laminates produced at the sister plants. Rather, the subject facility uses the asbestos produced at the sister facilities as a raw material for the insulation and braking systems made by the subject, worker group.

Further, even if the subject facility was considered a downstream producer, the subject worker group would not be eligible for TAA certification because the insulation and braking systems produced at the subject facility are unrelated and significantly different from the vulcanized rubber and high-pressure laminates produced at the sister facilities.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC this 9th day of September, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20866 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,002]

Parallax Power Components, LLC, RV Converter Products, Goodland, IN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June

29, 2004, applicable to workers of Parallax Power Components, LLC, Goodland, Indiana. The notice was published in the **Federal Register** on August 3, 2004 (69 FR 46575).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce finished recreational vehicle power converters.

The review shows that all workers of Parallax Power Components, LLC, in Goodland, Indiana, were previously certified eligible to apply for adjustment assistance under petition number TA–W–40,523, which expired on January 23, 2004.

Therefore, in order to avoid an overlap in worker group coverage, the Department is amending the May 20, 2003, impact date established for TA–W–55,002, to read January 24, 2004.

The amended notice applicable to TA–W–55,002 is hereby issued as follows:

All workers of Parallax Power Components, LLC, RV Converter Products Division, Goodland, Indiana, who became totally or partially separated from employment on or after January 24, 2004, through June 29, 2006, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed in Washington, DC, this 2nd day of September, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20869 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55,484]

Toro Irrigation and Consumer Products, El Paso, TX; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 20, 2004, in response to a worker petition filed by a company official on behalf of workers at Toro Irrigation and Consumer Products, El Paso, Texas.

The petitioning group of workers is covered by an earlier petition filed on August 19, 2004 (TA–W–55,476) that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 26th day of August, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20873 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–55, 072]

Jaymar-Ruby, Inc. D/B/A Trans-Apparel Group A Subsidiary of Hartmarx Corporation Michigan City, IN; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Jaymar-Ruby, Inc., d/b/a Trans-Apparel Group, a subsidiary of Hartmarx Corporation, Michigan City, Indiana. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–55, 072; Jaymar-Ruby, Inc., d/b/a Trans-Apparel Group, a subsidiary of Hartmarx Corporation, Michigan City, Indiana (August 31, 2004).

Signed in Washington, DC this 8th day of September, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20870 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,899]

Zilog, Inc., Nampa, ID; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Zilog, Inc., Nampa, Idaho. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

PTA–W–54,899; Zilog, Inc. Napma, Idaho (September 1, 2004)

Signed at Washington, DC this 8th day of September 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–20867 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Eastern Associated Coal Corporation

[Docket No. M–2004–037–C]

Eastern Associated Coal Corporation, P.O. Box 1990, Henderson, Kentucky 42420 has filed a petition to modify the application of 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35 (Portable trailing Cables and Cords) to its Harris No. 1 Mine (MSHA I.D. No. 46–01271) located in Boone County, West Virginia. The petitioner requests a modification of the existing standard to permit the use of trailing cables for certain roof bolters, mobile roof supports, and shuttle cars longer than the cable lengths specified in 30 CFR 18.35. The maximum length of the cables supplying the roof bolters, and mobile roof supports shall not exceed 900 feet. The maximum length of the trailing cables supplying shuttle cars will not exceed 800 feet. The trailing cable(s) for the 480-volt mobile roof support(s) will not be smaller than a No. 4 A.W.G, the trailing cable(s) for roof bolters (E) will not be smaller than No. 2 A.W.G., and the cables for shuttle cars will not be smaller than No. 1/0. This petition will apply only to trailing cables that supply 480-volt, three phase, and alternating current to roof bolters, mobile roof supports, and 300-volt D.C shuttle cars. The petitioner has listed specific procedures in this petition that would be followed when implementing the proposed alternative method. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

2. Brooks Run Mining Company, LLC

[Docket No. M–2004–038–C]

Brooks Run Mining Company, LLC, 25 Little Birch Road, Sutton, West

Virginia 26601 has filed a petition to modify the application of 30 CFR 75.1711 (Sealing of mines) to its Mine No. 4 (MSHA I.D. No. 46–06213) located in Webster County, West Virginia. The petitioner proposes to barricade or fence-off mine openings to prevent entrance to the Mine No. 4, instead of sealing mine openings. The petitioner states that the Mine No. 4 has remaining coal reserves that may be economically recoverable in the future, currently no miners are employed at the mine site, and the mine has been idle and the portals barricaded since March 25, 1993. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

3. Vigo Coal Company

[Docket No. M–2004–039–C]

Vigo Coal Company, 14649 Highway 41 North, Evansville, Indiana 47725 has filed a petition to modify the application of 30 CFR 77.1304(a) (Blasting agents; special provisions) to its Friendsville Mine (MSHA I.D. No. 11–03064) located in Wabash County, Illinois, and Cypress Creek Mine (MSHA I.D. No. 12–02178) located in Warrick County, Indiana. The petitioner requests a modification of the existing standard to permit the blending of coal with ammonium nitrate and fuel oil (ANFO) to form an efficient and cost effective blasting agent at the Friendsville Mine and Cypress Mine. The petitioner states that proposed guidelines will be provided for testing, storage, transportation, mixing and use of coal and ANFO blends. The petitioner has listed specific terms and conditions in this petition that will be followed when implementing the proposed alternative method. The petitioner asserts that the proposed alternative method will not result in a diminution of safety to the miners.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to *comments@msha.gov*, by fax at (202) 693–9441, or by regular mail to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. All comments must be postmarked or received in that office on or before October 18, 2004. Copies of these petitions are available for inspection at that address.

Dated at Arlington, Virginia, this 10th day of September 2004.

Marvin W. Nichols, Jr.,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 04–20883 Filed 9–15–04; 8:45 am]

BILLING CODE 4510–43–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Notice of Federal Advisory Committee Meeting

Authority: 5 U.S.C. Appendix; 20 U.S.C. 5601–5609.

AGENCY: U.S. Institute for Environmental Conflict Resolution, Morris K. Udall Foundation.

ACTION: Notice of meeting.

SUMMARY: The National Environmental Conflict Resolution (ECR) Advisory Committee, of the U.S. Institute for Environmental Conflict Resolution, has postponed the Committee's teleconference previously noticed and scheduled for September 15, 2004, to October 7, 2004. The call will occur from 2 p.m. to approximately 4 p.m. eastern daylight time on October 7, 2004. Members of the public may participate in the call by dialing 1–800–930–9002 and entering a passcode: 8072291.

During this teleconference, the Committee will discuss: the Committee's first draft report, next steps for the Committee and planning for future Committee work. The draft report by the Committee can be viewed at *http://www.ecr.gov/necrac/reports.htm*.

Members of the public may make oral comments on the teleconference or submit written comments. In general, each individual or group making an oral presentation will be limited to five minutes, and total oral comment time will be limited to one-half hour at the end of the call.

Written comments may be submitted by mail or by e-mail to *gargus@ecr.gov*. Written comments received in the U.S. Institute office far enough in advance of a meeting may be provided to the Committee prior to the meeting; comments received too near the meeting date to allow for distribution will normally be provided to the Committee at the meeting. Comments submitted during or after the meeting will be accepted but may not be provided to the Committee until after that meeting.

FOR FURTHER INFORMATION CONTACT: Any member of the public who desires further information concerning the teleconference or wishes to submit oral or written comments should contact Tina Gargus, Special Projects Coordinator, U.S. Institute for Environmental Conflict Resolution, 130 S. Scott Avenue, Tucson, AZ 85701; phone (520) 670–5299, fax (520) 670–5530, or e-mail at *gargus@ecr.gov*. Requests to make oral comments must be in writing (or by e-mail) to Ms. Gargus and be received no later than 5 p.m. mountain standard time on Friday, October 1, 2004. Copies of the draft meeting agenda may be obtained from Ms. Gargus at the address, phone and e-mail address listed above.

Dated: September 10, 2004.

Christopher L. Helms,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. 04–20880 Filed 9–15–04; 8:45 am]

BILLING CODE 6820–FN–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR part 63—Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* One time.

5. *Who is required or asked to report:* The State of Nevada, local governments, or affected Indian Tribes, or their representatives, requesting consultation with the NRC staff regarding review of

the potential high-level waste geologic repository site, or wishing to participate in a license application review for the potential geologic repository.

6. *An estimate of the number of responses:* 9.

7. *The estimated number of annual respondents:* 3.

8. *The number of hours needed annually to complete the requirement or request:* 363 (An average of 40 hours per response for consultation requests, 80 hours per response for license application review participation proposals, and one hour per response for statements of representative authority).

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR part 63 requires the State of Nevada, local governments, or affected Indian Tribes to submit certain information to the NRC if they request consultation with the NRC staff concerning the review of the potential repository site, or wish to participate in a license application review for the potential repository. Representatives of the State of Nevada, local governments, or affected Indian Tribes must submit a statement of their authority to act in such a representative capacity. The information submitted by the State, local governments, and affected Indian Tribes is used by the Director of the Office of Nuclear Material Safety and Safeguards as a basis for decisions about the commitment of NRC staff resources to the consultation and participation efforts.

A copy of the final 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 should be directed to the OMB reviewer listed below by October 18, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

OMB Desk Officer, Office of Information and Regulatory Affairs (3150–0199), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated at Rockville, Maryland, this 9th day of September 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–20850 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR part 39—Licenses and Radiation Safety Requirements for Well Logging.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* Applications for new licenses and amendments may be submitted at any time. Applications for renewal are submitted every 10 years. Reports are submitted as events occur.

5. *Who is required or asked to report:* Applicants for and holders of specific licenses authorizing the use of licensed radioactive material for radiography.

6. *An estimate of the number of responses:* 1,800 (NRC: 391 [356 + 35 recordkeepers] and (Agreement States: 1409 [1,283 + 126 recordkeepers]).

7. *The estimated number of annual respondents:* 161 (35 NRC licensees and 126 Agreement State licensees).

8. *The number of hours needed annually to complete the requirement or request:* 34,933 hours. The NRC licensees total burden is 7,594 hours (111 reporting hrs plus 7,483 recordkeeping hrs). The Agreement State licensees total burden is 27,339 hours (405 reporting hrs plus 26,934 recordkeeping hrs). The average burden per response for both NRC licensees and Agreement State licensees is 3.2 hours, and the burden per recordkeeper is 214 hours.

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR part 39 establishes radiation safety requirements for the use of radioactive material in well logging operations. The information in the applications, reports and records is used by the NRC staff to ensure that the health and safety of the public is protected and that licensee possession and use of source and byproduct material is in compliance with license and regulatory requirements.

A copy of the final 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 World Wide 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 should be directed to the OMB reviewer listed below by October 18, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. OMB Desk Officer, Office of Information and Regulatory Affairs (3150–0130), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated at Rockville, Maryland, this 8th day of September 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–20853 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U. S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR Part 34—Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* Applications for new licenses and amendments may be submitted at any time. Applications for renewal are submitted every 10 years. Reports are submitted as events occur.

5. *Who is required or asked to report:* Applicants for and holders of specific licenses authorizing the use of licensed radioactive material for radiography.

6. *An estimate of the number of responses:* 867 (NRC: 188 [67 + 126 recordkeepers] and (Agreement States: 674 [220 + 454 recordkeepers]).

7. *The estimated number of annual respondents:* 580 (126 NRC licensees and 454 Agreement State licensees).

8. *The number of hours needed annually to complete the requirement or request:* 243,922 hours. The NRC licensees total burden is 48,335 hours (85 reporting hrs [an average of 1.3 hours per response] plus 48,250 recordkeeping hrs [an average of 384 hours per recordkeeper]). The Agreement State licensees total burden is 195,587 hours (299 reporting hrs [an average of 1.4 hours per response] plus 195,414 recordkeeping hrs [an average of 430 hours per recordkeeper]).

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR part 34 establishes radiation safety requirements for the use of radioactive material in industrial radiography. The information in the applications, reports and records is used by the NRC staff to ensure that the health and safety of the public is protected and that licensee possession and use of source and byproduct material is in compliance with license and regulatory requirements.

A copy of the final 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 World Wide 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 should be directed to the OMB reviewer listed below by October 18, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

OMB Desk Officer, Office of Information and Regulatory Affairs (3150–0007), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated in Rockville, Maryland, this 8th day of September, 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–20854 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–331, 50–255, 50–266, 50–301, 50–282 AND 50–306]

Nuclear Management Company, LLC; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed no Significant Hazards Consideration Determination, and Opportunity for A Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR–49, DPR–20, DPR–24, DPR–27, DPR–42 and DPR–60 issued to Nuclear Management Company, LLC, (the licensee) for operation of the Duane Arnold Energy Center located in Linn County, Iowa; the Palisades Plant located in Van Buren County, Michigan; the Point Beach Nuclear Plant, Units 1 and 2, located in Town of Two Creeks, Manitowoc County, Wisconsin; and the Prairie Island Nuclear Generating Plant, Units 1 and 2, located in Goodhue County, Minnesota, respectively.

The proposed amendments allow entry into a mode or other specified condition in the applicability of a technical specification (TS), while in a condition statement and the associated required actions of the TS, provided the licensee performs a risk assessment and manages risk consistent with the program in place for complying with the requirements of Title 10 of the Code of Federal Regulations (10 CFR), Part 50, Section 50.65(a)(4). Limiting Condition for Operation (LCO) 3.0.4 exceptions in individual TSs would be eliminated, and Surveillance Requirement (SR) 3.0.4 revised to reflect the LCO 3.0.4 allowance.

This change was proposed by the industry's Technical Specification Task Force (TSTF) and is designated TSTF–359. The NRC staff issued a notice of opportunity for comment in the **Federal Register** on August 2, 2002 (67 FR 50475), on possible amendments concerning TSTF–359, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 4, 2003 (68 FR 16579). The licensee affirmed the applicability of the following NSHC determination in its application dated December 23, 2003.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facilities in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a

margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. Being in a TS condition and the associated required actions is not an initiator of any accident previously evaluated. Therefore, the probability of an accident previously evaluated is not significantly increased. The consequences of an accident while relying on required actions as allowed by proposed LCO 3.0.4, are no different than the consequences of an accident while entering and relying on the required actions while starting in a condition of applicability of the TS. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Entering into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by this change will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change allows entry into a mode or other specified condition in the applicability of a TS, while in a TS condition statement and the associated required actions of the TS. The TS allow operation of the plant without the full complement of equipment through the conditions for not meeting the TS LCO. The risk associated with this allowance is managed by the imposition of required actions that must be performed within the prescribed completion times. The net effect of being in a TS condition on the margin of safety is not considered significant. The proposed change does not alter the required actions or completion times of the TS. The proposed change allows TS conditions to be entered, and the associated required actions and completion times to be used in new circumstances. This use is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The change also eliminates current allowances for utilizing required actions and completion times in similar circumstances, without assessing and managing risk. The net change to the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendments before expiration of the 60-day period provided that its final determination is that the amendments involve no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of a facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which

may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment requests involve no significant hazards consideration, the Commission may issue the amendments and make them immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments. If the final determination is that the amendment requests involve a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by email to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016, the attorney for the licensee.

For further details with respect to this action, see the application for amendments dated December 23, 2003, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 9th day of September 2004.

For the Nuclear Regulatory Commission

L. Mark Padovan,

Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–20851 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste, Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACNW Subcommittee on Planning and Procedures will hold a meeting on September 24, 2004, at the Suncoast Hotel (Fairway 2 Room), 9090 Alta Drive, Las Vegas, Nevada.

The entire meeting will be closed to public attendance pursuant to 5 U.S.C. 552b(c) (2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACNW, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The Subcommittee will continue to discuss self-assessment of ACNW performance in CY 2004, potential operational areas for improved effectiveness, and other activities related to the conduct of ACNW business.

Further information regarding this meeting can be obtained by contacting Mr. Howard J. Larson, Assistant Director for ACNW/Team Leader (telephone 301/415–6805), between 7:30 a.m. and 4 p.m. (e.t.).

Dated: September 9, 2004.

Michael R. Snodderly,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 04–20858 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste (ACNW); Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 153rd meeting on September 22–23, 2004, at the Suncoast Hotel (Ballroom A), 9090 Alta Drive, Las Vegas, Nevada.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

Wednesday, September 22, 2004

(1) 8–8:10 a.m. Opening Statement

Working Group on the Evaluation of Igneous Activity and its Consequences at a Geologic Repository at Yucca Mountain, Nevada (Open)

(2) 8:10–8:20 a.m. Greeting and Introductions
Working Group Session; 1 Geologic Considerations in the Estimation of Probability of Igneous Activity at Yucca Mountain
(3) 8:20–8:50 a.m.[1] NRC Perspective on Volcanism Modeling Issues
(4) 8:50–9:50 a.m. NRC Overview of Igneous Activity in the Yucca Mountain Region
9:50–10:10 a.m. * * * Break * * *
(5) 10:10–10:55 a.m. 1996 Probabilistic Volcanic Hazards Analysis: One Subject Matter Experts' Perspective
(6) 10:55–11:40 a.m. Alternative Views on the Likelihood of an Igneous Event in the Yucca Mountain Region
11:40–1 p.m. * * * Lunch * * *
(7) 1–2 p.m. Session 1 Working Group Roundtable Discussion
(8) 2–2:30 p.m. Public Comments
2:30–2:45 p.m. * * * Break * * *
Working Group Session 2; Characterization of Magma/Repository Interactions
(9) 2:45–3:30 p.m. NRC Staff Perspective on the Modeling of Magma/Repository Interactions
(10) 3:30–4:15 p.m. 2002 Recommendations of the DOE-Sponsored Igneous Consequences Peer Review Panel: One Panelist's Perspective
(11) 4:15–5 p.m. Alternative Views on the Modeling of Magma/Repository Interactions at Yucca Mountain
(12) 5–6 p.m. Session 2 Working Group Roundtable Discussion
(13) 6–6:30 p.m. Public Comments
Adjourn Day 1

Thursday, September 23, 2004

(14) 8–8:10 a.m. Opening Statement
Working Group Session 3; Biosphere Doses Due to Disruptive Igneous Events
(15) 8:10–9:40 a.m. NRC Staff Perspective on Challenges to Modeling Doses due to Disruptive Igneous Events
(16) 9:40–12 p.m. ACNW Invited Speakers on Biosphere Dose Modeling Issues
16.1 Perspectives on Aerosol Modeling Issues
16.2 Perspectives on Resuspension Modeling Issues
16.3 Perspectives on Dose Modeling Issues
12–1 p.m. * * * Lunch * *
(17) 1–2 p.m. Session 3 Working Group Roundtable Discussion
(18) 2–3 p.m. Presentations by Stakeholder Organizations
3–3:15 p.m. * * * Break * * *
(19) 3:15–4:15 p.m. Panel and Committee Summary Discussion
(20) 4:15–4:45 p.m. Epilogue Remarks
(21) 4:45–5 p.m. Closing Comments by the Working Group Chairman
(22) 5–5:30 p.m. Discussion of ACNW Letter Report
5:30–6 p.m. * * * Break * * *
(23) 6–7 p.m. Future ACNW Activities/Report of the Planning and Procedures Subcommittee
Adjourn 153rd ACNW Meeting

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on October 16, 2003 (68 FR 59643). In accordance with these procedures, oral or written statements may be presented by members of the public. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Persons desiring to make oral statements should notify Mr. Howard J. Larson, Assistant Director for ACNW/Team Leader (telephone 301/415–6805), between 7:30 a.m. and 4 p.m. e.t., as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting will be limited to selected portions of the meeting as determined by the ACNW Chairman.

Information regarding the time to be set aside for taking pictures may be obtained by contacting the ACNW office prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should notify Mr. Larson as to their particular needs.

Further information regarding topics to be discussed, whether the meeting has been canceled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefore can be obtained by contacting Mr. Larson.

ACNW meeting agenda, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr@nrc.gov*, or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/* (ACRS & ACNW Mtg schedules/agendas).

Dated: September 10, 2004.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 04–20859 Filed 9–15–04; 8:45 am]

BILLING CODE 7590–01–P

[1] Presentation time should not exceed 50 percent of the total time allocated for a specific agenda item. The remaining 50 percent of the time is reserved for discussion.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50338; File No. S7–05–04]

RIN 3235–AJ02

Collection Practices Under Section 31 of the Exchange Act

AGENCY: Securities and Exchange Commission.

ACTION: Notice of OMB approval of collection of information.

FOR FURTHER INFORMATION CONTACT: Michael Gaw, Senior Special Counsel, 202–942–0158, or Christopher Solgan, Attorney, 202–942–7937; Division of Market Regulation; Securities and Exchange Commission; 450 5th Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget has approved the collection of information requirements titled "Rule 31—Section 31 transaction fees; Rule 31T—Temporary Rule regarding fiscal year 2004; Form R31—Form for reporting covered sales and covered round turn transactions under Section 31 of the Securities Exchange Act of 1934" (OMB Control No. 3235–0597). The Commission adopted Rules 31 and 31T and Form R31 in June 2004.[1]

Dated: September 9, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–20845 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[1] *See* Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004).

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:

Rule 17a–3, SEC File No. 270–026, OMB Control No. 3235–0033.

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") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17a–3 [17 CFR 240.17a–3] under the Securities Exchange Act of 1934 requires records to be made by certain exchange members, brokers, and dealers, to be used in monitoring compliance with the Commission's financial responsibility program and antifraud and antimanipulative rules as well as other rules and regulations of the Commission and the self-regulatory organizations. It is estimated that approximately 6,900 active broker-dealer respondents registered with the Commission incur an average burden of 2,421,195 hours per year to comply with this rule. The Commission believes that requirements included in Rule 17a–3(a)(17) relating to new account data would be performed by clerical workers. The hourly wage of the average person who would be providing customers with account record information is $24 per hour.[1] The hourly wage of the average person who would be updating account record information is $25 per hour.[2] Thus the aggregate cost of these hours is about $16.86 million ((601,753 hours × $24)[3] + (96,742 hours × $25)[4]). The Commission believes that requirements contained in the rest of Rule 17a–3 would be performed by individuals in a broker-dealer's compliance department at $82 per hour.[5] Thus, the dollar cost of the 4,600 yearly hours incurred as a result of these rules is 1,722,700 × 82 = $171.66 million. The total cost of ongoing compliance with Rule 17a–3 is $16.86 + $171.66 = $188.52 million.

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 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

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: September 8, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2199 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[1] This figure is based on the SIA Report on Office Salaries In the Securities Industry 2003 (Retail Sales Assistant, Junior) and includes 35% for overhead charges.

[2] This figure is based on the SIA Report on Office Salaries In the Securities Industry 2003 (Data Entry Clerk, Senior) and includes 35% for overhead charges.

[3] This figure comes to approximately $14,442,072.

[4] This figure comes to approximately $2,418,550.

[5] This figure is based on statistics collected by the Commission's Office of Economic Analysis.

SECURITIES AND EXCHANGE COMMISSION

[File No. 22–28755]

Application and Opportunity for Hearing: Petroleos Mexicanos and the Pemex; Project Funding Master Trust

September 10, 2004.

The Securities and Exchange Commission gives notice that Petroleos Mexicanos (Pemex) and the Pemex Project Funding Master Trust have filed an application under Section 304(d) of the Trust Indenture Act of 1939. Pemex and the Master Trust ask the Commission to exempt from the provisions of Section 316(b) of the 1939 Act: (1) An indenture between Pemex, certain subsidiary guarantors of Pemex and Deutsche Bank Trust Company Americas, as trustee and (2) an indenture between the Master Trust, Pemex as guarantor, certain subsidiary guarantors of Pemex and Deutsche Bank Trust Company Americas, as trustee. The indentures relate to debt securities of Pemex and the Master Trust that will be issued in the future and that will be qualified under the 1939 Act.

Section 304(d) of the 1939 Act, in part, authorizes the Commission to exempt conditionally or unconditionally any indenture from one or more provisions of the 1939 Act. The Commission may provide an exemption under Section 304(d) if it finds that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the 1939 Act.

Section 316(b) provides, with stated exceptions, that, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective due dates, shall not be impaired or affected without the consent of such holder * * *

The application requests an exemption from Section 316(b) to allow the inclusion of a "collective action clause" in each of the indentures at issue. These collective action clauses would permit, under specified circumstances described in the application, an amendment of payment terms (including the amount due as principal or interest and the maturity date) with the consent of the holders of a supermajority (75%) of the outstanding principal amount of debt securities. Absent an exemption, the 1939 Act would preclude the inclusion of collective clauses in indentures qualified under the 1939 Act.

In their application, Pemex and the Master Trust allege that:

1. Pemex is a decentralized entity of the federal government of Mexico. It is wholly owned and controlled by the Mexican federal government and thus has no private shareholders. Because Mexico does not guarantee Pemex's debt, Pemex is not considered a foreign government or political subdivision of the Mexican government for the purposes of Schedule B of the Securities Act of 1933, and instead follows the rules and regulations applicable to foreign private issuers. Furthermore, in connection with offerings registered under the 1933 Act, Pemex and the Master Trust qualify their indentures under the 1939 Act based on the understanding that a government guaranty would be necessary for Pemex and the Master Trust to fall within the exemption provided by Section 304(a)(6) of the 1939 Act.

2. Under a subsidiary guarantee agreement, Pemex's three principal operating subsidiaries, each of which is also a decentralized public entity of the federal government of Mexico, jointly and severally guarantee payment of principal and interest on Pemex's debt.

3. The Master Trust is a Delaware statutory trust established by Pemex as a financing vehicle to segregate the funding of its long-term productive infrastructure projects and take advantage of preferential budgetary treatment. Pemex is the only beneficiary of the Master Trust and controls the Master Trust in all of its activities. Pemex guarantees all of the Master Trust's debt, and the subsidiary

guarantors, in turn, jointly and severally guarantee Pemex's payment obligations as guarantors. The Master Trust has no shareholders, issues no subordinated debt and is consolidated into Pemex's consolidated financial statements prepared in accordance with Mexican generally accepted accounting principles.

4. As noted above, in connection with previous offerings registered under the 1933 Act, including exchange offers, Pemex and the Master Trust have qualified their indentures under the 1939 Act. Pemex and the Master Trust will qualify the indentures at issue under the 1939 Act.

5. Mexican government debt restructurings have proceeded in tandem with Pemex's debt restructuring primarily because Pemex's debt makes up a substantial part of Mexican public sector debt and, accordingly, investors view the debt of Pemex (and the Master Trust) and the debt of Mexico as inextricably connected. Any future debt restructuring of Mexico's public debt would thus be expected to include the debt of Pemex and the Master Trust.

6. Mexico, as a sovereign issuer to which the 1939 Act does not apply pursuant to Section 304(a)(6) of the 1939 Act, recently introduced collective action clauses in its debt securities. The collective action clauses permit amendment of the payment terms and certain key nonfinancial terms with the consent of the holders of 75% of the outstanding principal amount of the debt securities. Because Mexican government debt restructurings have historically been negotiated and implemented in tandem with restructuring of the debt of Pemex, Pemex and the Master Trust request that they be permitted to issue debt securities in the future under indentures that contain collective action clauses similar to those that the Mexican government has recently introduced.

7. The collective action clauses are contained in sections 9.02 of the indentures that have been submitted as Exhibit A and Exhibit B to the application. These provisions are designed to ensure that the collective action clauses are narrowly tailored to be invoked only in situations in which an effective restructuring of Pemex's and the Master Trust's debt is necessary in order to effect a tandem general restructuring of the Mexican government's debt. Specifically, the proposed collective action clauses would permit amendments to payment terms with the consent of the holders of 75% of the principal amount of the series of debt securities affected thereby in the event that such an amendment is being made in connection with a "General Restructuring" by Mexico. "General Restructuring" is defined as a request by Mexico for an amendment or an exchange offer by Mexico, each of which affects a matter that would (if made to Pemex's or the Master Trust's debt securities) constitute a "Reserved Matter," and that applies to either (1) at least 75% of the aggregate principal amount of outstanding Mexico External Market Debt that will become due and payable within a period of five years following such request or exchange offer or (2) at least 50% of the aggregate principal amount of Mexico External Market Debt outstanding at the time of such request or exchange offer. Mexico External Market Debt is defined as all debt securities issued by the Mexican government and indebtedness of the Mexican government for borrowed money which is payable or at the option of its holder may be paid in a currency other than Mexican pesos, excluding any such indebtedness that is owed to or guaranteed by multilateral creditors, export credit agencies and other international or governmental institutions. The principal amount of Mexico External Debt that is the subject of any request by Mexico for such an amendment will be added to the principal amount of Mexico External Market Debt that is the subject of a substantially contemporaneous exchange offer by Mexico for the purposes of determining the existence of a general restructuring.

8. As decentralized entities of the federal government, like the Mexican government itself, Pemex and its subsidiary guarantors are not subject to commercial bankruptcy protection under Mexican law or Chapter 11 of the U.S. Bankruptcy Code. Although the Master Trust is eligible for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code, in the event of such a filing or reorganization thereunder, the Master Trust's creditors could still continue to enforce their rights against Pemex under its guaranty of the Master Trust's debt securities notwithstanding any such filing or proceeding. Because a bankruptcy filing by the Master Trust would not affect Pemex's and the subsidiary guarantors' obligations as guarantors, Pemex and the Master Trust are thus not able to avail themselves of the benefits of consensual debt restructuring that are afforded other companies under Mexican and U.S. bankruptcy law.

9. Because Pemex, like the Mexican government, has no recourse to formal bankruptcy or reorganization proceedings under Mexican or U.S. law, with respect to its own debt securities or its guaranty of the debt securities issued by the Master Trust, and given the practical impossibility of obtaining consents from the holders of 100% of the debt that will be issued, the collective clauses are necessary for an effective restructuring of the external bonds of Pemex and the Master Trust.

10. The proposed collective action clauses would place an investor in debt securities issued or guaranteed by Pemex in no materially worse position than it would be in were Pemex able to avail itself of Mexican or U.S. bankruptcy proceedings.

11. In addition to the collective action clauses, Pemex and the Master Trust propose to increase the percentage of holders needed to consent to modifications of certain key nonpayment terms, expand the scope of persons who are excluded from voting and quorum purposes and add a restriction on their ability to issue further debt securities that are fungible with the debt securities originally issued at a discount. These measures are intended to provide a further safeguard against the potential abuses that the 1939 Act intended to rectify and protect investors from other coercive measures.

Any interested persons should look to the application for a more detailed statement of the asserted matters of fact and law. The application is on file in the Commission's Public Reference Section, File Number 22–28755, 450 Fifth Street, NW., Washington, DC 20549.

The Commission also gives notice that any interested persons may request, in writing, that a hearing be held on this matter. Interested persons must submit those requests to the Commission no later than October 12, 2004. Interested persons must include the following in their request for a hearing on this matter:

—The nature of that person's interest;

—The reasons for the request; and

—The issues of law or fact raised by the application that the interested person desires to refute or request a hearing on.

The interested person should address this request for a hearing to: Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. At any time after October 12, 2004, the Commission may issue an order granting the application, unless the Commission orders a hearing.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2205 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27889]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

September 9, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to 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 October 4, 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 October 4, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Exelon Corporation, et al. (70–9645)

Exelon Corporation, a registered holding company under the Act ("Exelon") at 10 South Dearborn Street, 37th Floor, Chicago, Illinois and three subsidiary companies, Commonwealth Edison Company, an electric public-utility company and a holding company exempt from registration by order under section 3(a)(1) of the Act ("ComEd"), at 10 South Dearborn Street, 37th Floor, Chicago, Illinois, PECO Energy Company, a public-utility company ("PECO"), at 2301 Market Street, Philadelphia, Pennsylvania and Exelon Generation Company, LLC, a public-utility company ("Genco"), at 300 Exelon Way, Kennett Square, Pennsylvania (collectively "Applicants"), have filed a post-effective amendment under sections 9, 10 and 11 of the Act to an application/declaration previously filed.

PECO is a public-utility company engaged in the purchase, transmission, distribution and sale of electricity and the purchase, distribution and sale of natural gas in Pennsylvania. ComEd is a public-utility company and exempt holding company engaged in the purchase, transmission, distribution and sale of electricity in Illinois. Genco is a public-utility company engaged in the purchase, generation and sale of electricity in Pennsylvania, Illinois, and elsewhere.

In its order approving the merger ("Merger") that created Exelon (Holding Co. Act Release No. 27256, October 19, 2000) ("Merger Order"), the Commission found that the electric properties of Exelon and its subsidiary companies would be interconnected within the meaning of section 2(a)(29)(A) of the Act. That finding was based in part on the fact that Exelon had obtained a 100 MW firm west-to-east contract path ("Contract Path") from the interface of the transmission systems of American Electric Power Company, Inc. ("AEP") and ComEd to PJM Interconnection, LLC ("PJM"). At the time of the Merger, PECO was a member of what was then the PJM independent system operator. Exelon committed to file a post-effective amendment seeking Commission approval of any alternative arrangement to satisfy the interconnection requirement. Exelon asserts that AEP will join PJM effective October 1, 2004. According to Exelon, upon integration of AEP into PJM, the transmission facilities of ComEd will be physically interconnected with those of PECO through the facilities of other members of PJM. Accordingly, Exelon requests that the Commission issue an order finding that, once AEP joins PJM, the Exelon interconnection requirement will be satisfied by the membership of ComEd and PECO in PJM. Exelon asks the Commission to further determine that, with the entry of AEP into PJM, Exelon is not required to renew the Contract Path as a basis for interconnection under the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2206 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50341; File No. SR–BSE–2004–14]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by the Boston Stock Exchange, Inc. To Amend Its Intermarket Options Linkage Rules

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 6, 2004, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the BSE. On June 9, 2004, the BSE submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE proposes to amend its rules relating to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

The text of the proposed rule change, as amended, is below. Proposed additions are in *italics*.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from John Boese, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 8, 2004 ("Amendment No. 1"). In Amendment No. 1, the BSE amended the proposed rule text to clarify that the general requirement that the Exchange's Firm Customer Quote Size ("FCQS") and Firm Principal Quote Size ("FPQS") be at least 10 contracts would not apply if the BSE were disseminating a quotation of fewer than 10 contracts. In that case, the Exchange may establish a FQCS or FPQS equal to its disseminated size.

Rules of the Boston Options Exchange Facility

Trading of Options Contracts on BOX

Chapter XII Intermarket Linkage Rules

Sec. 1 Definitions

* * * * *

(g) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of (a) The number of option contracts that the Participant sending a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant receiving a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Customer orders entered directly for execution in that market. This number shall be at least 10 *contracts unless the receiving Participant Exchange is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

(h) "Firm Principal Quote Size" means the number of option contracts that a Participant Exchange guarantees it will execute at its disseminated quotation for incoming Principal Orders in an Eligible Option Class. This number shall be 10. *However, if the Participant Exchange is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the BSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The BSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to make the rules of the Boston Options Exchange ("BOX"), a facility of the BSE, consistent with the other participants in the Linkage Plan ("Participants") with regard to the "natural size" of quotations under the Linkage Plan.[4] Specifically, the Linkage Plan currently requires that the Participants be firm for both Principal Acting as Agent ("P/A") and Principal Orders for at least 10 contracts. Concurrent with proposed Joint Amendment No. 13, the current proposed rule change would eliminate this requirement, permitting BOX to be firm for the actual size of its quotation, even if this amount is less than 10 contracts. This change would enable BOX to conform its quotation requirements for incoming Principal and P/A Orders to be consistent with its quotation requirements for non-Linkage orders.

2. Statutory Basis

The BSE believes that the proposed rule is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5)[6] in particular in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The BSE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the BSE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BSE–2004–14 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–

[4] The Participants have filed an amendment to the Linkage Plan to change the definitions of "Firm Customer Quote Size" ("FCQS") and "Firm Principal Quote Size" ("FPQS") (Joint Amendment No. 13). *See* Securities Exchange Act Release No. 50211 (August 18, 2004), 69 FR 52050 (August 26, 2004) (File No. 4–429).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

2004–14 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–2228 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50340; File No. SR–CBOE–2004–41]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Minimum Size Guarantees for Linkage Orders

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 7, 2004, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its rules to conform to Amendment No. 13 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

The text of the proposed rule change is below. Proposed additions are in *italics.*

* * * * *

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Section E: Intermarket Linkage

Rule 6.80 Definitions

(1)–(8) (No change.)

(9) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of (a) The number of option contracts that the Participant Exchange sending a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant Exchange receiving a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Customer orders entered directly for execution in that market. The Firm Customer Quote Size will be at least 10 contracts for each series of an Eligible Option Class *unless the receiving Participant Exchange is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

(10) "Firm Principal Quote Size" means the number of options contracts that a Participant Exchange guarantees it will execute at its disseminated quotation for incoming Principal Orders in an Eligible Option Class. This number shall be no fewer than 10, *however if the Participant Exchange is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

(11)–(21) (No change.)

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to conform CBOE's linkage rules to proposed Amendment No. 13 to the Linkage Plan, which would accommodate "natural size" of quotations.[3] Specifically, the Linkage Plan and CBOE rules currently require that the Exchange be firm for both Principal Acting as Agent ("P/A") and Principal Orders for at least 10 contracts (the "10-up" requirement). The proposed rule change would permit CBOE members to be firm for the actual size of their quotation, even if this amount is less than 10 contracts.

The Participants adopted the 10-up requirement for the Linkage Plan at a time when all the exchanges had rules requiring that their quotations be firm for customer orders for at least 10 contracts.[4] The CBOE no longer applies the 10-up requirement to all its quotes.[5] Thus, the CBOE now seeks to conform its quotation requirements for incoming Principal and P/A Orders to be more consistent with the quotation requirements for non-Linkage orders.

The proposed rule change would amend the definitions of both FCQS and FPQS. While CBOE's Linkage rules would maintain a general requirement that the FCQS and FPQS be at least 10 contracts, that minimum would not apply if CBOE were disseminating a quotation of fewer than 10 contracts. In that case, the Exchange may establish a FQCS or FPQS equal to its disseminated size.

As with Principal and P/A Orders today, if the order is of a size eligible for automatic execution ("auto-ex"),[6] the receiving exchange must provide for the auto-ex of the order. If this is not the case (for example, the receiving exchange's auto-ex system is not engaged), the receiving exchange still must provide a manual execution for at least the FCQS or FPQS, as appropriate (in this case, the size of its disseminated quotation of less than 10 contracts).

2. Statutory Basis

The CBOE believes that the proposed rule is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5)[8] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The participants in the Linkage Plan ("Participants") have filed an amendment to the Linkage Plan to change the definitions of "Firm Customer Quote Size" ("FCQS") and "Firm Principal Quote Size" ("FPQS") (Joint Amendment No. 13). *See* Securities Exchange Act Release No. 50211 (August 18, 2004), 69 FR 52050 (August 26, 2004) (File No. 4–429).

[4] *See* Securities Exchange Act Release No. 44383 (June 1, 2001), 66 FR 30959 (June 8, 2001) (SR–Amex–2001–18; SR–CBOE–2001–15; SR–ISE–2001–07; SR–PCX–2001–18; and SR–Phlx–2001–37).

[5] *See* CBOE Rule 8.51(c).

[6] At the request of the Exchange, Commission staff removed an extraneous reference provided in the original filing regarding the automatic execution size at exchanges sending and receiving Principal Orders. Telephone conversation between Angelo Evangelou, CBOE and Tim Fox, Attorney, Division of Market Regulation, Commission, on August 23, 2004.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the CBOE consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2004–41 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2004–41 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–2226 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50339; File No. SR–ISE–2004–01]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendments No. 1 and 2 Thereto, by the International Securities Exchange, Inc. Relating to Minimum Size Guarantees for Linkage Orders

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 13, 2004, the International Securities Exchange, Inc. ("ISE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the ISE. On May 10, 2004, the ISE submitted Amendment No. 1 to the proposed rule change.[3] On July 30, 2004, the Exchange submitted Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its rules regarding the minimum size of firm quotes for Principal Orders and Principal Acting as Agent Orders ("P/A Orders") received through the intermarket options linkage ("Linkage"). The ISE proposes that this rule change take effect upon approval by the Commission of both the instant proposal and the corresponding Joint Amendment No. 13 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

The text of the proposed rule change, as amended, is below. Proposed additions are in *italics*.

* * * * *

Chapter 19 Intermarket Linkage

Rule 1900. Definitions

The following terms shall have the meaning specified in this Rule solely for purposes of this Chapter 19:

* * * * *

(7) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of: (a) The number of option contracts that the Participant Exchange sending a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant Exchange receiving a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market. This number shall be at least 10 *unless the receiving Participant Exchange is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 7, 2004 ("Amendment No. 1"). In Amendment No. 1, the ISE amended the proposed rule text to clarify that the general requirement that the Exchange's Firm Customer Quote Size ("FCQS") and Firm Principal Quote Size ("FPQS") be at least 10 contracts would not apply if the ISE were disseminating a quotation of fewer than 10 contracts. In that case, the Exchange may establish a FQCS or FPQS equal to its disseminated size.

[4] *See* Letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division, Commission, dated July 28, 2004 ("Amendment No. 2"). In Amendment No. 2, the Exchange submitted a new Form 19b–4, which replaced and superceded the original filing in its entirety.

(8) "Firm Principal Quote Size" means the number of option contracts that a Participant Exchange guarantees it will execute at its disseminated quotation for incoming Principal Orders in an Eligible Option Class. This number shall be 10, *however if the Participant Exchange is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to limit the requirement that ISE Primary Market Makers provide minimum size guarantees for Principal and P/A Orders received through Linkage. This proposal would implement pending Amendment No. 13 to the Linkage Plan into the ISE rules, while providing uniformity between the minimum size guarantees that market makers provide for orders received through Linkage and orders received through other means.[5]

Until recently, the ISE required its Primary Market Makers to disseminate quotations assuring that the Exchange's best bid and offer ("BBO") be for a size of at least 10 contracts. However, the Commission recently approved an amendment to the Exchange rules that significantly changed those restrictions and obligations, permitting the dissemination of a BBO of less than 10 contracts.[6] Notwithstanding that rule change, the Linkage Plan continues to require that the ISE provide an automatic execution for at least 10 contracts for Principal and P/A Orders, regardless of the size of the Exchange's disseminated quotation (the "10-up requirement"). This is not a requirement that the ISE can unilaterally change; rather, any change to a Linkage Plan rule requires that the six options exchanges that are participants in the Linkage Plan ("Participants") unanimously agree to a Linkage Plan amendment, followed by corresponding changes to the rules of all the Participants.

While the Real Size Filing was pending at the Commission, the Participants agreed to submit Joint Amendment No. 13 to amend the Linkage Plan to eliminate the 10-up requirement. This proposed rule filing would implement that Linkage Plan Amendment by amending the ISE Rule definitions of FCQS and FPQS to recognize that an exchange's disseminated quotation size may be less than 10 contracts. However, as with Principal and P/A Orders today, if an order is of a size eligible for automatic execution at both the sending and receiving exchanges, the ISE will provide an automated execution of the Linkage order. If this is not the case, while the Exchange may allow the order to drop to manual handling, the ISE still must provide a manual execution for at least the FCQS or FPQS, as appropriate.

2. Statutory Basis

The ISE believes that the proposed rule is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5)[8] in particular in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change would provide uniformity between the minimum size guarantees that market makers provide for orders received through Linkage and orders received through other means.

B. Self-Regulatory Organization's Statement on Burden on Competition

The ISE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule

Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the ISE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2004–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–ISE–2004–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

[5] Telephone conversation between Michael J. Simon, Senior Vice President and General Counsel, ISE, and Tim Fox, Attorney, Division, Commission on August 3, 2004.

[6] *See* Securities Exchange Act Release No. 49602 (April 22, 2004), 69 FR 23841 (April 30, 2004) (SR–ISE–2003–26) (the "Real Size Filing").

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2004–01 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–2223 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50335; File No. SR–NASD–2004–136]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Implementation Date of Notice to Members 04–50 (Treatment of Commodity Pool Trail Commissions Under Rule 2810)

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 8, 2004, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b-4(f)(1) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is filing with the Commission a proposed rule change to delay the implementation date of *Notice to Members* 04–50 ("*NtM* 04–50") until October 12, 2004.

No changes to the text of NASD rules are required by this proposed rule change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 13, 2004, NASD filed *NtM* 04–50 with the SEC. In *NtM* 04–50, NASD announced that it was no longer going to exclude the payment of any trail commissions for commodity pool direct participation programs ("DPPs") from the underwriting compensation limits of Rule 2810 ("Direct Participation Programs" or "DPP Rule"). *NtM* 04–50 announced that, "effective immediately, in determining whether to issue a 'no objections' opinion in connection with a commodity pool DPP filed with the [NASD Corporate Financing] Department under Rule 2810, NASD staff will consider, among other things, whether the level of underwriting compensation, including the types of trail commission previously excluded, exceeds the 10% limitation in the DPP Rule." On July 22, 2004, the SEC published the Notice of Filing and Immediate Effectiveness of the *NtM* 04–50.[5]

In view of certain comments submitted to the SEC in response to SR–NASD–2004–108,[6] NASD is delaying the implementation date of *NtM* 04–50 until October 12, 2004. Thus, the policy announced in *NtM* 04–50 will not apply to commodity pool DPPs filed with the NASD Corporate Financing Department before October 12, 2004.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is in the public interest and will benefit investors in commodity pool DPPs by limiting the compensation that can be paid to members for selling commodity pool DPPs, and servicing the accounts that hold such investments, to the same amounts that apply to all other DPP investments. At the same time, the proposed rule change also provides additional time for commodity pool DPPs to adjust to the policy of *NtM* 04–50.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b-4(f)(1).

[5] Release No. 34–50065 (July 22, 2004), 69 FR 45870 (July 30, 2004) [File No. SR–NASD–2004–108] ("SR–NASD–2004–108").

[6] Eight comment letters were submitted to the Commission during the comment period. The NASD responded to these comment letters on August 31, 2004. These comment letters, the NASD response to these comment letters, and comment letters received after the end of the comment period may be examined at the places specified in Item IV below.

[7] 15 U.S.C. 78o-3(b)(6).

respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act[8] and Rule 19b-4(f)(1) thereunder,[9] which renders the proposal effective upon receipt of this filing by the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–136 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–136. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–136 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2203 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(i).

[9] 17 CFR 240.19b-4(f)(1).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50337; File No. SR–NYSE–2004–06]

Self-Regulatory Organizations; Order Granting Approval To Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. Relating to Amendments to Exchange Rule 104 and Rule 123

September 9, 2004.

On February 6, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder,[2] a proposed rule change to amend NYSE Rule 104.10 (Dealings by Specialists) to provide that customers may limit the ability of specialists to trade along with their orders or to invoke precedence based on size when the specialist is liquidating a position in its specialty security for its dealer account, and to make a corresponding change to NYSE Rule 123 (Records of Orders) concerning record keeping. On April 5, 2004, the Exchange amended the proposed rule change.[3] On July 14, 2004, the Exchange again amended the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on August 2, 2004.[5] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act,[6] applicable to a national securities exchange.[7] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[8] which requires, among other things that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Currently, when a specialist liquidates a position in his or her specialty security, the specialist is permitted to trade on parity with the crowd or may invoke precedence based on size.[9] The Exchange believes that there may be circumstances in which a customer will wish to preclude a specialist from trading on parity or invoking precedence based on size. Accordingly, the Exchange has proposed to amend NYSE Rule 104.10(6)(i) to include new paragraph (C) to provide that transactions by a specialist for his or her dealer account in liquidating or decreasing a position in a specialty security must yield to a customer's order in the crowd upon the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 2, 2004 and accompanying Form 19b–4 ("Amendment No. 1"). In Amendment No. 1, the NYSE clarified that, under the proposed rule change, customers may limit specialists from trading along with their orders and from invoking precedence based on size.

[4] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated July 13, 2004 and accompanying Form 19b–4 ("Amendment No. 2"). In Amendment No. 2, NYSE amended the proposed rule text and added additional explanatory material to clarify the proposal. Amendment No. 2 replaced the Exchange's original filing and Amendment No. 1 thereto in their entirety.

[5] *See* Securities Exchange Act Release No. 50090 (July 27, 2004), 69 FR 46197.

[6] *See* 15 U.S.C. 78f.

[7] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5).

[9] Specialist dealer transactions when liquidating a position are subject to specific affirmative market-making standards and review. NYSE Rule 104 requires that specialists' proprietary dealings be reasonably necessary to permit the specialist to maintain a fair and orderly market. In addition, specialists are required to obtain Floor Official approval for any liquidating sale transactions on a direct minus tick or purchase transactions on a direct plus tick.

included in the quote prior to the transaction. The customer's order will then participate in the transaction to the extent that priority, parity and precedence rules permit. In addition, the Exchange has proposed to amend NYSE Rule 123 to add new paragraph (g) to provide that a request to a specialist to yield to a customer order is a condition of that order and must be documented in accordance with applicable books and records requirements.[10]

By giving the crowd broker the ability to require that the specialist yield to his or her customer's order, the Commission believes that the proposed amendment will create more similarity in the way orders on the book and in the crowd are handled. The Commission further believes that the proposal may enhance the execution of customer orders on the Exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change, as amended, (SR–NYSE–2004–06) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2204 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50346; File No. SR–PCX–2004–84]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Definition of Firm Customer Quote Size and Firm Principal Quote Size Pursuant to the Intermarket Options Linkage Plan

September 10, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 1, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Pacific Exchange, Inc. ("PCX" or "Exchange") is proposing to amend the definitions of Firm Customer Quote Size ("FCQS") and Firm Principal Quote Size ("FPQS") pursuant to the intermarket options linkage ("Linkage").

The text of the proposed fee schedule is below. Proposed additions are *italicized.*

* * * * *

Rules of the Pacific Exchange, Inc.

* * * * *

Definitions

Rule 6.92(a)(1)–(8)—(No Change).

(9) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of (a) the number of option contracts that the Participant Exchange sending a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of an Eligible Option Class for Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant Exchange receiving a P/A Order guarantees it will automatically execute at its disseminated quotation in a series of Eligible Option Class for Customer orders entered directly for execution in that market. This number will be at least 10 *unless the receiving Participant Exchange is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

(10) "Firm Principal Quote Size" means the number of option contracts that a Participant Exchange guarantees it will execute at its disseminated quotation for incoming Principal Orders in an Eligible Option Class. This number will be at least 10 *however if the Participant Exchange is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

(11)–(21)—(No Change).

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to implement proposed Joint Amendment No. 13 to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan") into the PCX Rules.[3] Joint Amendment No. 13, together with this proposed rule change, would change the definitions of both FCQS and FPQS. While Joint Amendment No. 13 and this proposed rule change would maintain a general requirement that the FCQS and FPQS be at least 10 contracts, such a minimum would not apply if the Exchange were disseminating a quotation of fewer than 10 contracts. In that case, the Exchange may establish a FQCS or FPQS equal to its disseminated size.[4]

As with Principal and Principal Acting as Agent ("P/A") Orders today, if a Principal or P/A Order is of a size eligible for automatic execution ("auto-ex"),[5] the receiving Participant must provide for the auto-ex of the order. If this is not the case (for example, the receiving Participant's auto-ex system is not engaged), the receiving Participant may allow the order to drop to manual handling. However, the receiving Participant must nonetheless provide manual execution of the order for at least the FCQS or FPQS, as appropriate (in this case, the size of its disseminated quotation of less than 10 contracts). The proposed rule change would allow the Exchange to accommodate natural size of quotations for Linkage Orders.

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[10] Relevant rules include NYSE Rules 123 and 410 and Rules 17a–3 and a—4 under the Act, 17 CFR 240.17a—3 and 240.17a–4.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The participants in the Linkage Plan ("Participants") have filed an amendment to the Linkage Plan to change the definitions of FCQS and FPQS ("Joint Amendment No. 13"). *See* Securities Exchange Act Release No. 50211 (August 18, 2004), 69 FR 52050 (August 26, 2004) (File No. 4–429).

[4] The PCX would only disseminate a quotation of fewer than 10 contracts when the Exchange's rule, as approved by the Commission, permitted such dissemination.

[5] At the request of the Exchange, Commission staff removed an extraneous reference provided in the original filing regarding the automatic execution size at exchanges sending and receiving Principal Orders. Telephone conversation between Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX and Tim Fox, Attorney, Division of Market Regulation, Commission, on September 10, 2004.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,[8] to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule

Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the PCX consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2004–84 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number SR–PCX–2004–84. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2004–84 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–2224 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] At the request of the Exchange, Commission staff made a technical correction to this section of the filing. Telephone conversation between Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX and Tim Fox, Attorney, Division of Market Regulation, Commission, on September 10, 2004.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50332; File No. SR–Phlx–2004–49]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Fees Applicable to the Exchange's Electronic Trading Platform, Phlx XL

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on July 29, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. On August 13, 2004, Phlx submitted an amendment to the proposed rule change.[3] The proposed rule change has been filed by the Phlx as establishing or changing a due, fee, or other change, pursuant to Section 19(b)(3)(A)(ii) of the Act,[4] and Rule 19b–4(f)(2)[5] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its fee schedule in anticipation of the deployment of its electronic trading platform for options, Phlx XL.[6] Specifically, the Exchange proposes: (1) To establish charges applicable to Exchange Registered Options Traders ("ROTs") that submit proprietary electronic quotations ("streaming

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Richard S. Rudolph, Director and Counsel, Phlx, to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation, Commission, dated August 12, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx added a footnote to the text of its proposed fee schedule indicating that the 50% pass-through charge applicable to those Streaming Quote Traders to whom the Exchange supplies Hyperfeed data is subject to a pilot scheduled to expire on January 28, 2005. The Phlx also made technical, non-substantive changes to the proposed rule text.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

[6] *See* Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR–Phlx–2003–59).

quotes"),[7] and (2) to no longer charge the option specialist for listed options currently subject to the Exchange's Specialist Deficit (Shortfall) fee ("shortfall fee"),[8] when that option is offered on Phlx XL.

SQT Fees

The Phlx has determined to assess SQTs a 50% pass-through charge relating to costs borne by the Phlx for data it will provide to SQTs who desire to obtain from the Exchange real-time underlying data to enable them to price the overlying options ("Hyperfeed" costs)[9] in addition to any other applicable fees.[10] The 50% pass-through charge will be implemented beginning on the first day of deployment of the first option to trade on Phlx XL, and will apply on a pilot basis to those SQTs that the Exchange supplies Hyperfeed data for the first 180 days of deployment of Phlx XL.[11]

Shortfall Fee

The shortfall fee is a component of the Exchange's Specialist Fixed Fee calculation.[12] Therefore, for any options specialist that has elected the Specialist Fixed Fee and lists an option that was subject to the shortfall fee (which was used in calculating the Specialist Fixed Fee), the Specialist's Fixed Fee will be reduced by the amount of the shortfall fee. The Specialist Fixed Fee calculation and the shortfall fee will be pro-rated in the month in which the option is deployed on Phlx XL.[13]

The text of the proposed rule change is available at the Phlx, at the Commission, and on the Commission's Web site, *http://www.sec.gov/rules/sro/phlx.shtml*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change, as amended, is to adopt fees relating to Phlx XL. With respect to the Hyperfeed fee, the purpose is to recoup part of the costs borne by the Exchange for data supplied by the Exchange to SQTs in connection with the anticipated deployment of Phlx XL. The Exchange believes that the 50% pass-through cost should enable ROTs that wish to become SQTs to make the transition on a cost-effective basis, with the Exchange effectively absorbing 50% of the Hyperfeed costs during the 180 day deployment of Phlx XL. With respect to the shortfall fee, the purpose of the proposed rule change, as amended, is to address the effect of the shortfall fee calculation as it relates to options traded on Phlx XL. The Exchange believes that it would be unreasonable to impose a shortfall fee on specialists (once there are streaming quotes) when SQTs will be competing for market share on a relatively equal basis, as the shortfall fee was designed, in part, to create an incentive for specialists to promote the options they have been allocated.

2. Statutory Basis

The Phlx believes that its proposal to amend its schedule of dues, fees, and charges is consistent with Section 6(b) of the Act[14] in general, and furthers the objectives of Section 6(b)(4) of the Act[15] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members who become SQTs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[16] and Rule 19b–4(f)(2)[17] thereunder, because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, as amended, 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.[18]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send E-mail to *rule-comments@sec.gov*. Please include File

[7] Such ROTs are known as Streaming Quote Traders ("SQTs"). *See* Phlx Rule 1014(b).

[8] *See* Securities Exchange Act Release Nos. 48206 (July 22, 2003), 68 FR 44555 (July 29, 2004) (SR–Phlx–2003–45); and 48207 (July 22, 2003), 68 FR 44558 (July 29, 2003) (SR–Phlx–2003–47). The Exchange charges a fee of $0.35 per contract for specialists trading any Top 120 Option if 12% of the total national monthly contract volume for such Top 120 Option is not effected on the Exchange. The fee is limited to $10,000 per month per option provided that the total monthly market share effected on the Phlx in the Top 120 Option is equal to or greater than 50% of the volume threshold in effect.

[9] SQTs trading options on Phlx XL will use handheld devices for the purpose of streaming quotations in options in which they are assigned. The Exchange will not supply the handheld devices; SQTs will obtain the handheld devices from one of several Exchange-approved vendors. Some vendors provide underlying data to the SQT who uses their handheld as a service to enable such SQT to price overlying options, while other vendors do not. The Exchange will provide such underlying data, obtained from a third-party service provider, to those SQTs whose vendors do not provide such data as part of the service they provide to the SQT. The Hyperfeed fee represents a pass-through of 50% of the costs borne by the Exchange in obtaining and providing such data to such SQTs.

[10] Members who stream proprietary quotations in "Streaming Quote Options" traded on Phlx XL will also pay any Exchange transaction-related fees as well as non transactional-related fees and membership-related fees in effect during this time period, when applicable, such as trading post/booth, floor facility, shelf space and permit fees.

[11] The Commission notes that any changes or pilot extensions of the Hyperfeed data pass-through charge would require the Phlx to file a proposed rule change pursuant to Section 19(b) of the Act.

[12] *See* Securities Exchange Act Release Nos. 48459 (September 8, 2003), 68 FR 54034 (September 15, 2003) (SR–Phlx–2003–61); 49467 (March 24, 2004), 69 FR 17017 (March 31, 2004) (SR–Phlx–2004–17); and 49770 (May 25, 2004), 69 FR 31150 (June 2, 2004) (SR–Phlx–2004–31).

[13] The Exchange intends to roll out equity options on the Phlx XL in stages. Unlike the Hyperfeed fee, the shortfall fee calculation will not be limited to the first 180 calendar days of deployment of Phlx XL.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 240.19b–4(f)(2).

[18] For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on August 13, 2004, the date Phlx filed Amendment No. 1.

Number SR–Phlx–2004–49 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–49 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2200 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50333; File No. SR–Phlx–2004–48]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto Relating to SIG Indices, LLLP Disclaimer

September 9, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 28, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I and II below, which Items have been prepared by the Phlx. The Exchange has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. On August 19, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposed to amend Rule 1104A, Susquehanna Indices, LLP Indexes, to provide the name change and expand the coverage of the rule. Below is the proposed rule change. Proposed new language is *italicized*. Proposed deletions are in [brackets].[6]

* * * * *

Rule 1104A. [Susquehanna] *SIG* Indices, LLLP Indexes

[Susquehanna] *SIG* Indices, LLLP makes no warranty, express or implied, as to results to be obtained by any person or any entity from the use of the SIG Investment Managers Index™, [or] the SIG Cable, Media & Entertainment Index™, *the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, and the SIG Semiconductor Device Index™*, or any data included therein in connection with the trading of option contracts thereon, or for any other use. [Susquehanna] *SIG* Indices, LLLP makes no express or implied warranties of merchantability or fitness for a particular purpose for use with respect to the SIG Investment Managers Index™, [or] the SIG Cable, Media & Entertainment Index™, *the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, and the SIG Semiconductor Device Index* ™, or any data included therein.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose[7]

The purpose of the proposed rule change is to amend Phlx Rule 1104A which applies to indexes maintained by SIG Indices, LLLP (formerly known as "Susquehanna Indices, LLLP").[8] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Letter from Carla Behnfeldt, Director, Phlx to Mia Zur, Attorney, Division of Market Regulation ("Division"), Commission, dated August 18, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx replace the original proposed rule change in its entirety.

[6] The Exchange requested that the staff of the Division correct a minor error in the proposed rule text. Telephone discussion between Carla Behnfeldt, Director, Phlx and Mia Zur, Attorney, Division, Commission (August 25, 2004).

[7] The Phlx requested that the staff of the Division make minor non-substantive modifications to language in the purpose section. Telephone discussion between Carla Behnfeldt, Director, Phlx and Mia Zur, Attorney, Division, Commission (August 25, 2004).

[8] The Exchange currently lists options on the SIG Investment Managers Index™ and the SIG Cable, Media & Entertainment Index™ pursuant to a license agreement with SIG Indices, LLLP and Exchange Rule 1009A(b). The Exchange recently amended Exchange Rule 1104A to cover the SIG Cable, Media & Entertainment Index™ pursuant to a requirement in the license agreement. *See* Securities Exchange Act Release No. 49605 (April 22, 2004), 69 FR 24209 (May 3, 2004). The Exchange is filing the current proposed rule change pursuant to a requirement in the license agreement. SIG Investment Managers Index™, SIG Cable, Media & Entertainment Index™, SIG Casino Gaming Index™, SIG Semiconductor Equipment

rule currently provides generally that Susquehanna Indices, LLP ("SI") makes no warranty, express or implied, as to results to be obtained by any person or entity from the use of SIG Investment Managers Index and that SI makes no express or implied warranties of merchantability or fitness for a particular purpose for use with respect to that index or any data included therein.[9] The Exchange is now proposing to amend Phlx Rule 1104A to update the rule to reflect the name change and to expand the coverage of the rule to include the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, and the SIG Semiconductor Device Index™ which are new indexes upon which options have recently been listed on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirement under section 6(b) of the Act[10] in general, and furthers the objectives of section 6(b)(5) of the Act[11] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule should encourage SI to continue to maintain the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, and the SIG Semiconductor Device Index™ so that options on them may be traded on the Exchange, thereby providing investors with enhanced investment opportunities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Phlx has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13] Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. As required under Rule 19b–4(f)(6)(iii), the Phlx provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to filing the proposal with the Commission or such shorter period as designated by the Commission.[14]

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[15]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2004–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number SR–Phlx–2004–48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro.shtml*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–48 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2201 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

Index™, and SIG Semiconductor Device IndexTM are trademarks of SIG Indices, LLLP.

[9] The Exchange noted in its filing to adopt Exchange Rule 1104A that it believed that the disclaimer proposed in Exchange Rule 1104A is appropriate given that it is similar to disclaimer provisions of American Stock Exchange Rule 902C relating to indexes underlying options listed on that exchange. *See* Securities Exchange Release No. 48135 (July 7, 2003), 68 FR 42154 (July 16, 2003) (approving SR–Phlx–2003–21).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(a).

[13] 17 CFR 240.19b–4(f)(6).

[14] *See supra*, note 5.

[15] For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on August 19, 2004, the date the Phlx filed Amendment No. 1.

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50336; File No. SR–Phlx–2004–54]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and 2 Thereto Relating to Continuing Education Requirements for Registered Persons

September 9, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 18, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I and II below, which items have been prepared by the Phlx. The Exchange has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission.[5] On August 26, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[6] On September 3, 2004, the Exchange filed Amendment No. 2 to the proposed rule change.[7] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx, pursuant to section 19(b)(1) of the Act and Rule 19b–4 thereunder,[8] proposes to amend Exchange Rule 640(a) to allow members and member organizations ("Member Firms") to administer the Continuing Education Regulatory Element Program to its registered persons[9] by instituting an in-firm program acceptable to the Exchange. The text of the proposed rule change is below. Proposed new language is in *italics.*

Continuing Education For Registered Persons

Rule 640(a)(1)–(3) No change.

(4) In-Firm Delivery of the Regulatory Element—Members and member organizations will be permitted to administer the continuing education Regulatory Element program to their registered persons by instituting an in-firm program acceptable to the Exchange.

The following procedures are required:

(A) Principal/Officer In-Charge. The firm has designated a principal/officer-in-charge to be responsible for the in-firm delivery of the Regulatory Element.

(B) Site Requirements:

(i) The location of all delivery sites will be under the control of the firm.

(ii) The delivery of Regulatory Element continuing education will take place in an environment conducive to training. (Examples: a training facility, conference room or other area dedicated to this purpose would be appropriate. Inappropriate locations would include a personal office or any location that is not or cannot be secured from traffic and interruptions.)

(iii) Where multiple delivery terminals are placed in one room, adequate separation between terminals will be maintained.

(C) Technology Requirements. The communication links and firm delivery computer hardware must comply with standards defined by the Exchange or its designated vendor.

(D) Supervision

(i) The firm's written supervisory procedures must contain the procedures implemented to comply with requirements of in-firm delivery of the Regulatory Element continuing education.

(ii) The firm's supervisory procedures must identify the principal/officer-in-charge designated pursuant to paragraph (A) above and contain a list of individuals authorized by the firm to serve as proctors.

(iii) Firm locations for delivery of the Regulatory Element continuing education will be specifically listed in the firm's written supervisory procedures.

(E) Proctors.

(i) All sessions will be proctored by an authorized person during the entire Regulatory Element continuing education session. Proctors must be present in the session room or must be able to view the person(s) sitting for Regulatory Element continuing education through a window or by video monitor.

(ii) The individual responsible for proctoring at each administration will sign a certification that required procedures have been followed, that no material from Regulatory Element continuing education had been reproduced, and that no candidate received any assistance to complete the session. Such certification may be part of the sign-in log required under paragraph (F) below.

(iii) Individuals serving as proctors must be persons registered with an SRO and supervised by the designated principal/officer-in-charge for purposes of in-firm delivery of the Regulatory Element continuing education.

(iv) Proctors will check and verify the identification of all individuals taking Regulatory Element continuing education.

(F) Administration

(i) All appointments will be scheduled in advance using the procedures and software specified by the Exchange to communicate with the Exchange's system and designated vendor.

(ii) The firm/proctor will conduct each session in accordance with administrative appointment scheduling procedures established by the Exchange or its vendor.

(iii) A sign-in log will be maintained at the delivery facility. Logs will contain the date of each session, the name and social security number of the individual taking the session, that required identification was checked, the sign-in time, the sign-out time, and the name of the individual proctoring the session. Such logs are required to be maintained pursuant to SEC Rules 17a–3 and 17a–4.

(iv) No material will be permitted to be utilized for the session nor may any session-related material be removed.

(v) Delivery sites will be made available for inspection by the SROs.

*(vi) Before commencing in-firm delivery of the Regulatory Element continuing education, members are required to file with their Designated Examining Authority ("DEA"), a letter of attestation (*as specified below)*

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Phlx asked the Commission to waive the 30-day operative delay. *See* Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* letter from Mark I. Salvacion, Director and Counsel, Phlx to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 24, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx replaced the original proposed rule change in its entirety.

[7] *See* letter from Mark I. Salvacion, Director and Counsel, Phlx to Katherine A. England, Assistant Director, Division, Commission, dated September 2, 2004 ("Amendment No. 2"). In Amendment No. 2, the Phlx made minor changes to the proposed rule text. For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on September 3, 2004, the date the Phlx filed Amendment No. 2. *See* Rule 19b–4(f)(2), 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 240.19b–4.

[9] For purposes of Exchange Rule 640 the term "registered person" means any member, registered representative or other person registered or required to be registered under Exchange rules, but does not include a person whose activities are limited solely to the transaction of business on the floor with members or registered broker-dealers. *See* Exchange Rule 640, Commentary .01.

signed by a principal/officer-in-charge executive officer or executive representative, attesting to the establishment of required procedures addressing principal/officer-in-charge, supervision, site technology proctors and administrative requirements. Letters filed with Exchange should be sent to Examinations Department, Philadelphia Stock Exchange, 1900 Market Street, Philadelphia, Pennsylvania, 19103.

**Letter of Attestation for In-Firm Delivery of Regulatory Element Continuing Education [Name of member or member organization] has established procedures for delivering Regulatory Element continuing education on its premises. I have determined that these procedures are reasonably designed to comply with SRO requirements pertaining to in-firm delivery of Regulatory Element continuing education, including that such procedures have been implemented to comply with principal/officer in-charge, supervision, site, technology, proctors, and administrative requirements.*
Signature:
Printed Name:
Title: [Must be signed by a Principal Executive Officer (or Executive Representative) of the Member Organization.]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 640(a) to allow Member Firms to administer the Continuing Education Regulatory Element Program ("Regulatory Element") to their registered persons by instituting an in-firm program acceptable to the Exchange. The Regulatory Element currently requires registered persons to complete a computer-based training program on the second anniversary of their registration, and every three years thereafter. The program includes topics related to sales practices, customer communications, compliance, ethics, and other subjects pertinent to conducting a securities business.[10] Currently, Member Firms generally use third-party testing centers to administer the Regulatory Element.

At the recommendation of the Securities Industry/Regulatory Council on Continuing Education ("Council"),[11] the Exchange proposes to adopt amendments to Exchange Rule 640(a) to permit member organizations to administer the Regulatory Element of the Continuing Education Program to their registered persons by instituting firm programs acceptable to the Exchange. The proposed rule requires that member organizations meet certain conditions for in-house delivery relating to the security of the training delivery environment. The proposed rule change sets forth the delivery requirements as specified by the Council. The Exchange believes that the proposed rule change is consistent with recent changes made to similar rules by other self-regulatory organizations.[12]

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [13] in general, and furthers the objectives of section 6(b)(5) of the Act [14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest by ensuring that Member Firms have adequate opportunities to provide training in the Regulatory Element to their registered persons. The Exchange also believes that the proposed rule change is consistent with section 6(c)(3) of the Act.[15] Under that section, it is the Exchange's responsibility to prescribe standards of training, experience and competence for persons associated with Exchange members and member organizations. The Exchange has proposed this rule change to establish an additional mechanism for the administration of the Regulatory Element of the Program, which will help to enable registered persons to satisfy their continuing education obligations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17]

A proposed rule change filed under Rule 19b–4(f)(6) [18] normally does not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange satisfied the five-day pre-filing requirement. The Exchange further requested that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii), and designate the proposed rule change immediately operative. The Commission notes that the proposed rule change, as amended, is similar to proposed rule changes that previously have been approved by the Commission that were subject to the full notice and comment period,[19] and thus does not raise new

[10] *See* Securities Exchange Act Release No. 35341 (February 8, 1995), 60 FR 8426 (February 14, 1995). *See also* Securities Exchange Act Release No. 39802 (March 25, 1998), 63 FR 15474 (March 31, 1998).

[11] The Council is comprised of representatives from broker-dealers and self-regulatory organizations whose duties include recommending and helping develop specific content and questions for the Regulatory Element, as well as minimum core curricula for the Firm Element. The Council has developed a model under which member organizations may deliver the computer-based training in-house.

[12] The proposed change is identical in substance, and substantially similar in wording, to American Stock Exchange Rule 341A, New York Stock Exchange Rule 345a, Interpretation /03, National Association of Securities Dealers Rule 1120, and Chicago Board Options Exchange Rule 9.3A.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78f(c)(3).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6).

[19] *See supra*, note 12.

issues of regulatory concern. For these reasons, the Commission, consistent with the protection of investors and the public interest, has waived the 30-day operative date requirement for this proposed rule change, and has determined to designate the proposed rule change as operative on August 18, 2004, the date it was submitted to the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[20]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2004–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–54. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal offices of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–54 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2202 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[20] For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on September 3, 2004, the date the Phlx filed Amendment No. 2.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50342; File No. SR–Phlx–2004–16]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, by the Philadelphia Stock Exchange, Inc. Relating to Exchange Rules 1083(g) and (h), To Modify the Definitions of "Firm Customer Quote Size" and "Firm Principal Quote Size"

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 13, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. On August 11, 2004, the Phlx submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Richard S. Rudolph, Phlx, Director and Counsel to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation, Commission, dated August 10, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx amended the proposed rule text to clarify that the general requirement that the Exchange's Firm Customer Quote Size ("FCQS") and Firm Principal Quote Size ("FPQS") be at least 10 contracts would not apply if the Phlx were disseminating a quotation of fewer than 10 contracts. In that case, the Exchange may establish a FQCS or FPQS equal to its disseminated size.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its rules relating to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

The text of the proposed rule change, as amended, is below. Proposed additions are in italics. Proposed deletions are in [brackets].

* * * * *

Intermarket Linkage

Rule 1083. Definitions

The following terms shall have the meaning specified in this Rule solely for the purpose of Rules 1083 through 1087:

(a)–(f) (No change).

(g) "Firm Customer Quote Size" with respect to a P/A Order means the lesser of (a) the number of option contracts that the Participant Exchange sending a P/A Order guarantees it will automatically execute at its disseminated price in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market; or (b) the number of option contracts that the Participant Exchange receiving a P/A Order guarantees it will automatically execute at its disseminated price in a series of an Eligible Option Class for Public Customer orders entered directly for execution in that market. This number shall be at least 10, *unless the receiving Participant is disseminating a quotation of less than 10 contracts, in which case this number may equal such quotation size.*

(h) "Firm Principal Quote Size" means the number of options contracts that a Participant Exchange guarantees it will execute at its disseminated price for incoming Principal Orders in an Eligible Option Class. This number shall be at least 10[.], *however if the Participant is disseminating a quotation size of less than 10 contracts, this number may equal such quotation size.*

(i)–(u) (No change).

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate the requirement that the Phlx members that participate in the Linkage Plan be firm for incoming Principal and Principal Acting as Agent ("P/A") Orders for a size of at least 10 contracts where the Exchange's disseminated size is less than 10 contracts. The proposed rule change would allow Phlx members that participate in the Linkage Plan to execute inbound Principal and P/A Orders at their actual disseminated size as opposed to a minimum quote size.[4]

The proposed rule change represents another step towards the execution of all order types at the Exchange's disseminated price up to its actual disseminated size, rather than the execution of orders at the Exchange's disseminated price up to an artificially designated size. The Commission has approved several Exchange rule amendments that require Phlx responsible brokers or dealers to be firm for their actual disseminated size,[5] as well as amendments providing automatic executions at the Exchange's disseminated size, rather than a pre-set "AUTO–X guarantee."[6]

The purpose of the instant proposed rule change is to eliminate the artificial 10 contract minimum contained in the definition of "FCQS" and "FPQS" in the Exchange's rules. Specifically, the proposed rule change would allow Phlx members that participate in the Linkage Plan to execute inbound P/A and Principal Orders at the actual size of the disseminated quote.[7] Currently, Exchange Rules 1083(g) and (h) impose the obligation on the Phlx specialist to execute an order at a minimum guaranteed size of 10 contracts despite the fact that the actual disseminated size may be less than 10 contracts.[8] The proposed rule change would permit the Phlx to execute inbound Linkage orders at the Exchange's actual disseminated size. The proposed rule change would eliminate the artificial minimum guaranteed size of 10 contracts, and would therefore require Phlx specialists to be firm at the Exchange's disseminated price for their actual disseminated size.

The Exchange believes that executions of Principal and P/A Orders at the Exchange's actual disseminated size should enhance the ability of participants of the Linkage Plan that send Principal and P/A Orders to the Exchange to ascertain the actual number of contracts available at the Exchange's disseminated price, thus resulting in more transparency in the marketplace.

2. Statutory Basis

The Phlx believes that the proposed rule is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5)[10] in particular in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade, by permitting Exchange specialists to provide executions for Linkage Orders at the Exchange's actual disseminated size.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Phlx consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2004–16 on the subject line.

Paper Ccomments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal

[4] At the request of the Exchange, this paragraph has been modified to make clear that the proposed rule change applies exclusively to Phlx members. Telephone conversation between Richard S. Rudolph, Director and Counsel, Phlx, and Tim Fox, Attorney, Division of Market Regulation ("Division"), Commission, on September 7, 2004.

[5] *See* Securities Exchange Act Release No. 47646 (April 8, 2003), 68 FR 27610 (May 20, 2003) (SR–Phlx–2003–18).

[6] *See* Securities Exchange Act Release No. 46886 (November 22, 2002), 67 FR 72015 (December 3, 2002) (SR–Phlx–2002–39).

[7] At the Exchange's request, this sentence was modified to make clear that the proposed rule change would permit the execution of Principal and P/A Orders at the actual disseminated size as opposed to the size of the order. Telephone conversation between Richard S. Rudolph, Director and Counsel, Phlx, and Tim Fox, Attorney, Division, Commission, on September 7, 2004.

[8] Currently, for example, if the Exchange's disseminated size is for 3 contracts and the Phlx receives an inbound eligible P/A or Principal Order with a size of 10 contracts, then Rule 1083 requires that the specialist must execute 10 contracts despite the fact that the Exchange's disseminated size is only 3 contracts.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–16 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–2225 Filed 9–15–04; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3620]

State of Florida; Amendment #2

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective September 9, 2004, the above numbered declaration is hereby amended to include Charlotte, Columbia, DeSoto, Dixie, Gilchrist, Hardee, Hillsborough, Levy, and Marion counties as disaster areas due to damages caused by Hurricane Frances occurring on September 3, 2004, and continuing.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Hamilton, Lafayette, Sarasota, Suwannee, and Taylor in the State of Florida; and Clinch and Echols in the State of Georgia may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have previously been declared.

The economic injury number assigned to Georgia is 9ZU400. All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is November 3, 2004 and for economic injury the deadline is June 6, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: September 10, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 04–20885 Filed 9–15–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3621]

State of Kansas

Wyandotte County and the contiguous counties of Johnson and Leavenworth in the State of Kansas; and Clay, Jackson, and Platte in the State of Missouri constitute a disaster area due to severe thunderstorms and flash flooding that occurred on August 27, 2004. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on November 8, 2004 and for economic injury until the close of business on June 9, 2005 at the address listed below or other locally announced locations: Small Business Administration, Disaster Area 3 Office, 14925 Kingsport Road, Fort Worth, TX 76155–2243.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	6.375
Homeowners without credit available elsewhere	3.187
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 362106 for Kansas and 362206 for Missouri. The number assigned to this disaster for economic injury is 9ZU200 for Kansas and 9ZU300 for Missouri.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: September 9, 2004.

Hector V. Barreto,

Administrator.

[FR Doc. 04–20819 Filed 9–15–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #P047]

State of Kansas; Amendment #4

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective September 1, 2004, the above numbered Public Assistance declaration is hereby amended to include Barton, Decatur, Marion, Morris, Ness, Pawnee, Sheridan, Thomas, Wabaunsee and Wallace Counties in the State of Kansas as disaster areas due to damages caused by severe storms, flooding, and tornadoes occurring on June 12, 2004, and continuing through July 25, 2004.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is October 4, 2004.

(Catalog of Federal Domestic Assistance Program Nos. 59008).

Dated: September 8, 2004.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–20820 Filed 9–15–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3619]

Commonwealth of Virginia; Amendment #1

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective September 8, 2004, the above numbered declaration is hereby amended to establish the incident period for this disaster as beginning August 30, 2004, 2004, and continuing through September 8, 2004. All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is November 2, 2004 and for economic injury the deadline is June 3, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: September 10, 2004.

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 04–20886 Filed 9–15–04; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4830]

Culturally Significant Objects Imported for Exhibition Determinations: "Great Expectations: John Singer Sargent Painting Children"

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to

the authority vested in me by the Act of October 19, 1965 [79 Stat. 985; 22 U.S.C. 2459], Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 [112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*], Delegation of Authority No. 234 of October 1, 1999 [64 FR 56014], Delegation of Authority No. 236 of October 19, 1999 [64 FR 57920], as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition, "Great Expectations: John Singer Sargent Painting Children," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the exhibition or display of the exhibit objects at the Brooklyn Museum of Art, Brooklyn, New York, from on or about October 8, 2004, to on or about January 16, 2005, the Chrysler Museum of Art, Norfolk, Virginia, from on or about February 25, 2005, to on or about May 22, 2005, the Portland Art Museum, Portland, Oregon, from on or about June 18, 2005, to on or about September 11, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information or a list of exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, 202/619–5997, and the address is United States Department of State, SA–44, Room 700, 301 4th Street, SW., Washington, DC 20547–0001.

Dated: September 7, 2004.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 04–20894 Filed 9–15–04; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2004–17114]

Port of Anchorage Expansion—Marine Terminal Redevelopment

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of extension of comment period.

SUMMARY: The Maritime Administration is hereby giving notice that the closing date for filing comments on the Port of Anchorage Expansion, Marine Terminal Redevelopment (Docket No. MARAD 2004–17114) has been extended to the close of business (5 p.m. EST) on September 17, 2004. The Notice of Availability was published in the **Federal Register** on August 11, 2004 (69 FR 48905).

By Order of the Maritime Administrator.

Dated: September 10, 2004.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–20861 Filed 9–15–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34538]

Patrick D. Broe and OmniTRAX, Inc.—Continuance in Control Exemption—Alliance Terminal Railroad, LLC

Patrick D. Broe (Mr. Broe) and OmniTRAX, Inc. (OmniTRAX) (collectively, applicants) have filed a verified notice of exemption to continue in control of Alliance Terminal Railroad, LLC (ATR) upon ATR's becoming a Class III rail carrier.

The transaction was expected to be consummated on August 24, 2004, the effective date of the exemption.

This transaction is related to the concurrently filed verified notice of exemption in STB Finance Docket No. 34537, *Alliance Terminal Railroad, LLC—Lease and Operation Exemption—Quality Terminal Services, LLC*, wherein ATR seeks to sublease from Quality Terminal Services, LLC, in Haslet, TX, and operate approximately 12.9 miles of rail line owned by The Burlington Northern and Santa Fe Railway Company (BNSF), and to acquire overhead incidental trackage rights over 11 miles of BNSF's main line located between milepost 359.0, at Haslet, and milepost 370.0, at Saginaw, TX.

Mr. Broe is a noncarrier individual who directly controls OmniTRAX, Inc., a non-carrier company. OmniTRAX currently controls eight Class III railroads operating in six states: Chicago Rail Line, LLC (CRL), Georgia Woodlands Railroad, LLC (GWRC), Great Western Railway of Colorado, LLC (GWR), Great Western Railway of Iowa, LLC (CBGR), Manufacturers' Junction Railway, LLC (MJ), Newburgh & South Shore Railroad Limited (NSR), Northern Ohio & Western Railway, LLC (NOW), and Panhandle Northern Railroad, LLC (PNR).[1]

The rail lines operated by CRL, GWRC, GWR, CBGR, MJ, NSR, NOW, and PNR do not connect with the rail lines being subleased by ATR. PNR's rail line, which is located in Broger, TX, is a substantial distance from the line being subleased by ATR.

Under 49 CFR 1180.2(d)(2), a continuance in control transaction is exempt if: (i) The railroads do not connect with each other or any railroad in their corporate family; (ii) the continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (iii) the transaction does not involve a Class I carrier. There are no Class I carriers involved in this transaction and applicants state that the railroads do not connect with each other and there are no plans to acquire additional rail lines for the purpose of making such a connection. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34538, 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 Karl Morell, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: September 10, 2004.

[1] CRL's lines are located in Illinois; GWRC's line is located in Georgia; GWR's lines are located in Colorado; CBGR's lines are located in Iowa; MJ's lines are located in Illinois; NSR's lines are located in Ohio; NOW's line is located in Ohio; and PNR's line is located in Texas.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–20890 Filed 9–15–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34537]

Alliance Terminal Railroad, LLC—Lease and Operation Exemption—Quality Terminal Services, LLC

Alliance Terminal Railroad, LLC (ATR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to sublease from Quality Terminal Services, LLC (QTS) and operate approximately 12.9 miles of rail line owned by The Burlington Northern and Santa Fe Railway Company (BNSF). There are no milepost designations associated with the rail lines ATR will be subleasing. The rail lines being subleased are located adjacent to BNSF's mainline between milepost 362.2 and milepost 365.0 in Haslet, TX. ATR will also acquire overhead incidental trackage rights over 11 miles of BNSF's main line located between milepost 359.0, at Haslet, and milepost 370.0, at Saginaw, TX.

This transaction is related to STB Finance Docket No. 34538, *Patrick D. Broe and OmniTRAX, Inc.—Continuance in Control Exemption—Alliance Terminal Railroad, LLC,* wherein Patrick D. Broe and OmniTRAX, Inc., seek to acquire control of ATR upon ATR's becoming a Class III carrier.

ATR certifies that its projected revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier, and further certifies that its projected revenues will not exceed $5 million. The transaction was scheduled to be consummated on or shortly after August 24, 2004, the effective date of the exemption.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34537, 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 Karl Morell, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: September 10, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–20891 Filed 9–15–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: The OCC, Board, FDIC, and OTS (Agencies), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on proposed revisions to continuing information collections, as required by the Paperwork Reduction Act of 1995. The Agencies are soliciting comments on proposed revisions to the information collections titled: "Interagency Biographical and Financial Report" and "Interagency Notice of Change in Control." Additionally, the OCC is making other clarifying changes to the *Comptroller's Licensing Manual.* Also, the Board is proposing to extend, without revision, the Interagency Notice of Change in Director or Senior Executive Officer. The Agencies also give notice that they have sent the information collections to OMB for review and approval. The Agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

DATES: You should submit written comments by October 18, 2004.

ADDRESSES: Interested parties are invited to submit comments to any or all of the Agencies and the OMB Desk Officer. All comments, which should refer to the OMB control number, will be shared among the Agencies:

OCC: Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW., Mail Stop 1–5, Attention: 1557–0014, Washington, DC 20219. Due to delays in paper mail delivery in the Washington area, commenters are urged to fax comments to (202) 874–4448, or e-mail comments to *regs.comments@occ.treas.gov.* You may make an appointment to inspect and photocopy comments by calling (202) 874–5043.

Board: Comments may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by e-mail to *regs.comments@federalreserve.gov,* or faxing them to the Office of the Secretary at 202–452–3819 or 202–452–3102. Members of the public may inspect comments in Room MP–500 between 9 a.m. and 5 p.m. on weekdays pursuant to 261.12, except as provided in 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

FDIC: Comments may be mailed to Thomas Nixon, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments also may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. or submitted by e-mail to *comments@fdic.gov.* Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC between 9 a.m. and 4:30 p.m. on business days.

OTS: Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: 1550–0005, –0015, –0032, –0047; FAX number (202) 906–6518; or e-mail to

infocollection.comments@ots.treas.gov. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a fax to (202) 906–7755.

OMB Desk Officer for the Agencies: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503, or e-mail to *mmenchik@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: You may request additional information from:

OCC: John Ference, OCC Clearance Officer, or Camille Dixon, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219. For subject matter information, you may contact Cheryl Martin at (202) 874–4614, Licensing Activities, Licensing Department, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Cindy Ayouch, Federal Reserve Board Clearance Officer, (202) 452–3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Thomas Nixon, (202) 898–8766, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Marilyn K. Burton, OTS Clearance Officer, (202) 906–6467; Frances C. Augello, Senior Counsel, Business Transactions Division, (202) 906–6151; Patricia D. Goings, Regulatory Analyst, Supervision Policy, (202) 906–5668; or Damon C. Zaylor, Regulatory Analyst, Supervision Policy, (202) 906–6787, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: Proposal to extend for three years, with revision, the following currently approved collections of information:

Report Titles: Interagency Biographical and Financial Report and Interagency Notice of Change in Control.

OCC's Title: Comptroller's Licensing Manual (Manual). The specific portions of the Manual covered by this notice are those that pertain to the "Background Investigations" and "Change in Bank Control" booklets of the Manual and various portions to which the OCC is making technical and clarifying changes. The OCC also will submit to OMB for renewal the Manual in its entirety.

Board's Additional Title: Interagency Notice of Change in Director or Senior Executive Officer. The Board also is proposing to extend this form, without revision, which is part of this information collection.

OMB Numbers:

OCC: 1557–0014.

Board: 7100–0134.

FDIC: Interagency Biographical and Financial Report, 3064–0006; Interagency Notice of Change in Control, 3064–0019.

OTS: Interagency Biographical and Financial Report, 1550–0005, 1550–0015, 1550–0047; Interagency Notice of Change in Control, 1550–0032.

Form Numbers:

OCC: None.

Board: FR 2081a, b, c.

FDIC: Interagency Biographical and Financial Report, Form 6200–06; Interagency Notice of Change in Control, Form 6822–01.

OTS: Interagency Biographical and Financial Report, Form 1623; Interagency Notice of Change in Control, Form 1622.

Affected Public: Individuals or households; businesses or other for-profit.

Type of Review: Revision of currently approved collections.

Estimated Number of Respondents:

OCC: Interagency Biographical and Financial Report—450; Interagency Notice of Change in Control—17; Satisfaction Survey—680; Conversion—20; Capital—150.

Board: Interagency Biographical and Financial Report—850; Interagency Notice of Change in Control—120; and Interagency Notice of Change in Director or Senior Executive Officer—121.

FDIC: Interagency Biographical and Financial Report—1,769; Interagency Notice of Change in Control—27.

OTS: Interagency Biographical and Financial Report—886; Interagency Notice of Change in Control—35.

Frequency of Response: On occasion.

Estimated Annual Burden Hours per Response:

OCC: Interagency Biographical and Financial Report—4; Interagency Notice of Change in Control—30; Satisfaction Survey—0.50; Conversion—4.5; Capital—1.

Board: Interagency Biographical and Financial Report—4; Interagency Notice of Change in Control—30; Interagency Notice of Change in Director or Senior Executive Officer—2.

FDIC: Interagency Biographical and Financial Report—4 ; Interagency Notice of Change in Control—30.

OTS: Interagency Biographical and Financial Report—4; Interagency Notice of Change in Control—30.

Estimated Total Annual Burden Hours:

OCC: Interagency Biographical and Financial Report—1,800; Interagency Notice of Change in Control—510; Satisfaction Survey—340; Conversion—90; Capital—150.

Board: Interagency Biographical and Financial Report—3,400; Interagency Notice of Change in Control—3,600; and Interagency Notice of Change in Director or Senior Executive Officer—242.

FDIC: Interagency Biographical and Financial Report—7,076; Interagency Notice of Change in Control—810.

OTS: Interagency Biographical and Financial Report—3,544; Interagency Notice of Change in Control—1,050.

General Description of Report: This information collection is mandatory. 12 U.S.C. 1828(c) (OCC, FDIC, and OTS), and 12 U.S.C. 1817(j), and 12 U.S.C. 1813(q) (Board). Except for select sensitive items, this information collection is not given confidential treatment. Small businesses, that is, small institutions, are affected.

Abstract: This submission covers a revision to the Agencies' Interagency Biographical and Financial Report. The Agencies use the biographical information to evaluate the competence, experience, character, and integrity of the persons proposed as organizers, senior executive officers, directors, or principal shareholders of depository institutions or their holding companies. The Agencies use the financial information to evaluate the financial ability of those persons. Finally, the Agencies also use this form to evaluate proposed acquisitions.

This submission also covers a revision to the Agencies' Interagency Notice of Change in Control. An individual, a group, or a company that proposes to acquire control of a depository institution or its holding company must submit prior notice of that intent to the appropriate Agency pursuant to the Change in Bank Control Act and the Agencies' applicable regulations.

The Agencies need the information from both of these forms to ensure that the proposed transaction is permissible under law and regulation and is consistent with safe and sound banking practices. For example, the Agencies must consider the financial and managerial resources and future earnings prospects of an institution and its acquirers, directors, and executive management. Accordingly, the Agencies

use the information to evaluate specific individuals' qualifications. Individuals organizing, acquiring control of, or managing a financial institution must provide this information.

This submission also covers the OCC's Satisfaction Survey; Conversion, and Capital sample applications; and various portions to which the OCC is making technical clarifying changes. The OCC sends a Satisfaction Survey to applicants after processing a filing and asks for information about the process. The survey is voluntary, but information received enables the OCC to refine its application process. The Conversion, and Capital sample documents have been reformatted from a letter submission to a numbered question type of submission that will facilitate the OCC's development of an electronic submission. Additionally, the OCC is submitting to OMB for renewal the *Comptroller's Licensing Manual* in its entirety.

This submission also covers the Board's Interagency Notice of Change in Director or Senior Executive Officer (FR 2081b), which is being extended without revision. The FR 2081b is used by an insured depository institution or its parent holding company(ies) to notify the appropriate regulatory agency of a proposed change in the board of directors or senior executive officer of such institution or holding company(ies). A notice of change is required if the depository institution is viewed to be in troubled condition by its primary Federal regulatory agency. The requirement applies to a depository institution or its holding company that is not in compliance with all minimum capital requirements, is in troubled condition or, otherwise, is required by the Board to provide such notices.

Current Actions: On June 9, 2004, the Agencies published in the **Federal Register** (67 FR 32414) a notice on the proposed revisions to these information collections. The comment period expired on August 9, 2004. The Agencies received no public comments, and each Agency is now submitting its request to OMB for approval of the extension, with revision, of these information collections, as proposed.

The Agencies modified certain sections of the Interagency Biographical and Financial Report (report), especially section 5, to improve their ability to evaluate the character and integrity of a filer. The Agencies also amended the form to make it easier to understand the type and scope of information that must be provided. For example, the Agencies made each question in section 5 more descriptive to clarify for filers the circumstances where they should provide further explanatory information with the report.

In addition, the Agencies made changes to comply with section 508 of the Rehabilitation Act, which requires Federal departments and agencies, when developing and using electronic and information technology, to ensure that the relevant information and technology is accessible to individuals with disabilities. Specifically, the Agencies amended the report to improve the ability of the form to be read by screen reader software applications used by individuals with visual impairments.

The Agencies modified the Interagency Notice of Change in Control to gather relevant information to comply with section 307(c) of the Gramm-Leach-Bliley Act (GLBA). This section of GLBA requires the appropriate Agency to consult with the appropriate state insurance regulator prior to making any determination relating to the affiliation of a depository institution with a company engaged in insurance activities. As a result, the Agencies propose to add an item to the Interagency Notice of Change in Control to collect information regarding the name of an affiliated insurance company, a description of its insurance activities, and the name of the state in which the company is domiciled or in which it has a resident license. *Exception:* The OTS requires a company filing for a change in control of a federal savings bank or savings and loan association to use the appropriate holding company application and, therefore, it will not have any company filing this form.

The Agencies made technical corrections to the General Instructions section for both forms to make them uniform with revisions to other recently issued interagency forms and to ensure consistency, where appropriate, with other forms the Agencies use. The Agencies also added definitions for certain essential terms to the General Instructions for the Interagency Biographical and Financial Report to make it easier for filers to determine whether a given request for information applies to them.

Further, the OCC is changing its "General Policies and Procedures" booklet of the Manual by adding questions to its Satisfaction Survey (survey). The OCC sends a survey to applicants after the processing of the filing is final. This survey, which is voluntary, provides the OCC with information that enables it to refine and improve its application process. The additional questions relate to the electronic submission of certain types of applications and the effectiveness of the electronic filing system. The OCC also is changing to the format of the conversion and capital applications that are part of the "Conversions" and "Capital and Dividends" booklets of the Manual. Previously, the OCC used a letter format. The OCC is changing that format to an application type of filing so that it can accept the submission electronically. The changes to these documents are not material and are technical in nature. These changes are an administrative adjustment, and do not change the requirements on national banks.

Comments: All comments will become a matter of public record. Written comments are invited on:

a. Whether the information collection is necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

b. The accuracy of the Agencies' estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: September 2, 2004.

Stuart E. Feldstein,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System, August 27, 2004.

Jennifer J. Johnson,

Secretary of the Board.

Dated in Washington, DC, this 2nd day of September, 2004.

Robert E. Feldman,

Executive Secretary.

Dated: August 30, 2004.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

[FR Doc. 04–20881 Filed 9–15–04; 8:45 am]

BILLING CODE 4810–33; 6210–01; 6714–01; 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Proposed Collection; Comment Request for Payments to Persons Who Hold Certain Categories of Judgments

AGENCY: Office of Foreign Assets Control, 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 Office of Foreign Assets Control (OFAC) within the Department of the Treasury is soliciting comments concerning OFAC's information collection requirements contained within the procedures set forth for persons to establish eligibility for payments authorized by section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Act), Public Law 106–386, as amended by section 201 of the Terrorism Risk Insurance Act of 2002, Public Law 107–297 (section 2002), and other similar laws that may be enacted in the future requiring substantially similar information submissions. Section 2002 directs the Secretary of the Treasury to make payments to persons who hold certain categories of judgments against Cuba or Iran in suits brought on the basis of 28 U.S.C. 1605(a)(7). The procedures pertaining to establishing eligibility for such payments are set forth in **Federal Register** notices published on November 22, 2000, at 65 FR 70382, December 15, 2000, at 65 FR 78533, and February 19, 2003, at 68 FR 8077.

DATES: Written comments should be received on or before November 15, 2004 to be assured of consideration.

ADDRESSES: Comments may be submitted to the Chief of Records, ATTN: Request for Comments, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Alternatively, comments may be submitted via facsimile to the Chief of Records at (202) 622–1657 or via OFAC's Web site *http://www.treas.gov/offices/enforcement/ofac/comment.html.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information about the filings or procedures should be directed to Rochelle E. Stern, Chief, Policy Planning and Program Management, tel.: (202) 622–2500, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Title: Procedures for Payments to Persons Who Hold Certain Categories of Judgments.

OMB Number: 1505–0177.

Abstract: This information collection pertains to present procedures for applying for payments under section 2002 and other laws that may be enacted requiring substantially similar information submissions to process compensations claims based on judgments in lawsuits brought pursuant to 28 U.S.C. 1605(a)(7). The procedures for payments under section 2002 are set forth in the **Federal Register** notices published by OFAC on November 22, 2000, December 15, 2000, and February 19, 2003. The collection of this information is required to enable the Department of the Treasury to determine the eligibility of an applicant under section 2002, and other future similar laws, and to complete processing of payments. The collection of information is voluntary, but submission of the information is required by OFAC in processing applications for payments. The estimated average burden per applicant is 12 hours.

Current Actions: There are no changes proposed with respect to the nature of the information collected. However, as reflected in the change of the title from "Procedures for Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran" to "Procedures for Payments to Persons Who Hold Certain Categories of Judgments," OFAC also will apply the information collection to certain claims based on judgments against countries other than Cuba or Iran.

Type of Review: Extension of a currently approved collection.

Affected Public: Persons who hold certain judgments.

Estimated Number of Respondents: 20.

Estimated Time Per Respondent: 12 hours.

Estimated Total Annual Burden Hours: 240.

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 Office of Management and Budget (OMB) control number. Books or records relating to a collection of information must be retained for five years.

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 has 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: September 7, 2004.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

[FR Doc. 04–20882 Filed 9–15–04; 8:45 am]

BILLING CODE 4810–25–P

Federal Register

Thursday,
September 16, 2004

Part II

Social Security Administration

20 CFR Part 404
Revised Medical Criteria for Evaluating Cardiovascular Impairments; Proposed Rule

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Regulation No. 4]

RIN 0960–AF48

Revised Medical Criteria for Evaluating Cardiovascular Impairments

AGENCY: Social Security Administration.

ACTION: Proposed rules.

SUMMARY: We propose to revise the criteria in the Listing of Impairments (the listings) that we use to evaluate claims involving cardiovascular impairments. We apply these criteria when you claim benefits based on disability under title II and title XVI of the Social Security Act (the Act). The proposed revisions reflect our program experience and advances in medical knowledge, treatment, and methods of evaluating cardiovascular disorders.

DATES: To be sure your comments are considered, we must receive them by November 15, 2004.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at: *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at: *http://www.regulations.gov;* e-mail to *regulations@ssa.gov*; telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

Electronic Version: The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*. It is also available on the Internet site for SSA (*i.e.*, Social Security Online): *http://policy.ssa.gov/pnpublic.nsf/LawsRegs*.

FOR FURTHER INFORMATION CONTACT: Fran O. Thomas, Social Insurance Specialist, Office of Disability and Income Security Programs, Social Security Administration, 100 Altmeyer, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 966–9822 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, *Social Security Online*, at *http://www.socialsecurity.gov*.

SUPPLEMENTARY INFORMATION:

What Programs Would These Proposed Regulations Affect?

These proposed regulations would affect disability determinations and decisions that we make under title II and title XVI of the Act. In addition, to the extent that Medicare entitlement and Medicaid eligibility are based on whether you qualify for disability benefits under title II or title XVI, these proposed regulations would also affect the Medicare and Medicaid programs.

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (*see* 20 CFR 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means you have a medically determinable impairment(s) as described above and that results in . . .
Title II	An adult or a child	The inability to do any substantial gainful activity (SGA).
Title XVI	a person age 18 or older	The inability to do any SGA.
Title XVI	A person under age 18	Marked and severe functional limitations.

What Are the Listings?

The listings are examples of impairments that we consider severe enough to prevent an individual from doing any gainful activity or that result in "marked and severe functional limitations" in children seeking SSI payments under title XVI of the Act. Although we publish the listings only in appendix 1 to subpart P of part 404 of our rules, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are an individual age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are an individual under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (*See* §§ 404.1525 and 416.925.) If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (*See* §§ 404.1526 and 416.926.)

We use the listings only to decide that individuals are disabled or that they are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" that we use to evaluate all disability claims. (*See* §§ 404.1520, 416.920, and 416.924.)

Also, when we conduct reviews to determine whether your disability continues, we will not find that your disability has ended based only on any changes in the listings. Our regulations explain that, when we change our listings, we continue to use our prior

listings when we review your case, if you qualified for disability benefits or SSI payments based on our determination or decision that your impairment(s) met or medically equaled the listings. In these cases, we determine whether you have experienced medical improvement and, if so, whether the medical improvement is related to the ability to work. If your condition(s) has medically improved so that you no longer meet or medically equal the prior listing, we evaluate your case further to determine whether you are currently disabled. We may find that you are currently disabled, depending on the full circumstances of your case. *See* §§ 404.1594(c)(3)(i) and 416.994(b)(2)(iv)(A). If you are a child who is eligible for SSI payments, we follow a similar rule after we decide that you have experienced medical improvement in your condition(s). *See* § 416.994a(b)(2).

Why Are We Proposing To Revise the Listings for Cardiovascular Impairments?

We last published final rules revising the listings for the cardiovascular body system in the **Federal Register** on February 10, 1994 (59 FR 6468). In that notice, we said that those rules would be effective for 4 years unless we extended them, or revised and issued them again. The current listings for the cardiovascular system will no longer be effective on July 1, 2005, unless we extend them, or revise and issue them again.

We are proposing these revisions because we decided to update the medical criteria and provide more information about how we evaluate cardiovascular impairments.

When Will We Start To Use These Rules?

We will not use these rules until we evaluate the public comments we receive on them, determine whether to issue them as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them, and summarize and respond to the major public comments. Until the effective date of any final rules, we will continue to use our current rules.

How Long Would These Proposed Rules Be Effective?

If we publish these proposed rules as final rules, they will remain in effect for 5 years after the date they become effective, unless we extend them, or revise and issue them again.

How Are We Proposing To Change the Introductory Text to the Adult Cardiovascular Listings?

We propose to expand and reorganize the introductory material in current section 4.00 to provide additional guidance and to reflect the new listings. Because of the extensive information and guidance included in the introductory text to the listings, we propose to provide separate sections that are devoted to specific issues. The following is an explanation of the proposed material.

Proposed 4.00A—General

In this proposed section, we provide general information on what we mean by a cardiovascular impairment and what we consider when we evaluate cardiovascular impairments. Proposed section 4.00A1 incorporates the information found in current 4.00B, with some minor editing. Proposed section 4.00A2 is taken from the first paragraph of current 4.00A. Proposed section 4.00A3 is a new section containing definitions of some terms we use in these proposed listings.

Proposed 4.00B—Documenting Cardiovascular Impairments

In 4.00B1, we propose to provide information on the basic documentation that we need to evaluate cardiovascular impairments under the listings. In proposed sections 4.00B2–4.00B3, we include a discussion of the importance of longitudinal records and what we will do when a longitudinal record is not available because you have not received ongoing medical treatment. In proposed sections 4.00B4–4.00B6, we explain when we will wait for your condition to become stable before we ask for more evidence to help us evaluate the severity and duration of your impairment, explain when we may decide to order studies, and specify what studies we will not order. Much of this information is taken from the current sections 4.00A and 4.00C, with some rephrasing to clarify our meaning.

Proposed 4.00C—Using Cardiovascular Test Results

In this proposed section, we discuss various specialized cardiovascular tests and how we evaluate their results. In 4.00C1, we explain what an electrocardiogram (ECG) is. Our specifications for ECG tracings from current section 4.00C1 are given in proposed section 4.00C2. In proposed section 4.00C3, we explain what the different kinds of exercise tests are and discuss their uses. Exercise testing is the most widely used testing for identifying the presence of myocardial ischemia and for estimating maximal aerobic capacity if you have heart disease. However, as we state throughout the introductory text, we will consider all the relevant evidence and will not rely solely on the results of one type of test. In proposed section 4.00C4, we discuss what limitations exercise tolerance tests (ETTs) have. We also explain, in proposed section 4.00C5, what ETTs with measurement of maximal or peak oxygen uptake are and how they differ from other ETTs.

In proposed sections 4.00C6–4.00C7, we explain when we will consider ordering an exercise test for case evaluation and what we must do before ordering one. We will continue to require that a medical consultant (MC), preferably one with experience in the care of patients with cardiovascular disease, review the evidence to determine whether performing an exercise test would put you at significant risk, or if there is some other medical reason not to do the test. (When an administrative law judge or an administrative appeals judge at the Appeals Council decides that a consultative examination is appropriate, the administrative law judge or the administrative appeals judge will ask the State agency to arrange for the examination. In this situation, an MC will still assess whether a consultative examination that includes exercise testing would involve a significant risk to you. This is the same procedure that we follow under our current rules.) We also send copies of your records to the physician conducting the exercise test for us, if he or she does not already have them, as the examining physician has the ultimate responsibility for determining whether you would be at risk. We also propose, in section 4.00C8, to reorganize and modify the information on "significant risk" in current section 4.00C2c. We are doing this because some of the so-called risk factors identified in the current section are not risks *per se*, but are factors that affect proper interpretation of the tracings or are situations that only temporarily preclude exercise testing. We propose to identify several different categories that explain the various circumstances under which we will not order an ETT or will defer ordering one. We propose to base much of these provisions on the list of contraindications to exercise testing in the *Guidelines for Exercise Testing* published jointly by the American College of Cardiology (ACC) and the American Heart Association (AHA) in 1997 and updated in 2002. (*See* citations at the end of this preamble.)

In proposed section 4.00C9, we explain when we consider exercise test results to be timely. In proposed sections 4.00C10–4.00C11, we outline the criteria for evaluating how ETTs we order should be performed (taken from current section 4.00C2b) and explain how we evaluate ETT results (taken from current section 4.00C2e). We explain when ETTs are done with imaging and when we will consider ordering such tests in proposed sections 4.00C12–4.00C13, which are based on the guidance given in current section 4.00C3. We provide new guidance on drug-induced stress tests, what they are, and how they are used, in proposed section 4.00C14.

In proposed section 4.00C15, we placed the information found in current section 4.00C4 on two types of cardiac catheterization reports and the details that the reports should contain and what we consider when evaluating these reports. In proposed sections 4.00C16–4.00C17, we placed the information found in current section 4.00E4 on the details that exercise Doppler studies should contain and how any such studies we order should be performed. We propose to change the requirement in the third paragraph of current section 4.00E4 for walking on a 10 or 12 percent grade to a 12 percent grade. This proposed change would make our rules consistent with how the test is generally done. Because this is an exercise test, we must evaluate whether such testing would put you at significant risk, in accordance with the guidance found in proposed 4.00C7 and 4.00C8. We also specify that the tracings should be included with the report and that they should be annotated with the standardization used by the testing facility.

In proposed sections 4.00D–4.00H, we would provide general medical information on the various cardiovascular impairments and information on how we evaluate each of them using the proposed listing criteria. We propose to incorporate information currently found in section 4.00E and guidance we have provided to our adjudicators that is not in the current listings. We also propose to add some new information, as described below.

Proposed 4.00D—Evaluating Chronic Heart Failure

In proposed section 4.00D1, for chronic heart failure, we explain what chronic heart failure is and the differences between the two main types of chronic heart failure. We also propose to evaluate *cor pulmonale* under the respiratory system listing 3.09, rather than listing 4.02, as it is a heart condition resulting from a respiratory disorder. In proposed 4.00D2 and 4.00D3, we describe the evidence of chronic heart failure that we need and explain how ETTs are used to evaluate individuals with known chronic heart failure. We also explain, in proposed 4.00D4, the phrase "periods of stabilization," which we use in proposed listing 4.02B2.

Proposed 4.00E—Evaluating Ischemic Heart Disease

In proposed section 4.00E, for ischemic heart disease (IHD), we would incorporate most of the information in current section 4.00E3. We explain what IHD is and what causes chest discomfort of myocardial origin in proposed sections 4.00E1 and 4.00E2. We propose to move unchanged the material on chest discomfort of myocardial ischemic origin from current section 4.00E3e to proposed section 4.00E2 and to explain that individuals with IHD may experience manifestations other than typical angina pectoris. We discuss the characteristics of typical angina pectoris in proposed section 4.00E3. This section is based on and incorporates material from current section 4.00E3a. In proposed section 4.00E4, we include a definition of, and information on, atypical angina, which we include in our discussion of anginal equivalent in current section 4.00E3b. We discuss anginal equivalent in proposed section 4.00E5. The material on anginal equivalent is based on current section 4.00E3b, but we explain that it is essential to establish objective evidence of myocardial ischemia in order to differentiate anginal equivalent shortness of breath (dyspnea) that results from myocardial ischemia from dyspnea that results from non-ischemic or non-cardiac causes. Proposed section 4.00E6 on variant angina is based on current section 4.00E3c, but we discuss in greater detail what variant angina is, how it is diagnosed and treated, and how we will evaluate it. We also state that vasospasm that is catheter-induced during coronary angiography is not variant angina.

In proposed section 4.00E7, we would expand the discussion of silent ischemia that appears in current section 4.00E3d. We explain what silent ischemia is and why it may occur. We describe the situations in which it most often occurs, how it may be documented using ambulatory monitoring (Holter) equipment, and how we evaluate it. We propose to move the material on chest discomfort of non-ischemic origin from current section 4.00E3f to proposed section 4.00E8. We propose to add acute anxiety or panic attacks to the examples of noncardiac conditions that may produce symptoms mimicking myocardial ischemia, since we recognize that mental disorders may produce physical symptoms. In proposed section 4.00E9, we explain how we evaluate IHD using the criteria in proposed listing 4.04.

Proposed 4.00F—Evaluating Arrhythmias

In proposed section 4.00F, we provide information on evaluating arrhythmias. We explain what arrhythmias are and discuss the different types in proposed sections 4.00F1–4.00F2. In proposed section 4.00F3, we explain what we mean by "near syncope" in listing 4.05. In proposed sections 4.00F4 and 4.00F5, we would add information on implantable cardiac defibrillators and how we will evaluate arrhythmias if you have a defibrillator implanted.

Proposed 4.00G—Evaluating Peripheral Vascular Disease

In the proposed section on peripheral vascular disease (PVD), 4.00G, we would incorporate the information in current 4.00E4 and provide additional information and guidance on the evaluation of PVD, based on questions we have received in the past. Proposed section 4.00G1 explains what we mean by PVD and describes its usual effects. In proposed section 4.00G2, we explain how we assess the limitations resulting from PVD. This section is based on current section 4.00E4, and explains that we will evaluate limitations based on your symptoms, together with physical findings, Doppler studies, other appropriate non-invasive studies, or angiographic findings. We also explain that we will evaluate amputations resulting from PVD under the musculoskeletal body system listings.

We explain in proposed section 4.00G3 what brawny edema is to distinguish it from pitting edema and clarify that pitting edema does not satisfy the requirements of listing 4.11. We also propose to explain what lymphedema is and what causes it in proposed section 4.00G4. We also add guidance on the evaluation of lymphedema in section 4.00G5. We propose to evaluate lymphedema either under the listing for the underlying cause, or to consider whether the condition medically equals a cardiovascular listing, such as listing 4.11, or a musculoskeletal listing in 1.00. We also explain how we evaluate the condition in cases in which the listings are not met or medically equaled.

In proposed section 4.00G6, we clarify how we consider blood pressures taken at the ankle. We will use the higher of the posterior tibial or dorsalis pedis systolic blood pressures measured at the ankle, because the higher pressure is the more reliable. In proposed section 4.00G7, we take information from the third paragraph of current section 4.00E4 on how the ankle/brachial ratio is determined for purposes of evaluating a claim under listing 4.12. We also explain that the ankle and brachial pressures do not have to be taken on the same side of the body because we will use the higher brachial pressure measured, and we provide information on the various techniques used for obtaining ankle systolic blood pressures. We also specify that we will request any available tracings from those techniques, so that we can review them.

We would move and rephrase somewhat for clarity the information on when we will obtain exercise Doppler studies for the evaluation of peripheral arterial disease from current section 4.00E4 to proposed section 4.00G8, but make no substantive changes. We add guidance in proposed section 4.00G9 on the use of toe pressures for evaluating intermittent claudication in individuals with abnormal arterial calcification or small vessel disease, as may happen if you have diabetes mellitus or certain other diseases. In the presence of abnormal arterial calcification or small vessel disease, the blood pressure at the ankle may be misleadingly high, but the toe pressure is seldom affected by these vascular changes. We are also proposing two new criteria in listing 4.12 using toe pressure and toe/brachial pressure ratio. Then, in proposed section 4.00G10, we explain how toe pressures are measured. In proposed section 4.00G11, we describe other studies helpful in evaluating PVD, particularly the recording ultrasonic Doppler unit, and the value of reviewing pulse wave tracings from these studies when evaluating individuals with diabetes mellitus or other diseases with similar vascular changes. We close our discussion of the evaluation of PVD with section 4.00G12, which discusses the similarities between peripheral grafting and coronary grafting and explains how we will evaluate cases involving peripheral grafting.

Proposed 4.00H—Evaluating Other Cardiovascular Impairments

In proposed section 4.00H, we provide guidance on evaluating other cardiovascular impairments. In proposed section 4.00H1, we discuss the evaluation of hypertension, rephrasing material found in current section 4.00E2. We explain what congenital heart disease is in proposed section 4.00H2 and provide guidance on how we will evaluate symptomatic congenital heart disease in proposed 4.00H3. In proposed 4.00H4, we provide guidance on what cardiomyopathy is and how we will evaluate it. We provide guidance on the evaluation of valvular heart disease in proposed 4.00H5. We discuss the evaluation of heart transplant recipients in proposed section 4.00H6. Finally, we explain when an aneurysm has "dissection not controlled by prescribed treatment" as required under listing 4.10, in proposed section 4.00H7. We propose to add guidance on what hyperlipidemia is and how we will evaluate it in proposed section 4.00H8.

Proposed 4.00I—Other Evaluation Issues

In this section, we would provide guidance on a variety of issues. In proposed section 4.00I1, we explain the evaluation of obesity's effect on the cardiovascular system. The guidance in this section is taken from current section 4.00F and incorporates additional guidance we included in Social Security Ruling 02–1p ("Titles II and XVI: Evaluation of Obesity," 67 FR 57859 (2002)). Proposed section 4.00I2 explains how we relate treatment to functional status. This section is based on current section 4.00D; we have deleted some language that dealt with listing-level impairment from the current section and made non-substantive editorial changes. If the anticipated improvement might affect the determination or decision on the case, we will wait an appropriate length of time in order to evaluate the results of the treatment. Finally, in proposed section 4.00I3, we explain how we evaluate cardiovascular impairments that do not meet a cardiovascular listing. This section is based on the fourth paragraph of current section 4.00A. We propose to make non-substantive editorial changes in the current language.

How Are We Proposing To Change the Criteria in the Listings for Evaluating Cardiovascular Impairments in Adults?

Proposed 4.01—Category of Impairments, Cardiovascular System

We propose to delete the following current cardiovascular listings because they are reference listings that direct adjudicators to evaluate these impairments and their effects under other listings: 4.02C, Cor pulmonale; 4.03, Hypertensive cardiovascular disease; 4.06C, Symptomatic congenital heart disease with chronic heart failure; 4.06D, Symptomatic congenital heart disease with recurrent arrhythmias; 4.07, Valvular heart disease or other stenotic defects, or valvular regurgitation; 4.08, Cardiomyopathies; 4.10B, Aneurysm of aorta or major branches with chronic heart failure; 4.10C, Aneurysm of aorta or major branches with renal failure; and 4.10D, Aneurysm of aorta or major branches with neurological complications. As we have done with other body system listings, we propose to delete these reference listings from our listings because they are redundant. However, we provide guidance in the introductory text of the listing on how we will evaluate these impairments using other listings.

The following is a detailed explanation of the proposed listing criteria.

Proposed 4.02—Chronic Heart Failure

We propose to change the format of current listing 4.02, creating two new sections, 4.02A and 4.02B, with subsections. For the listing to be met, both the 4.02A and 4.02B requirements must be satisfied. We propose to move the required imaging findings that are generally associated with the clinical diagnosis of heart failure from current subsections 4.02A and 4.02B to new subsections 4.02A1 and 4.02A2 and to revise them to reflect the anatomical changes associated with systolic and diastolic dysfunction, respectively. The current listing has different criteria for heart failure in sections 4.02A and 4.02B and does not provide criteria for both systolic and diastolic failure. Additionally, because the criteria in current listing 4.02A of 5.5 cm is generally considered the high end of normal for heart size, we propose to change the left ventricular diastolic diameter to left ventricular end diastolic dimensions greater than 6.0 cm. This change would more clearly establish an enlarged heart that would result in the signs and symptoms associated with listing-level severity.

We also propose to redesignate current listing 4.02A as 4.02B1 and revise the criteria language. The current listing includes a description of heart failure and refers to the "inability to carry on any physical activity," which implies that the individual must be bedridden. Our program experience shows that this listing is set at too high a level of severity and is little used. We have removed the description of heart failure and rephrased the proposed criteria in listing 4.02B1 to describe an extreme limitation in that you have an impairment that very seriously limits

your ability to independently initiate, sustain, or complete activities of daily living. This is modeled after the definition of "inability to ambulate effectively" in the musculoskeletal listings, section 1.00A2b(1). We believe this reflects the proper listing level of severity. This listing may only be used if exercise testing presents a significant risk to you.

We propose to add a new criterion in listing 4.02B2 to include individuals who have frequent acute attacks of heart failure, showing that the heart failure is not well-controlled by the prescribed treatment. This also would provide another avenue that would allow us to make favorable determinations or decisions in certain cases without exercise tolerance test documentation.

We propose to redesignate current 4.02B1 as listing 4.02B3. We also propose to revise it, by specifying in proposed listing 4.02B3a the symptoms of chronic heart failure that might cause termination of an ETT. This proposed change makes it clear that the inability to exercise at a workload equivalent to 5 METs could be due to symptoms, as well as the signs listed in proposed 4.02B3b through 4.02B3d. We propose to change the "three or more multiform beats" in the current listing 4.02B1a to "increasing frequency of ventricular ectopy with at least 6 premature ventricular contractions per minute" in proposed listing 4.02B3b. This provides broader criteria for terminating the test on account of exercise-induced (and potentially dangerous) ventricular ectopy (an arrhythmia in which the heartbeat is being triggered inappropriately by the ventricle, causing premature ventricular contraction).

In proposed listing 4.02B3c, we propose to eliminate the criterion for "[f]ailure to increase systolic blood pressure by 10 mmHg," from current listing 4.02B1b because your blood pressure might be temporarily elevated at "baseline" due to anxiety, and the blood pressure response could be blunted by medications. Instead, we propose to specify only an amount of decrease from the "baseline" systolic blood pressure due to left ventricular dysfunction or the preceding systolic pressure measured during exercise at which the test should be terminated. We would redesignate current listing 4.02B1c, for signs attributable to inadequate cerebral perfusion, as proposed listing 4.02B3d, but would make no other changes to it. We would remove current listing 4.02B2, the functional criterion that calls for "marked limitation of physical activity," because it is unnecessary. If you satisfy one of the proposed 4.02A criteria and one of the proposed 4.02B3 criteria, a very seriously limited level of physical activity is implied, so it is not necessary to have a criterion describing this limitation.

Proposed 4.04—Ischemic Heart Disease

In the header text, we propose to change "chest discomfort" to "symptoms" because some individuals have discomfort in other parts of their body, such as an arm, back, or neck, or have other symptoms, such as shortness of breath (dyspnea), associated with ischemia. In proposed listing 4.04A1, we would remove the phrase "and that have a typical ischemic time course of development and resolution (progression of horizontal or downsloping ST depression with exercise)" which appears in current listing 4.04A1 because we believe it is unnecessary. We also propose to eliminate the current listing 4.04A2 criterion. The ACC/AHA *Guidelines for Exercise Testing* indicated that an upsloping ST junction depression, as described in the current criterion, has less specificity (more false-positive results) and they favored the more commonly used horizontal or downsloping ST depression. We would redesignate the subsequent criteria.

In proposed listing 4.04A2 (current listing 4.04A3), we would specify that the ST elevation must occur in "non-infarct" leads; that is, leads that do not reflect previous injury due to an infarction. This is because ST elevation during exercise commonly occurs with a ventricular aneurysm resulting from an infarction, without ischemia being present. We also propose to reduce the requirement for the ST elevation during recovery from 3 or more minutes to 1 or more minutes. This ST elevation in non-infarct leads is of such significance, we believe persistence of the ST elevation for 1 or more minutes of recovery to be sufficient for listing-level severity. In proposed listing 4.04A3 (current listing 4.04A4), we would eliminate the phrase "failure to increase systolic pressure by 10 mmHg" for the reasons previously discussed under the explanation of proposed listing 4.02B3c. We also would specify a decrease of 10 mmHg below baseline due to left ventricular dysfunction, or the preceding systolic pressure measured during exercise, despite an increase in workload, because exercise normally raises blood pressure and a decrease during exercise reflects the presence of ischemia.

We propose to revise current listing 4.04A5, but would make no substantive changes to it, to make clear that the "perfusion defect" represents ischemia and to provide for use of imaging techniques other than radionuclide perfusion scans. We would also redesignate it as listing 4.04A4.

We propose a new listing 4.04B criterion. The new criterion would provide that you would meet the listing if you have three separate ischemic episodes, each requiring revascularization (angioplasty or bypass surgery) or be not amenable to revascularization, within a consecutive 12-month period. This will permit us to decide some cases more quickly.

In the header text for listing 4.04C, we propose to change the phrase "evaluating program physician" to "MC" to be consistent with our terminology throughout these proposed rules and in other regulations. Because not everyone who has the cited findings has ischemia, we propose to add that this criterion can be used only "in the absence of a timely exercise tolerance test or a timely normal drug-induced stress test."

We also propose to revise the current listing 4.04C1e criterion, "[t]otal obstruction of a bypass graft vessel," to change it from "total obstruction" to "70 percent or more narrowing." This would conform to the criterion in current listing 4.04C1b for a nonbypassed coronary artery, which we are not proposing to change. When we originally published the current rule, it was not possible to tell how obstructed bypass graft vessels were. Imaging techniques have improved, making it possible to identify lesser degrees of obstruction of a bypass graft vessel. We propose to revise the 4.04C2 criterion, using substantively the same language that appears in proposed 4.02B1.

Proposed 4.05—Recurrent Arrhythmias

We propose to change the requirement for "uncontrolled repeated episodes of cardiac syncope or near syncope" to "uncontrolled recurrent episodes" using the same definitions for the terms "uncontrolled" and "recurrent" in proposed 4.00A3 that we use throughout these proposed rules. We propose to remove the phrase "and arrhythmia" that follows near syncope in current 4.05, because it is redundant. Listing 4.05 is for "recurrent arrhythmias." We also propose to add language that allows documentation "by other appropriate medically acceptable testing coincident with the occurrence of syncope or near syncope" to provide for the use of electrophysiological studies or any appropriate medical tests developed for arrhythmia in the future.

Proposed 4.06—Symptomatic Congenital Heart Disease

Because we propose to eliminate current reference listings 4.06C and 4.06D, we would redesignate current listing 4.06E as 4.06C. In proposed listing 4.06C, we would no longer refer to "mean" pulmonary artery pressure, as it is the relationship between the pulmonary artery pressure and the systemic arterial pressure that is important. We also clarify that the systolic pressures are to be used.

Proposed 4.09—Heart Transplant

We propose to change the name from "Cardiac transplantation" to "Heart transplant" consistent with terminology in our other listings. We also propose to change the phrase "reevaluate residual impairment" to "evaluate residual impairment," as more accurate, since we would not have evaluated the residual impairment earlier than the end of the 12-month period following the transplant. In addition, we propose to remove the cross-reference to listings 4.02 to 4.08, which we explain we may use when we reevaluate an individual a year after the transplant, and to substitute the phrase "the appropriate listing." This will clarify that other listings besides listings 4.02 through 4.08 may apply, including listings in other body systems.

Proposed 4.10—Aneurysm of Aorta or Major Branches

As we have already noted, we propose to remove listings 4.10B through 4.10D because they are reference listings. We would incorporate the criteria from current listing 4.10A into the header text, because it would be the sole remaining criterion. Because dissection of an aorta must be either acute or chronic, we propose to remove those descriptors as unnecessary in this context. We also propose to change the description of treatment to "prescribed treatment," which includes both medical and surgical methods, and to include a cross-reference to proposed section 4.00H7. That paragraph explains what a dissecting aneurysm is and when we consider that it is not controlled for purposes of this listing.

Proposed 4.11—Chronic Venous Insufficiency

In listing 4.11A, we propose to add language to clarify what we mean by "extensive" brawny edema. We provide that, for purposes of this proposed listing, the brawny edema is "extensive" if it involves approximately two-thirds of the leg between the ankle and knee. In listing 4.11B, we propose to refer only to "prescribed treatment," which includes both medical and surgical methods. This is a non-substantive change from the current listing, which uses the phrase "prescribed medical or surgical therapy." We have also clarified that the phrase "that has not healed following at least 3 months of prescribed treatment" applies only to "persistent" ulceration.

Proposed 4.12—Peripheral Arterial Disease

In listing 4.12, we propose to remove current listing 4.12A because arteriograms are generally used to determine when and where surgical intervention is needed and, if surgery is performed, it is unlikely that the duration requirement would be met. Following surgery, if intermittent claudication continued, it would be evaluated under the remaining criteria. We would redesignate current listings 4.12B1 and 4.12B2 as 4.12A and 4.12B. (**Note:** We removed prior 4.12C, amputation, when we published the final musculoskeletal rules, which were effective February 19, 2002. *See* 66 FR 58010.)

We also propose to revise the criteria on the methods for establishing peripheral arterial disease by substituting the phrase "appropriate medically acceptable imaging" for the current reference to "Doppler studies." In proposed listing 4.12B (current listing 4.12B2), we propose to eliminate the phrase "at the ankle" following "pre-exercise level" because it is redundant.

We also propose two new listings, 4.12C and 4.12D, for the use of resting toe systolic blood pressures and resting toe/brachial systolic blood pressure ratios. As we explained under the discussion of proposed 4.00G8, ankle pressures can be misleadingly high when you have a disease that results in abnormal arterial calcification or small vessel disease.

How Are We Proposing To Change the Introductory Text to the Listings for Evaluating Cardiovascular Impairments in Children?

We propose to expand and reorganize the introductory material in 104.00 to provide additional guidance and reflect the new listings. As with the adult listings, because of the extensive information and guidance included in the introductory text for the listings, we propose to group information on various subjects and related issues together in separate sections. Except for minor changes to refer to children, we have repeated much of the introductory text of proposed 4.00 in the introductory text to proposed 104.00. This is because the same basic rules for establishing and evaluating the existence and severity of cardiovascular impairments in adults also apply to children. Because we have already described these provisions under the explanation of proposed 4.00, the following discussions describe only those provisions that are unique to the childhood rules or that require further explanation.

Proposed 104.00A—General

In proposed section 104.00A3, we explain the same terms and phrases as in proposed 4.00A4, but also include an explanation of the phrase "currently present," which appears only in the childhood listings for reasons we explain below.

Proposed 104.00B—Documenting Cardiovascular Impairments

In proposed 104.00B5, we specify that "We will make a reasonable effort to obtain any additional studies from a qualified medical source in an office or center experienced in pediatric cardiac assessment." In proposed section 104.00B7a and 104.00B7b, we include the discussion, with some non-substantive editorial changes, on the use of exercise testing in children found in the third and fourth paragraphs of current section 104.00B. In proposed section 104.00B7c, we include a cross-reference to the guidance on ETT requirements and usage found in proposed section 4.00C. We did not repeat that section in the childhood listing because it addresses cardiovascular tests used mainly for the diagnosis and evaluation of ischemia, which is rare in children, but if present, the documentation and evaluation are the same as for adults.

Proposed 104.00C—Evaluating Chronic Heart Failure

In proposed section 104.00C1, we do not differentiate between systolic and diastolic dysfunction, as we do with adults in proposed section 4.00D1a, because in children, it is unlikely that we will have a specific type of dysfunction clearly identified. For children, certain laboratory findings of cardiac functional and structural abnormality in support of the diagnosis of chronic heart failure are sufficient. In proposed section 104.00C2a, we also update the findings that represent cardiomegaly or ventricular dysfunction in children. We use the phrase "fractional shortening" rather than "shortening fraction" in the discussion of left ventricular dysfunction and explain what it is. We retain in proposed 104.00C2a(1)(c) the chest x-ray findings cited in the second paragraph of current section 104.00E. In

proposed section 104.00C2b, we include the information found in the first and third paragraphs of current 104.00E, with some rephrasing for clarity, but no substantive changes.

Proposed 104.00D—Evaluating Congenital Heart Disease

In the proposed congenital heart disease section, we would move the list of examples of congenital heart defects from the second paragraph of current section 104.00A to proposed section 104.00D1. In proposed section 104.00D2, we state that we will accept pulse oximetry measurements instead of arterial O_2 values when evaluating children under proposed listing 104.06A2. However, if the arterial O_2 values are available, they are preferred because they are the most accurate. Proposed section 104.00D3 lists examples of congenital heart defects that we would evaluate under proposed listing 104.06D. This material was taken from the first and second paragraphs of current section 104.00D. The discussion of symptomatic congenital heart disease found in proposed section 4.00H3 is repeated in proposed 104.00D4, with minor changes to address children. We propose to delete the information contained in the third paragraph of current section 104.00D, which discusses pulmonary vascular obstructive disease, because it is rarely seen due to the improved diagnosis and treatment of congenital heart disease.

Proposed 104.00E—Evaluating Arrhythmias

This section is substantively identical to the corresponding section in the adult listing, 4.00F, with minor editorial changes that refer specifically to children.

Proposed 104.00F—Evaluating Other Cardiovascular Impairments

In proposed section 104.00F, we address cardiovascular impairments that are most likely to affect children and that are not already discussed in previous sections, omitting those that are more often seen in adults, such as peripheral vascular disease. If necessary, the effects of any such cardiovascular impairment on a child can be evaluated using the adult listings. We include discussions of cardiovascular impairments that are more likely to be seen in children, such as chronic rheumatic fever or rheumatic heart disease. This proposed section contains much of the same information found in the proposed section 4.00H, with the following differences.

We address ischemia in proposed section 104.00F1 instead of a separate section (like in the adult rules) because it is rare in children. Because the documentation and evaluation are the same as for adults, we refer to the adult sections 4.00E and listing 4.04 for the evaluation of ischemic heart disease in children. Proposed section 104.00F2, on how we will evaluate hypertension, is similar to proposed section 4.00H1, but has been modified to reflect its effects on children. In proposed section 104.00F5, we include the information on chronic rheumatic fever and rheumatic heart disease found in current section 104.00G. We refer to the appropriate cardiovascular listings for the evaluation of chronic heart failure and arrhythmias associated with rheumatic heart disease. In proposed section 104.00F7, we discuss how we will evaluate Kawasaki Disease (formerly called Kawasaki syndrome), which usually develops before you are 5 years old.

Proposed 104.00G—Other Evaluation Issues

This proposed section corresponds to the proposed adult section 4.00I, with minor editorial changes to refer to children.

How Are We Proposing To Change the Criteria in the Listings for Evaluating Cardiovascular Impairments in Children?

Proposed 104.01—Category of Impairments, Cardiovascular System

We propose to delete the following current listings: 104.02C, Chronic heart failure with recurrent arrhythmias; 104.02D3, Chronic heart failure with growth disturbance as described under the criteria in 100.00; 104.03, Hypertensive cardiovascular disease; 104.06B, Congenital heart disease with chronic heart failure with evidence of ventricular dysfunction; 104.06C, Congenital heart disease with recurrent arrhythmias; 104.06E, Congenital heart disease with congenital valvular or other stenotic defects, or valvular regurgitation; 104.06G, Congenital heart disease with growth failure; 104.07, Valvular heart disease or other stenotic defects, or valvular regurgitation; 104.08, Cardiomyopathies; 104.13B, Chronic rheumatic fever or rheumatic heart disease with evidence of chronic heart failure; 104.13C, Chronic rheumatic fever or rheumatic heart disease with recurrent arrhythmias; 104.14, Hyperlipidemia; and 104.15, Kawasaki syndrome. With the exception of listings 104.07B, 104.14B, 104.14C, 104.14D and 104.15A, these are reference listings that we propose to delete because they are redundant. However, we provide guidance in the introductory text of the listing on how we will evaluate these impairments using other listings.

We propose to delete current listing 104.07B, Critical aortic stenosis in newborn, because treatment has improved such that this condition would not usually be expected to result in limitations of listing-level severity for 12 months. When necessary, this impairment can be evaluated using proposed listing 104.06D. We also propose to delete the current Hyperlipidemia listings that are not reference listings, 104.14B, 104.14C, and 104.14D. We propose to delete these listings because there is better treatment now available for hyperlipidemia, making it less likely to result in limitations of listing-level severity. If necessary, hyperlipidemia's effect on a child can be evaluated under a listing for the affected body system. We propose to delete current listing 104.15A, Kawasaki syndrome with major coronary artery aneurysm, because generally such an aneurysm would be producing symptoms of heart failure or ischemia, which can be evaluated under the appropriate listings.

The following is a detailed explanation of the proposed listing criteria.

Proposed 104.02—Chronic Heart Failure

We propose to add language to the header text to clarify that the heart failure must occur "while on a regimen of prescribed treatment." Listings 104.02A and 104.02B and their associated tables will remain the same. Because we propose to delete current listing 104.02C, Recurrent arrhythmias, which refers the adjudicator to listing 104.05, we would redesignate the current listing 104.02D, Growth disturbance, as 104.02C. We also propose to add language to the first two growth disturbance criteria to clarify that the weight loss must be currently present and have persisted for 2 months or longer. This is to clarify that we will not find that a child is disabled simply because of a short-term growth disturbance that occurred sometime in the past. We also specify that we will use the current growth charts issued by the National Center for Health Statistics in the Centers for Disease Control and Prevention. This is consistent with the Growth Impairment listings at 100.00. The current growth charts are available on-line at: *www.cdc.gov/growthcharts/.*

Proposed 104.05—Recurrent Arrhythmias

We propose to use the same language as in proposed listing 4.05.

Proposed 104.06—Congenital Heart Disease

In the header text of this section, we propose to add language on documentation by appropriate medically acceptable imaging or cardiac catheterization, to make it parallel with the adult listing. In listing 104.06A1, we propose to revise the language on the frequency of the hematocrit finding to better capture persistence of the finding. Because we propose to remove current listings 104.06B and 104.06C, which refer the adjudicator to other listings, we would redesignate current listing 104.06D as 104.06B. In proposed listing 104.06B, we would no longer refer to "mean" pulmonary artery pressure, for the reason discussed under proposed listing 4.06. We also clarify that we will use the systolic pressures for purposes of this listing. We propose to remove current listing 104.06E, because it is a reference listing, and redesignate current listing 104.06F as 104.06C. We also propose to revise the language of proposed listing 104.06C to reflect the definition of an "extreme" limitation, found in section 416.926a(e)(3) of our regulations.

Finally, we propose to remove the current reference listing 104.06G, redesignate current listing 104.06H as 104.06D and to remove the references to specific listings from it. Also in proposed listing 104.06D, we would change the language that currently directs that a child should be considered disabled until the later of 1 year of age or 12 months after surgery for a life-threatening congenital heart impairment. Instead, we would specify that the child should be considered disabled until at least 1 year of age. This is because, if the condition is truly life threatening, the surgical treatment would generally be done within the first few months after birth and, at the age of 1 year, an assessment of the child's residual impairment would generally be possible. We would further specify that the listing applies only when the impairment is expected to be disabling (because of residual impairment following surgery, the recovery time required, or both) until the attainment of at least 1 year of age. The listing would not apply to surgery for congenital heart impairments that routinely result in prompt recovery or less severe residual impairment.

Proposed Listing 104.09—Heart Transplant

We propose to use the same language as in proposed listing 4.09.

Proposed Listing 104.13—Rheumatic Heart Disease

We propose to change the name by removing "Chronic rheumatic fever" because the impairment is related to the resulting heart disease, rather than the fever activity. We also propose to include current listing 104.13A with the current header text, with some reorganization of the material. We would remove listings 104.13B and 104.13C because they are reference listings.

What Other Revision Are We Proposing?

We propose that *Cor pulmonale* be evaluated under the respiratory listings, as it is a heart condition resulting from a respiratory disorder. Thus, we also propose to revise current listing 3.09 by removing the reference listing 3.09C, which refers to listing 4.02.

Clarity of These Proposed Rules

Executive Order 12866 requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order (E.O.) 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under E.O. 12866, as amended by E.O. 13258. Thus, they were subject to OMB review.

Regulatory Flexibility Act

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules contain reporting requirements at 4.00B, 4.00C, 4.00D, 4.00E, 4.00F, 4.00G, 4.02A, 104.00B, 104.00C, 104.00E, and 104.06. The public reporting burden is accounted for in the Information Collection Requests for the various forms that the public uses to submit the information to SSA. Consequently, a 1-hour placeholder burden is being assigned to the specific reporting requirement(s) contained in these rules. We are seeking clearance of the burden referenced in these rules because the rules were not considered during the clearance of the forms. An Information Collection Request has been submitted to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments should be submitted and/or faxed to the Office of Management and Budget and to the Social Security Administration at the following addresses/numbers:

Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: (202) 395–6974.

Social Security Administration, Attn: SSA Reports Clearance Officer, Rm: 1338 Annex Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–6400.

Comments can be received for up to 60 days after publication of this notice and will be most useful if received within 30 days of publication. To receive a copy of the OMB clearance package, you may call the SSA Reports Clearance Officer on (410) 965–0454.

References

A list of the sources we consulted when developing these proposed rules include the following:

1. Gibbons RJ, Balady GJ, Beasley JW, Bricker JT, Duvernoy WFC, Froelicher VF, Mark DB, Marwick TH, McCallister BD, Thompson PD, Winters WL Jr, Yanowitz FG. ACC/AHA guidelines for exercise testing: a report of the American College of Cardiology/American Heart Association Task Force on Practice Guidelines (Committee on Exercise Testing). *J Am Coll Cardiol.* 1997; 30:260–315.

2. Gibbons RJ, Balady GJ, Bricker JT, Chaitman BR, Fletcher GF, Froelicher VF, Mark DB, McCallister BD, Mooss AN, O'Reilly MG, Winters WL Jr. ACC/AHA 2002 guideline update for exercise testing: a report of the American College of Cardiology/American Heart Association Task Force on Practice Guidelines (Committee on Exercise Testing). 2002. American College of

Cardiology Web site. Available at: *www.acc.org/clinical/guidelines/exercise/dirIndex.htm.*

3. Braddom, RL, ed., *Physical Medicine and Rehabilitation,* 2nd ed., Philadelphia: W.B. Saunders Co., 2000, pp. 665–686.

4. Canto, JG, *et al.*, "Prevalence, Clinical Characteristics, and Mortality Among Patients With Myocardial Infarction Presenting Without Chest Pain." *Journal of the American Medical Association,* June 28, 2000, Vol. 283, No. 24, pp. 3223–3229.

5. "Diastolic Heart Failure—No Time to Relax." *The New England Journal of Medicine,* January 4, 2001, Vol. 344, No. 1, pp. 56–58.

6. National Heart, Lung, and Blood Institute, National Institutes of Health. "Facts About Heart Failure." NIH Publication No. 97–923, Reprinted May 1997. Available on-line at: *www.nhlbi.nih.gov/health/public/heart/other/hrtfail.htm.*

7. Pinkowish, MD, "Revascularization in the 21st century." *Patient Care,* January 15, 2001, pp. 82–98.

8. "Syncope." *The New England Journal of Medicine,* December 21, 2000, Vol. 343, No. 25, pp. 1856–1862.

9. "Guidelines for the Diagnosis of Rheumatic Fever, Jones Criteria, 1992 Update." *The Journal of the American Medical Association,* October 21, 1992, Vol. 268, No. 15, pp. 2069–2073.

10. National Heart, Lung, and Blood Institute, National Institutes of Health. "Facts About Arrhythmias/Rhythm Disorders." NIH Publication No. 95–2264, Reprinted September 1995. Available on-line at: *www.nhlbi.nih.gov/health/public/heart/other/arrhyth.htm.*

11. Anthony S. Fauci, *et al.*, eds., *Harrison's Principles of Internal Medicine,* 14th ed., New York: McGraw-Hill, 1998, pp.1405–1406.

12. P. J. Palumbo, MD, and L. Joseph Melton III, MD, "Peripheral Vascular Disease and Diabetes," *Diabetes in America,* 2nd ed., National Diabetes Data Group, National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health, NIH Publication No. 95–1468, 1995, chapter 17, pp. 401–408. Available on-line at: *www.niddk.nih.gov/health/diabetes/dia/chpt17.pdf.*

13. Jamie D. Santilli, MD, and Steven M. Santilli, MD, PhD, "Chronic Critical Limb Ischemia: Diagnosis, Treatment and Prognosis," *American Family Physician,* April 1, 1999, pp. 1899–1910. Available on-line at: *www.aafp.org/afp/990401ap/1899.html.*

14. Jeffrey W. Olin, DO, "Clinical Evaluation and Office-Based Detection of Peripheral Arterial Disease," Monograph from Continuing Medical Education, Part I: *The Epidemiology and Practical Detection of PAD,* Society of Vascular Medicine and Biology.

15. Michael R. Jaff, DO, FACP, FACC, "Severe Peripheral Arterial Disease and Critical Limb Ischemia: Incidence, Pathophysiology, Presentation, Methods of Diagnosis," Monograph from Continuing Medical Education, Part III: *Severe PAD: Limb Salvage and Revascularization Failure,* Society of Vascular Medicine and Biology.

16. National Heart, Lung, and Blood Institute, National Institutes of Health. "Facts About Cardiomyopathy." NIH Publication No. 97–3082, Revised July 1997. Available on-line at: *www.nhlbi.nih.gov/health/public/heart/other/cardiomy.htm.*

These references are included in the rulemaking record for these proposed rules and are available for inspection by interested individuals by making arrangements with the contact person shown in this preamble.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Dated: June 10, 2004.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—[Amended]

1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

Appendix 1 to Subpart P of Part 404—[Amended]

2. Appendix 1 to subpart P of part 404 is amended as follows:

a. Item 5 of the introductory text before part A of appendix 1 is revised as set forth below.

b. Listing 3.09 of part A of appendix 1 is amended by removing "; Or" at the end of paragraph B, replacing it with a period, and removing paragraph C.

c. Sections 4.00 and 104.00 of appendix 1 to subpart P of part 404 are revised to read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

5. Cardiovascular System (4.00 and 104.00): (Insert date 5 years from the date of publication of the final rules in the **Federal Register**.)

* * * * *

Part A

* * * * *

§ 4.00 Cardiovascular System

A. General

1. *What do we mean by a cardiovascular impairment?*

a. We mean any disorder that affects the proper functioning of either the heart or the circulatory system (arteries, veins, capillaries, and the lymphatic drainage). The disorder can be congenital or acquired.

b. Cardiovascular impairment results from one or more of four consequences of heart disease:

(1) Chronic heart failure or ventricular dysfunction.

(2) Discomfort or pain due to myocardial ischemia, with or without necrosis of heart muscle.

(3) Syncope, or near syncope, due to inadequate cerebral perfusion from any cardiac cause, such as obstruction of flow or disturbance in rhythm or conduction resulting in inadequate cardiac output.

(4) Central cyanosis due to right-to-left shunt, reduced oxygen concentration in the arterial blood, or pulmonary vascular disease.

c. Disorders of the veins or arteries (for example, obstruction, rupture, or aneurysm) may cause impairments of the lower extremities (peripheral vascular disease), the central nervous system, eyes, kidneys, and other organs. We will evaluate peripheral vascular disease under this body system and impairments of another body system(s) under the listings for that body system(s).

2. *What do we consider in evaluating cardiovascular impairments?* The listings in this section describe impairments of the cardiovascular system based on symptoms, signs, laboratory findings, response to a regimen of prescribed treatment, and functional limitations.

3. *What do the following terms or phrases mean in these listings?*

a. *Medical consultant* is an individual defined in §§ 404.1616(a) and 416.1016(a). This term does not include medical sources who provide consultative examinations for us. We use the abbreviation "MC" throughout this section to designate a medical consultant.

b. *Persistent* means that the longitudinal clinical record shows that, with few exceptions, the required finding(s) has been present, or is expected to be present, for a continuous period of at least 12 months, such that a pattern of continuing severity is established.

c. *Recurrent* means that the longitudinal clinical record shows that, within a consecutive 12-month period, the finding(s) occurs at least three times, with intervening periods of improvement of sufficient duration that it is clear that separate events are involved.

d. *Appropriate medically acceptable imaging* means that the technique used is the proper one to evaluate and diagnose the impairment and is commonly recognized as accurate for assessing the cited finding.

e. *A consecutive 12-month period* must occur within the period we are considering in connection with an application or continuing disability review.

f. *Uncontrolled* means the condition does not adequately respond to standard prescribed medical treatment.

B. Documenting Cardiovascular Impairment

1. *What basic documentation do we need?* We need sufficiently detailed reports on history, physical examinations, laboratory studies, and any prescribed treatment and response to allow us to assess the severity and duration of your cardiovascular impairment. A longitudinal clinical record covering a period of not less than 3 months of observations and treatment is usually necessary, unless we can make a determination or decision based on the current evidence.

2. *Why is a longitudinal clinical record important?* We will usually need a longitudinal clinical record to assess the severity and expected duration of your impairment(s). If you have a listing-level impairment, you probably will have received medically prescribed treatment. Whenever there is evidence of such treatment, your longitudinal clinical record should include a description of the ongoing management and evaluation provided by your treating or other medical source. It should also include your response to this medical management, as well as information about the nature and severity of your impairment. The record will provide us with information on your functional status over an extended period of time and show whether your ability to function is improving, worsening, or unchanging.

3. *What if there is no longitudinal record because you have not received ongoing medical treatment?*

a. You may not have received ongoing treatment or have an ongoing relationship with the medical community, despite the existence of a severe impairment(s). In such cases, we will base our evaluation on the current objective medical evidence and the other evidence we have. If you do not receive treatment, you cannot show an impairment that meets the criteria of most of these listings. However, you may have another impairment(s) that, in combination with your cardiovascular impairment, medically equals a listed impairment, or you may be found disabled based on consideration of your residual functional capacity and age, education, and work experience.

b. Unless your claim can be decided favorably on the basis of the current evidence, a longitudinal record is still important. In rare instances where there is no or insufficient longitudinal evidence, we may purchase any necessary examination(s) to establish the severity of your impairment.

4. *When will we wait before we ask for more evidence?*

a. We will wait when we have information showing that your impairment is not yet stable and the expected change in your condition might affect our determination or decision. In these cases, we need to wait to properly evaluate the severity and duration of your impairment during a stable period. Examples of when we might wait are:

(1) If you have had a recent acute event; for example, a myocardial infarction (heart attack).

(2) If you have recently had a corrective cardiac procedure; for example, coronary artery bypass grafting.

(3) If you have started new drug therapy and your response to this treatment has not yet been established; for example, beta-blocker therapy for dilated congestive cardiomyopathy.

b. In these situations, we will obtain more evidence 3 months following the event before we evaluate your impairment. However, we will not wait if we have enough information to make a determination or decision based on all of the relevant evidence in your case.

5. *Will we order any studies?* In appropriate cases, we will order additional studies necessary to substantiate the diagnosis or to document the severity of your impairment after we have evaluated the medical and other evidence we already have. We will order studies involving exercise testing only if there is no significant risk involved or if there is no other medical reason not to perform the test. We will follow sections 4.00C7 and 4.00C8 when we decide whether to order these studies.

6. *What studies will we not order?* We will not order any studies involving cardiac catheterization, such as coronary angiography, arteriograms, or electrophysiological studies. However, if the results of catheterization are part of the existing evidence we have, we will consider them together with the other relevant evidence.

C. Using Cardiovascular Test Results

1. *What is an ECG?*

a. *ECG* stands for *electrocardiograph* or *electrocardiogram.* An electrocardiograph is a machine that records electrical impulses of your heart on a strip of paper called an electrocardiogram or a *tracing.* To record the ECG, a technician positions a number of small contacts (or "leads") on your arms, legs, and across your chest to connect them to the ECG machine. An ECG may be done while you are resting or exercising.

b. The ECG tracing may indicate that you have a heart abnormality. It may indicate that your heart muscle is not getting as much oxygen as it needs (ischemia), that your heart rhythm is abnormal (arrhythmia), or that there are other abnormalities of your heart, such as left ventricular enlargement.

2. *How do we evaluate ECG evidence?* We consider a number of factors when we evaluate ECG evidence:

a. An original or legible copy of the 12-lead ECG obtained at rest must be appropriately dated and labeled, with the standardization inscribed on the tracing. Alteration in standardization of specific leads (such as to accommodate large QRS amplitudes) must be identified on those leads.

(1) Detailed descriptions or computer-averaged signals without original or legible copies of the ECG as described in subsection 4.00C2a are not acceptable.

(2) The effects of drugs or electrolyte abnormalities must be considered as possible noncardiac causes of ECG abnormalities of ventricular repolarization; that is, those involving the ST segment and T wave. If available, the predrug (especially digitalis glycosides) ECG should be submitted.

b. ECGs obtained in conjunction with treadmill, bicycle, or arm exercise tests (see 4.00C4–4.00C14) should meet the following specifications:

(1) ECG reports must include the original calibrated ECG tracings or a legible copy.

(2) A 12-lead baseline ECG must be recorded in the upright position before exercise.

(3) A 12-lead ECG should be recorded at the end of each minute of exercise.

(4) If ECG documentation of the effects of hyperventilation is obtained, the exercise test should be deferred for at least 10 minutes because metabolic changes of hyperventilation may alter the physiologic and ECG-recorded response to exercise.

(5) Post-exercise ECGs should be recorded using a generally accepted protocol consistent with the prevailing state of medical knowledge and clinical practice.

(6) All resting, exercise, and recovery ECG strips must have the standardization inscribed on the tracing. The ECG strips should be labeled to indicate the date, the times recorded and the relationship to the stage of the exercise protocol. The speed and grade (treadmill test) or work rate (bicycle or arm ergometric test) should be recorded. The highest level of exercise achieved, heart rate and blood pressure levels during testing, and the reason(s) for terminating the test (including limiting signs or symptoms) must be recorded.

3. *What are exercise tests and what are they used for?*

a. Exercise tests have you perform physical activity and record how your cardiovascular system responds. Exercise tests usually involve walking on a treadmill, but other forms of exercise, such as an exercise bicycle or an arm exercise machine, may be used. Exercise testing may be done for various reasons; such as, to evaluate the severity of your coronary artery disease or peripheral vascular disease or to evaluate your progress after a cardiac procedure or an acute event, like a myocardial infarction (heart attack). Exercise testing is the most widely used testing for identifying the presence of myocardial ischemia and for estimating maximal aerobic capacity if you have heart disease.

b. We include exercise tolerance test (ETT) criteria in 4.02B3 (chronic heart failure) and 4.04A (ischemic heart disease). To meet the ETT criteria in these listings, the ETT must be a sign-or symptom-limited test in which you exercise while connected to an ECG until you develop a sign or symptom that indicates you have exercised as much as is considered safe for you.

c. In 4.12B, we also refer to exercise testing for peripheral vascular disease. In this test, you walk on a treadmill, usually for a specified period of time, and the individual who administers the test measures the effect of exercise on the flow of blood in your legs, usually by using ultrasound. The test is also called exercise Doppler testing. Even though this test is intended to evaluate peripheral vascular disease, if you develop abnormal signs or symptoms because of heart disease, it will be stopped for your safety.

d. Each type of test is done in a certain way following specific criteria, called a *protocol*. For our program, we also specify certain aspects of how any exercise test we purchase is to be done. *See* 4.00C10 and 4.00C17.

4. *Do ETTs have limitations?* An ETT provides an estimate of aerobic capacity for walking on a grade, bicycling, or moving one's arms in an environmentally controlled setting. Therefore, ETT results do not correlate with the ability to perform other types of exertional activities, such as lifting and carrying heavy loads, and do not provide an estimate of the ability to perform, throughout a workday, activities required for work in all possible work environments. Also, certain medications (such as beta blockers) and conduction disorders (such as left or right bundle branch blocks) can result in false negatives or false positives. Therefore, we must consider the results of an ETT together with all the other relevant evidence.

5. *How does an ETT with measurement of maximal or peak oxygen uptake (VO_2) differ from other ETTs?* Occasionally, medical evidence will include the results of an ETT with VO_2. While ETTs without measurement of VO_2 provide only an estimate of aerobic capacity, measured maximal or peak oxygen uptake provides an accurate measurement of aerobic capacity, which is often expressed in METs (metabolic equivalents). The MET level may not be indicated in the report of attained maximal or peak VO_2 testing, but can be calculated as follows: 1 MET = 3.5 milliliter (ml) of oxygen uptake per kilogram (kg) of body weight per minute. For example, a 70 kg (154 lb.) individual who achieves a maximal or peak VO_2 of 1225 ml in 1 minute has attained 5 METs (1225 ml/70 kg/1 min = 17.5 ml/kg/min. 17.5/3.5 = 5 METs.)

6. *When will we consider ordering an exercise test for case evaluation?* We will consider ordering an exercise test when:

a. We cannot find you disabled on some other basis; and

b. There is no timely test in the evidence we have (see 4.00C9); and

c. There is a question whether a cardiovascular impairment meets or medically equals the severity of one of the listings; or

d. We need to assess your residual functional capacity and there is insufficient evidence in the record to evaluate your aerobic capacity or the effect of exercise on blood flow in your legs.

7. *What must we do before ordering an exercise test?*

a. Before we order an exercise test, an MC, preferably one with experience in the care of patients with cardiovascular disease, must review the pertinent history, physical examinations, and laboratory tests that we have to determine whether the test would present a significant risk to you or if there is some other medical reason not to order the test (*see* 4.00C8).

b. If you are under the care of a treating source (*see* § 404.1502) for a cardiac impairment, this source has not performed an exercise test, and there are no reported significant risks to testing, we will request a statement from that source explaining why it was not done or should not be done before we decide whether we will order the test.

c. In defining risk, the MC, in accordance with the regulations and other instructions on consultative examinations, will generally give great weight to the treating source's opinions and will generally not override them. In the rare situation in which the MC does override the treating source's opinion, the MC must prepare a written rationale documenting the reasons for overriding the opinion.

d. If you do not have a treating source or we cannot obtain a statement from your treating source, the MC is responsible for assessing the risk to exercise testing based on a review of the records we have before ordering an exercise test for you.

e. We must also provide your records to the medical source who performs the exercise test for review prior to conducting the test if the source does not already have them. The medical source who performs the exercise test has the ultimate responsibility for deciding whether you would be at risk.

8. *When will we not order or wait before we order an exercise test?*

a. We will not order an exercise test when an MC finds that you have one of the following significant risk factors:

(1) Unstable angina not previously stabilized by medical treatment.

(2) Uncontrolled cardiac arrhythmias causing symptoms or hemodynamic compromise.

(3) An implantable cardiac defibrillator.

(4) Symptomatic severe aortic stenosis.

(5) Uncontrolled symptomatic heart failure.

(6) Aortic dissection.

(7) Severe pulmonary hypertension (pulmonary artery systolic pressure greater than 60 mm Hg).

(8) Left main coronary stenosis of 50 percent or greater that has not been bypassed.

(9) Moderate stenotic valvular disease with a systolic gradient across the aortic valve of 50 mm Hg or greater.

(10) Severe arterial hypertension (systolic greater than 200 mm Hg or diastolic greater than 110 mm Hg).

(11) Hypertrophic cardiomyopathy with a systolic gradient of 50 mm Hg or greater; or

b. We will also not order an exercise test when you are prevented from performing exercise testing due to another impairment affecting your ability to use your arms and legs; or

c. We will wait to order an exercise test when you have had one of the following within the last 3 months. In these situations, we will defer ordering the ETT until 3 months after the event to allow for maximal, attainable restoration of functional capacity:

(1) Acute myocardial infarction.

(2) Surgical myocardial revascularization (bypass surgery).

(3) Other open-heart surgical procedures.

(4) Percutaneous transluminal coronary angioplasty with or without stenting; or

d. If you are deconditioned after an extended period of bedrest or inactivity and could improve with activity or if you are in acute heart failure and are expected to improve with treatment, we will wait an appropriate period of time for you to recuperate before we order an exercise test.

9. *What do we mean by a "timely" test?*

a. We consider exercise test results to be timely for 12 months after the date they are performed, provided there has been no change in your clinical status that may alter the severity of your cardiovascular impairment.

b. However, an exercise test that is older than 12 months, especially an abnormal one, can still provide information important to our adjudication. For example, a test that is more than 12 months old can provide evidence of ischemic heart disease or peripheral vascular disease, information on decreased aerobic capacity, or information about the duration or onset of your impairment. Such tests can be an important component of the longitudinal record.

c. When we evaluate a test that is more than 12 months old, we must consider the results in the context of all the relevant evidence, whether there has been an intervening event or improvement or worsening of your condition. We will also consider the purpose of the test.

d. We will order a new exercise test only if we cannot make a determination or decision based on the evidence we have.

10. *How should ETTs we order be performed?*

a. The ETT should be a "sign- or symptom-limited" test characterized by a progressive multistage regimen. It must be performed using a generally accepted protocol consistent with the prevailing state of medical knowledge and clinical practice. A description of the protocol that was followed must be provided, and the test must meet the requirements of 4.00C2b and this section. A radionuclide perfusion scan may be useful for detecting or confirming ischemia when resting ECG abnormalities, medications, or other factors may decrease the accuracy of ECG interpretation of ischemia. (The perfusion imaging is done at the termination of exercise, which may be at a higher MET level than that at which ischemia first occurs. If the imaging confirms the presence of reversible ischemia, the exercise ECG may be useful for detecting the MET level at which ischemia initially appeared.)

b. The exercise test should be paced to your capabilities and be performed following the generally accepted standards for adult exercise test laboratories. With a treadmill test, the speed, grade (incline), and duration of exercise must be recorded for each exercise test stage performed. Other exercise test protocols or techniques should use similar workloads. The exercise protocol may need to be modified in individual cases to allow for a lower initial workload with more slowly graded increments than the standard Bruce protocol.

c. Levels of exercise should be described in terms of workload and duration of each stage; for example, treadmill speed and grade, or bicycle ergometer work rate in kpm/min or watts.

d. The exercise laboratory's physical environment, staffing, and equipment should meet the generally accepted standards for adult exercise test laboratories.

11. *How do we evaluate ETT results?* We evaluate ETT results on the basis of the work level at which the test becomes abnormal, as documented by onset of signs or symptoms and any ECG or imaging abnormalities. The absence of an ischemic response on an ETT

alone does not exclude the diagnosis of ischemic heart disease. We must consider the results of an ETT in the context of all of the other evidence in your case record.

12. *When are ETTs done with imaging?* When resting ECG abnormalities preclude interpretation of ETT tracings relative to ischemia, a radionuclide (for example, thallium-201 or technetium-99m) perfusion scan or echocardiography in conjunction with an ETT provides better results. Examples of such resting ECG abnormalities include conduction defects—Wolff-Parkinson-White syndrome, left bundle branch block, left ventricular hypertrophy—or you are taking digitalis or other antiarrhythmic drugs or resting ST changes are present. Also, these techniques can provide a reliable estimate of ejection fraction.

13. *Will we order ETTs with imaging?* We may order an ETT with imaging in your case after an MC, preferably one with experience in the care of patients with cardiovascular disease, has reviewed your medical history and physical examination, any report(s) of appropriate medically acceptable imaging, ECGs, and other appropriate tests. We will consider ordering an ETT with imaging when other information we have is not adequate for us to assess whether you have severe ventricular dysfunction or myocardial ischemia, there is no significant risk involved (see 4.00C8a), and we cannot decide your claim in your favor on another basis.

14. *What are drug-induced stress tests?* These are tests designed primarily to provide evidence about myocardial ischemia or prior myocardial infarction, but do not require you to exercise. These tests are used when you cannot exercise or cannot exercise enough to achieve the desired cardiac stress. Drug-induced stress tests can also provide evidence about heart chamber dimensions and function; however, these tests do not provide information about your aerobic capacity and cannot be used to help us assess your ability to function. Some of these tests use agents, such as Persantine or adenosine, that dilate the coronary arteries and are used in combination with nuclear agents, such as thallium or technetium (for example, Cardiolyte or Myoview), and a myocardial scan. Other tests use agents, such as dobutamine, that stimulate the heart to contract more forcefully and faster (simulating exercise) and are used in combination with a 2-dimensional echocardiogram. We may, when necessary, order a drug-induced stress test to confirm the presence of myocardial ischemia after a review of the evidence in your file by an MC, preferably one with experience in the care of patients with cardiovascular disease.

15. *How do we evaluate cardiac catheterization evidence?*

a. Although we will not purchase cardiac catheterization, if you have had catheterization, we will make a reasonable effort to obtain the report and any ancillary studies. We will consider the quality and type of data provided and its relevance to the evaluation of your impairment. For adults, we generally see two types of catheterization reports, coronary arteriography and left ventriculography.

b. For coronary arteriography, the report should provide information citing the method of assessing coronary arterial lumen diameter and the nature and location of obstructive lesions. Drug treatment at baseline and during the procedure should be reported. Some individuals with significant coronary atherosclerotic obstruction have collateral vessels that supply the myocardium distal to the arterial obstruction so that there is no evidence of myocardial damage or ischemia, even with exercise. When available, we will consider quantitative computer measurements and analyses in interpreting the severity of stenotic lesions.

c. For left ventriculography, the report should describe the wall motion of the myocardium with regard to any areas of hypokinesis (abnormally decreased motion), akinesis (lack of motion), or dyskinesis (distortion of motion), and the overall contraction of the ventricle as measured by the ejection fraction. Measurement of chamber volumes and pressures may be useful. When available, quantitative computer analysis provides precise measurement of segmental left ventricular wall thickness and motion. There is often a poor correlation between left ventricular function at rest and functional capacity for physical activity.

16. *What details should exercise Doppler test reports contain?* The reports of exercise Doppler tests should describe the level of exercise; for example, the speed and grade of the treadmill settings, the duration of exercise, symptoms during exercise, and the reasons for stopping exercise if the expected level of exercise was not attained. They should also include the blood pressures at the ankle and other pertinent sites measured after exercise and the time required for the systolic blood pressure to return toward or to the pre-exercise level. The graphic tracings should also be included with the report. All tracings should be annotated with the standardization used by the testing facility.

17. *How should exercise Doppler tests we order be performed?* When we order an exercise Doppler test, you must exercise on a treadmill at 2 mph on a 12 percent grade for 5 minutes. The reports must include the information specified in 4.00C16. Because this is an exercise test, we must evaluate whether such testing would put you at significant risk, in accordance with the guidance found in 4.00C7 and 4.00C8.

D. Evaluating Chronic Heart Failure

1. *What is chronic heart failure (CHF)?*

a. CHF is the inability of the heart to pump enough oxygenated blood to body tissues. This syndrome is characterized by symptoms and signs of pulmonary or systemic congestion (fluid retention) or limited cardiac output. Certain laboratory findings of cardiac functional and structural abnormality support the diagnosis of CHF. There are two main types of CHF:

(1) Predominant systolic dysfunction (the inability of the heart to contract normally and expel sufficient blood), which is characterized by a dilated, poorly contracting left ventricle and reduced ejection fraction (abbreviated EF, it represents the percentage of the blood in the ventricle actually pumped out with each contraction), and

(2) Predominant diastolic dysfunction (the inability to relax and fill normally), which is characterized by a thickened ventricular muscle, poor ability of the left ventricle to distend, increased ventricular filling pressure, and a normal or increased EF.

b. CHF is considered in these listings as a single category whether due to atherosclerosis (narrowing of the arteries), cardiomyopathy, hypertension, or rheumatic, congenital, or other heart disease. However, if the CHF is the result of primary pulmonary hypertension secondary to disease of the lung (*cor pulmonale*), we will use 3.09 under the respiratory system listings.

2. *What evidence of CHF do we need?*

a. Cardiomegaly or ventricular dysfunction must be present and demonstrated by appropriate medically acceptable imaging, such as chest x-ray, echocardiography (M-Mode, 2-dimensional, and Doppler), radionuclide studies, or cardiac catheterization.

(1) Abnormal cardiac imaging showing increased left ventricular end diastolic diameter (LVEDD), decreased EF, increased left atrial chamber size, increased ventricular filling pressures measured at cardiac catheterization, or increased left ventricular wall or septum thickness, provides objective measures of both left ventricular function and structural abnormality in heart failure.

(2) An LVEDD greater than 6.0 cm or an EF of 30 percent or less measured during a period of stability (that is, not during an episode of acute heart failure) may be associated clinically with systolic failure.

(3) Left ventricular posterior wall thickness added to septal thickness totaling 2.5 cm or greater with left atrium enlarged to 4.5 cm or greater may be associated clinically with diastolic failure.

(4) However, these measurements do not in themselves reflect your functional capacity, which we evaluate by considering all of the relevant evidence. In some situations, we may need to order an ETT to help us assess your functional capacity.

(5) Other findings on appropriate medically acceptable imaging may include increased pulmonary vascular markings, pleural effusion, and pulmonary edema. These findings need not be present on each report, since CHF may be controlled by prescribed treatment.

b. To establish that you have *chronic* heart failure, there should also be characteristic symptoms and signs of pulmonary or systemic congestion, or limited cardiac output described in the medical history and on physical examinations, associated with the abnormal findings on appropriate medically acceptable imaging. When an acute episode of heart failure is triggered by a remediable factor, such as an arrhythmia, dietary sodium overload, or high altitude, cardiac function may be restored and a chronic impairment may not be present.

(1) Symptoms of congestion or of limited cardiac output include easy fatigue, weakness, shortness of breath (dyspnea), cough, or chest discomfort at rest or with activity. Individuals with CHF may also experience shortness of breath on lying flat

(orthopnea) or episodes of shortness of breath waking them from sleep (paroxysmal nocturnal dyspnea). They may also experience cardiac arrhythmias resulting in palpitations, lightheadedness, or fainting.

(2) Signs of congestion may include hepatomegaly, ascites, increased jugular venous distention or pressure, rales, peripheral edema, or rapid weight gain. However, these signs need not be found on all examinations, because fluid retention may be controlled by prescribed treatment.

3. *Is it safe for you to perform an ETT, if you have CHF?* The presence of CHF is not necessarily a contraindication to an ETT, unless you are having an acute episode of heart failure. Measures of cardiac performance are valuable in helping us to evaluate your ability to do work-related activities. Exercise testing has been safely used in individuals with CHF, and we may order an ETT for evaluation under 4.02B3 if an MC, preferably one experienced in the care of patients with cardiovascular disease, determines that there is no significant risk to you. (See 4.00C7–4.00C8 for what we must do before we order an ETT and when we will not order one.) Since the presence of possible ischemic ST segment abnormality on exercise is not critical for application of 4.02B3, digitalis use is not a factor when considering ETT purchase in cases involving CHF.

4. *What do we mean by "periods of stabilization" in 4.02B2?* We mean that, for at least 5 days between episodes of acute heart failure, there must be some objective evidence of clearing of the pulmonary edema or pleural effusions and that you returned to or you were medically considered able to return to your prior level of activity.

E. Evaluating Ischemic Heart Disease

1. *What is ischemic heart disease (IHD)?* IHD results when one or more of the coronary arteries is narrowed or obstructed or, in rare cases, constricted due to vasospasm, interfering with the normal flow of blood to the heart muscle (ischemia). The obstruction may be the result of an embolus, a thrombus, or plaque. When heart muscle tissue dies as a result of the reduced blood supply, it is called a myocardial infarction (heart attack).

2. *What causes chest discomfort of myocardial origin?*

a. Chest discomfort of myocardial ischemic origin, commonly known as angina pectoris, is usually caused by coronary artery disease (often abbreviated CAD). However, ischemic discomfort may be caused by a noncoronary artery condition, such as critical aortic stenosis, hypertrophic cardiomyopathy, pulmonary hypertension, or anemia.

b. Instead of typical angina pectoris, some individuals with IHD may experience atypical angina, anginal equivalent, variant angina, or even silent ischemia, all of which we may evaluate using 4.04. We discuss the various manifestations of ischemia in 4.00E3–4.00E7.

3. *What are the characteristics of typical angina pectoris?* Discomfort of myocardial ischemic origin (angina pectoris) is discomfort that is precipitated by effort or emotion and promptly relieved by rest, sublingual nitroglycerin (that is, nitroglycerin tablets that are placed under the tongue), or other rapidly acting nitrates. Typically, the discomfort is located in the chest (usually substernal) and described as pressing, crushing, squeezing, burning, aching, or oppressive. Sharp, sticking, or cramping discomfort is less common. Discomfort occurring with activity or emotion should be described specifically as to timing and usual inciting factors (type and intensity), character, location, radiation, duration, and response to nitrate treatment or rest.

4. *What is atypical angina?* Atypical angina describes discomfort or pain from myocardial ischemia that is felt in places other than the chest. The common sites of cardiac pain are the inner aspect of the left arm, neck, jaw(s), upper abdomen, and back, but the discomfort or pain can be elsewhere. When pain of cardiac ischemic origin presents in an atypical site in the absence of chest discomfort, the source of the pain may be difficult to diagnose. To establish that this symptom represents atypical angina, the discomfort or pain should have similar precipitating and relieving factors as with typical chest discomfort and we must have objective medical evidence of myocardial ischemia; for example, ECG or ETT evidence or appropriate medically acceptable imaging.

5. *What is anginal equivalent?* Often, individuals with cardiac disease will complain of shortness of breath (dyspnea) on exertion without chest pain or discomfort. In a minority of such cases, the shortness of breath is due to myocardial ischemia and this is called anginal equivalent. To establish that this symptom represents anginal equivalent, the shortness of breath should have similar precipitating and relieving factors as with typical chest discomfort and we must have objective medical evidence of myocardial ischemia; such as, ECG or ETT evidence or appropriate medically acceptable imaging. It is essential to establish objective evidence of myocardial ischemia in order to differentiate these cases from those presenting with effort dyspnea due to non-ischemic or non-cardiac causes.

6. *What is variant angina?*

a. Variant angina (Prinzmetal's, vasospastic angina) refers to the occurrence of anginal episodes at rest, accompanied by transitory ST segment elevation (or, at times, ST depression) on ECG. It is due to severe spasm of a coronary artery, causing ischemia of the heart wall, and is often accompanied by major ventricular arrhythmias, such as ventricular tachycardia, which we may evaluate using 4.05. Spasm of a coronary artery may occur in relation to an obstructive lesion of the vessel of varying degree and is the only situation in which we will consider variant angina under 4.04.

b. Variant angina may also occur in the absence of obstructive coronary disease. In this situation, the ETT will not demonstrate ischemia, and diagnosis will depend on documenting the typical transitory ST segment changes during attacks of pain, and the absence of obstructive lesions at catheterization. Treatment in cases where there is no obstructive coronary disease is limited to medications that reduce coronary vasospasm, such as calcium channel blockers and nitrates. In such cases, we will consider the frequency of anginal episodes despite prescribed treatment.

c. Vasospasm that is catheter-induced during coronary angiography is not variant angina.

7. *What is silent ischemia?*

a. Myocardial ischemia, and even myocardial infarction, can occur without perception of pain or any other symptoms; when this happens, we call it "silent" ischemia. Pain sensitivity may be altered by a variety of diseases, most notably diabetes mellitus and other neuropathic disorders. Individuals also vary in their threshold for pain.

b. Silent ischemia occurs most often in:

(1) Individuals with documented past myocardial infarction or established angina without prior infarction who do not have chest pain on ETT, but have a positive test with ischemic abnormality on ECG or perfusion imaging.

(2) Individuals with documented past myocardial infarction or angina who have ST segment changes on ambulatory monitoring (Holter monitoring) that are similar to those that occur during episodes of angina. The ambulatory recording may show ST depression that should not be interpreted as positive for ischemia unless similar depression is also seen during chest pain episodes annotated in the diary that the individual keeps while wearing the Holter monitor.

c. ST depression can result from a variety of factors such as postural changes and variations in cardiac sympathetic tone. In addition, there are differences in how different Holter monitors record the electrical responses. Therefore, we do not consider the Holter monitor reliable for the diagnosis of silent ischemia except in the situation described in 4.00E7b(2).

8. *What other sources of chest discomfort are there?* Chest discomfort of nonischemic origin may result from other cardiac conditions such as pericarditis. Noncardiac conditions may also produce symptoms mimicking that of myocardial ischemia. These conditions include acute anxiety or panic attacks, gastrointestinal tract disorders, such as esophageal spasm, esophagitis, hiatal hernia, biliary tract disease, gastritis, peptic ulcer, and pancreatitis, and musculoskeletal syndromes, such as chest wall muscle spasm, chest wall syndrome (especially after coronary bypass surgery), costochondritis, and cervical or dorsal spine arthritis. Hyperventilation may also mimic ischemic discomfort. Thus, in the absence of documented myocardial ischemia, such disorders should be considered as possible causes of chest discomfort.

9. *How do we evaluate IHD using 4.04?*

a. We must have objective evidence, as described under 4.00C, that your symptoms are due to myocardial ischemia.

b. Listing-level changes on the ECG in 4.04A1 are the classically accepted changes of horizontal or downsloping ST depression occurring during both exercise and recovery. Although we recognize that ischemic changes may at times be confined only to exercise or only to recovery, and may at times be upsloping with only junctional ST depression, such changes can also occur in the absence of ischemia; that is, a "false positive" ECG response. Such situations may

require appropriate medically acceptable imaging for clarification.

c. Also in 4.04A1, we require that the depression of the ST segment last for at least 1 minute of recovery because ST depression occurring during exercise that rapidly normalizes in recovery is a common "false positive" response.

d. In 4.04A2, we specify that the ST elevation must be in non-infarct leads during both exercise and recovery. This is because, in the absence of ECG signs of prior infarction, ST elevation during exercise denotes ischemia, usually severe, requiring immediate termination of exercise. However, if there is baseline ST elevation in association with a prior infarction or ventricular aneurysm, further ST elevation during exercise does not necessarily denote ischemia and could be a "false positive" ECG response. Diagnosis of ischemia in this situation requires radionuclide confirmation.

e. Listing 4.04A3 requires a decrease in systolic blood pressure below the baseline level (taken in the standing position immediately prior to exercise) or below any systolic pressure reading recorded during exercise. This is because, normally, systolic blood pressure and heart rate increase gradually with exercise. Decreases in systolic blood pressure below the baseline level that occur during exercise are often associated with ischemia-induced left ventricular dysfunction resulting in decreased cardiac output. However, a blunted response (that is, failure of the systolic blood pressure to rise 10 mm Hg or more) particularly in the first 3 minutes of exercise, may be drug-related and is not necessarily associated with left ventricular dysfunction. Also, some individuals (because of deconditioning or apprehension) with increased sympathetic responses may increase their systolic blood pressure and heart rate above their baseline level just before and early into exercise. This can be associated with a drop in systolic pressure in early exercise that is not due to left ventricular dysfunction. Therefore, an early decrease in systolic blood pressure must be interpreted within the total context of the test; that is, the presence or absence of symptoms such as lightheadedness, ischemic changes, or arrhythmias on the ECG.

f. In 4.04B, each of the three ischemic episodes must require revascularization or be not amenable to treatment. Revascularization means angioplasty, with or without stent placement, or bypass surgery. However, reocclusion that occurs after a revascularization procedure but during the same hospitalization, requiring a second procedure during the same hospitalization, will not be counted as another ischemic episode. "Not amenable" means that the revascularization procedure could not be done because of another health condition or the vessel was not suitable for revascularization.

g. For 4.04C to apply, you must be at risk for exercise testing (see 4.00C9) and we must not have a timely ETT or timely normal drug-induced stress test for you. For purposes of 4.04C, the term "nonbypassed" means that the blockage is in a vessel that is potentially bypassable; that is, large enough to be bypassed and considered to be a cause of ischemia. These vessels are usually major arteries or one of a major artery's major branches. A vessel that has become obstructed again after angioplasty or stent placement is considered a nonbypassed vessel for purposes of this listing. When you have had revascularization, we will not use the pre-operative findings to assess the current severity of your coronary artery disease under 4.04C, although we will consider the severity and duration of your impairment prior to your surgery in making our determination or decision.

F. Evaluating Arrhythmias

1. *What is an arrhythmia?* An arrhythmia is a change in the regular beat of the heart. Your heart may seem to skip a beat, beat irregularly, very quickly (tachycardia), or very slowly (bradycardia).

2. *What are the different types of arrhythmias?*

a. There are many types of arrhythmias. Arrhythmias are identified by where they occur in the heart (atria or ventricles) and by what happens to the heart's rhythm when they occur.

b. Arrhythmias arising in the atria (upper chambers of the heart) are called atrial or supraventricular arrhythmias. Ventricular arrhythmias begin in the ventricles (lower chambers). In general, ventricular arrhythmias caused by heart disease are the most serious.

3. *What do we mean by "near syncope" in 4.05?* We consider "near syncope" to be a period of altered consciousness, since syncope is a loss of consciousness or a faint. It is not merely a feeling of light-headedness, momentary weakness, or dizziness. For purposes of 4.05, there has to be a documented association between the symptom and the medically determinable arrhythmia to satisfy the requirements of the listing and it must be recurrent arrhythmia causing the recurrent episodes of syncope or near syncope. The arrhythmia, not some other cardiac or non-cardiac disorder, must be established as the cause of the symptom. Thus, for purposes of this listing, tilt table findings are not acceptable, as they may provoke syncope or near syncope not related to a cardiac condition.

4. *Will we evaluate arrhythmias under 4.05 when an implantable cardiac defibrillator is present?* If you have arrhythmias that are not fully controlled by drug or implantable cardiac defibrillator treatment such that you have uncontrolled recurrent episodes of syncope or near syncope, we will evaluate the arrhythmias under 4.05. If your arrhythmias are controlled, we will evaluate your underlying heart disease using the appropriate listing. For other considerations when we evaluate arrhythmias in the presence of an implantable cardiac defibrillator, see 4.00F5.

5. *What will we consider when we evaluate arrhythmias that do not meet 4.05 and an implantable cardiac defibrillator is present?*

a. Implantable cardiac defibrillators are used to prevent sudden cardiac death in individuals who have had, or are at high risk for, cardiac arrest from life-threatening ventricular arrhythmias. The largest group at risk for sudden cardiac death consists of individuals with cardiomyopathy (ischemic or non-ischemic) and reduced ventricular function. However, life-threatening ventricular arrhythmias can also occur in individuals with little or no ventricular dysfunction. The shock from the implantable cardiac defibrillator is a unique form of treatment; it rescues an individual from what may have been cardiac arrest. As a consequence of the shock(s), individuals may experience psychological distress, which we may evaluate under the mental disorders listings.

b. Most implantable cardiac defibrillators have rhythm-correcting and pacemaker capabilities. In some individuals, these functions may result in the termination of ventricular arrhythmias without an otherwise painful shock. (The shock is like being kicked in the chest.) Implantable cardiac defibrillators may deliver inappropriate shocks, often repeatedly, in response to benign arrhythmias or electrical malfunction. Also, exposure to strong electrical or magnetic fields, such as an MRI (magnetic resonance imaging), can trigger or reprogram an implantable cardiac defibrillator, resulting in inappropriate shocks. We must consider the frequency of and the reason(s) for the shocks when evaluating the severity and duration of your impairment.

c. In general, the exercise limitations imposed on individuals with an implantable cardiac defibrillator are those dictated by the underlying heart condition. However, the exercise limitations may be lowered further when the implantable cardiac defibrillator delivers an inappropriate shock in response to the increase in heart rate with exercise, or when there is exercise-induced ventricular arrhythmia.

G. Evaluating Peripheral Vascular Disease

1. *What is peripheral vascular disease (PVD)?* Generally, for our purposes, PVD is any condition that affects either the arteries (peripheral arterial disease) or the veins (venous insufficiency) in the extremities, particularly the lower extremities. The usual effect is blockage of the flow of blood either from the heart (arterial) or back to the heart (venous). You may have pain in the calf of your leg after walking a distance (intermittent claudication) if you have peripheral arterial disease. If you have venous insufficiency, you may have swelling, varicose veins, or skin changes.

2. *How do we assess limitations resulting from PVD?* We will assess your limitations based on your symptoms, together with physical findings, Doppler studies, other appropriate non-invasive studies, or angiographic findings. However, if the PVD has resulted in amputation, we will evaluate any limitations related to the amputation under the musculoskeletal listings, 1.00ff.

3. *What is brawny edema?* "Brawny" edema (4.11A) is usually dense and feels firm, due to the presence of increased connective tissue, and is associated with characteristic skin pigmentation changes. It is not the same thing as "pitting edema." Brawny edema generally does not "pit," and the terms are not interchangeable. Pitting edema does not satisfy the requirements of 4.11A.

4. *What is lymphedema?* Edema of the extremities due to a disorder of the lymph circulation is called lymphedema or, at its worst, elephantiasis. Primary lymphedema is caused by abnormal development of lymph vessels and may be present at birth (congenital lymphedema), but more often develops during the teens (lymphedema praecox). It may also appear later, usually after age 35 (lymphedema tarda). Secondary lymphedema is due to obstruction or destruction of normal lymphatic channels due to tumor, surgery, repeated infections, or parasitic infection such as filariasis. Lymphedema most commonly affects one extremity.

5. *How do we evaluate lymphedema?* We will evaluate lymphedema by considering whether the underlying cause meets or medically equals any listing or whether the lymphedema medically equals a cardiovascular listing, such as 4.11, or a musculoskeletal listing. If no listing is met or medically equaled, we will evaluate any functional limitations imposed by the lymphedema when we assess your residual functional capacity.

6. *Which ankle blood pressure is referred to in 4.12, the posterior tibial or the dorsalis pedis?* The ankle blood pressure referred to in 4.12 is the higher recorded pressure, either from the posterior tibial or dorsalis pedis. The higher pressure recorded from either site is the more reliable measurement.

7. *What is an ankle/brachial ratio and how do we use it under 4.12A?* The requirements for evaluating peripheral arterial disease in 4.12A are based on the ratio of the systolic blood pressure at the ankle to the systolic blood pressure at the brachial artery; both taken at the same time while you are lying on your back. We do not require that the ankle and brachial pressures be taken on the same side of your body. This is because, as with the ankle pressure, we will use the higher brachial systolic pressure measured. Techniques for obtaining ankle systolic blood pressures include Doppler, plethysmographic studies, duplex scanning with color imaging, or other techniques. We will request any available tracings generated by these studies so that we can review them. (*See* 4.00C16 and 4.00C17.) Listing 4.12A is met when your resting ankle/brachial systolic blood pressure ratio is less than 0.50. If your resting ankle/brachial systolic blood pressure ratio is 0.50 or above, we will use 4.12B to evaluate the severity of your peripheral arterial disease, unless you also have a disease causing abnormal arterial calcification or small vessel disease. *See* 4.00G9 and 4.00G10.

8. *When will we purchase exercise Doppler studies for evaluating peripheral arterial disease?* We will decide whether to purchase exercise Doppler studies by evaluating the existing clinical evidence. If we need additional evidence of your peripheral arterial disease, we will generally order exercise studies (*see* 4.00C16 and 4.00C17) when your resting ankle/brachial systolic blood pressure ratio is at least 0.50 or above, but less than 0.80, and only rarely when it is 0.80 or above. We will not order exercise Doppler testing if you have a disease that results in abnormal arterial calcification or small vessel disease, but will use your resting toe systolic blood pressure or resting toe/brachial systolic blood pressure ratio. (*See* 4.00G9.) There are no current medical standards for evaluating exercise toe pressures. Because any exercise test stresses your entire cardiovascular system, we will order exercise Doppler studies only after an MC, preferably one with experience in the care of patients with cardiovascular disease, has determined that none of the situations listed in 4.00C8 apply to you.

9. *When will we use toe systolic blood pressures for evaluating peripheral arterial disease under 4.12?* We will use resting toe systolic blood pressures or resting toe/brachial systolic blood pressure ratios (determined the same way as ankle/brachial ratios, *see* 4.00G7) when you have a disease that results in abnormal arterial calcification (for example, Monckeberg's sclerosis or diabetes mellitus) or small vessel disease (for example, diabetes mellitus). These diseases may result in misleadingly high blood pressure readings at the ankle. However, high blood pressures due to vascular changes related to these diseases seldom occur at the toe level. Therefore, if you have intermittent claudication and arterial calcification or small vessel disease, we will use your resting toe systolic blood pressure or resting toe/brachial systolic blood pressure ratio when we evaluate your impairment. While the criteria in 4.12C and 4.12D are intended primarily for use when you have a disease causing abnormal arterial calcification or small vessel disease, we may also use them for evaluating anyone with peripheral arterial disease.

10. *How are toe pressures measured?* Toe pressures are measured routinely in most vascular laboratories through one of three methods: Doppler ultrasound; plethysmography using strain gauge cuffs; and photoplethysmography. Toe pressure can also be measured by using any blood pressure cuff that fits snugly around the big toe and is neither too tight nor too loose. A neonatal cuff or a cuff designed for use on fingers or toes (digicuffs) can be used in the measurement of toe pressure.

11. *Are there any other studies that are helpful in evaluating PVD?* Doppler studies done using a recording ultrasonic Doppler unit and strain-gauge plethysmography are other useful tools for evaluating PVD. A recording Doppler, which prints a tracing of the arterial pulse wave in the femoral, popliteal, dorsalis pedis, and posterior tibial arteries, is an excellent evaluation tool to compare wave forms in normal and compromised peripheral blood flow. Qualitative analysis of the pulse wave is very helpful in the overall assessment of the severity of the occlusive disease. Tracings are especially helpful in assessing severity if you have small vessel disease related to diabetes mellitus or other diseases with similar vascular changes, or diseases causing medial calcifications when ankle pressure is either normal or falsely high.

12. *How do we use the PVD listings if you have had a peripheral graft?* Peripheral grafting serves the same purpose as coronary grafting; that is, to bypass a narrow or obstructed arterial segment. If intermittent claudication recurs or persists after peripheral grafting, we may purchase Doppler studies to assess the flow of blood through the bypassed vessel and to establish the current severity of the peripheral vascular impairment. However, if you have had peripheral grafting done for your PVD, we will not use the findings from before the surgery to assess the current severity of your impairment, although we will consider the severity and duration of your impairment prior to your surgery in making our determination or decision.

H. Evaluating Other Cardiovascular Impairments

1. *How will we evaluate hypertension?* Because hypertension (high blood pressure) generally causes disability through its effects on other body systems, we will evaluate it by reference to the specific body system(s) affected (heart, brain, kidneys, or eyes) when we consider the effects of hypertension under the listings. We will also consider any limitations imposed by your hypertension when we assess your residual functional capacity.

2. *What is cangenital heart disease?* Congenital heart disease is any abnormality of the heart or the major blood vessels that is present at birth.

3. *How will we evaluate symptamatic cangenital heart disease?* Because of improved treatment methods, more individuals with congenital heart disease are living longer. Although some types of congenital heart disease may be corrected through surgery, many individuals with treated congenital heart disease continue to have problems throughout their lives (symptomatic congenital heart disease). If you have congenital heart disease that results in chronic heart failure with evidence of ventricular dysfunction or in recurrent arrhythmias, we will evaluate your impairment under 4.02 or 4.05. Otherwise, we will evaluate your impairment under 4.06.

4. *What is cardiamyapathy and how will we evaluate it?* Cardiomyopathy is a disease of the heart muscle. The heart loses its ability to pump blood (heart failure) and, in some instances, heart rhythm is disturbed, leading to irregular heartbeats (arrhythmias). Usually, the exact cause of the muscle damage is never found (idiopathic cardiomyopathy). There are various types of cardiomyopathy, which fall into two major categories: "ischemic" and "nonischemic" cardiomyopathy. Ischemic cardiomyopathy typically refers to heart muscle damage that results from coronary artery disease, including heart attacks. Nonischemic cardiomyopathy includes several types: dilated, hypertrophic, and restrictive. We will evaluate cardiomyopathy under 4.02, 4.04, 4.05, or 11.04, depending on its effects on you.

5. *How will we evaluate valvular heart disease?* We will evaluate valvular heart disease under the listing appropriate for its effect on you. Thus, we may use 4.02, 4.04, 4.05, or the appropriate neurological listing in 11.00ff.

6. *What do we consider when we evaluate heart transplant recipients?*

a. After your heart transplant, we will consider you disabled for 1 year following the surgery because there is a greater likelihood of rejection of the organ and infection during the first year.

b. However, heart transplant patients generally meet our definition of disability before they undergo transplantation. We will determine the actual onset of your disability based on the facts in your case.

c. We will not assume that you became disabled when your name was placed on a transplant waiting list. This is because you may be placed on a waiting list soon after diagnosis of the cardiac disorder that may eventually require a transplant. Physicians recognize that candidates for transplantation often have to wait months or even years before a suitable donor heart is found, so they place their patients on the list as soon as permitted.

d. When we do a continuing disability review to determine whether you are still disabled, we will evaluate your residual impairment(s), as shown by symptoms, signs, and laboratory findings, including any side-effects of medication. We will consider any remaining symptoms, signs, and laboratory findings indicative of cardiac dysfunction in deciding whether medical improvement (as defined in §§ 404.1579(b)(1) and 404.1579(c)(1), 404.1594(b)(1) and 404.1594(c)(1), or 416.994(b)(1)(i) and 416.994(b)(2)(i), as appropriate) has occurred.

7. *When does an aneurysm have "dissection not controlled by prescribed treatment," as required under 4.10?* An aneurysm (or bulge in the aorta or one of its major branches) is dissecting when the inner lining of the artery begins to separate from the arterial wall. We consider the dissection not controlled when you have persistence of chest pain due to progression of the dissection, an increase in the size of the aneurysm, or compression of one or more branches of the aorta supplying the heart, kidneys, brain, or other organs. An aneurysm with associated dissection can cause heart failure, renal (kidney) failure, or neurological complications. We will evaluate these conditions using the appropriate listing.

8. *What is hyperlipidemia and how will we evaluate it?* Hyperlipidemia is the general term for an elevation of any or all of the lipids (fats/cholesterol) in the blood; for example, hypertriglyceridemia, hypercholesterolemia, and hyperlipoproteinemia. These disorders of lipoprotein metabolism and transport can cause defects in various organs. The effects most likely to interfere with function are those produced by atherosclerosis (narrowing of the arteries) and coronary artery disease. Treatment of all of these disorders has improved, which lessens or delays the resulting functional limitations. We will evaluate all of these lipoprotein disorders under the listing appropriate to its effects on you, which may include myocardial ischemia, arterial stenosis, liver transplant (as a form of treatment), pancreatitis, or joint effusions.

I. Other Evaluation Issues

1. *What effect does obesity have on the cardiovascular system and how will we evaluate it?* Obesity is a medically determinable impairment that is often associated with disorders of the cardiovascular system. Disturbance of this system can be a major cause of disability if you have obesity. Obesity may affect the cardiovascular system because of the increased workload the additional body mass places on the heart. Obesity may make it harder for the chest and lungs to expand. This can mean that the respiratory system must work harder to provide needed oxygen. This in turn would make the heart work harder to pump blood to carry oxygen to the body. Because the body would be working harder at rest, its ability to perform additional work would be less than would otherwise be expected. Thus, the combined effects of obesity with cardiovascular impairments can be greater than the effects of each of the impairments considered separately. If you have obesity, when we determine whether you have a listing-level cardiovascular impairment (or a combination of impairments that medically equals the severity of a listed impairment), and when assessing your claim at other steps of the sequential evaluation process, including when assessing your residual functional capacity, we must consider any additional and cumulative effects of obesity.

2. *How do we relate treatment to functional status?* In general, conclusions about the severity of a cardiovascular impairment cannot be made on the basis of type of treatment rendered or anticipated. The amount of function restored and the time required for improvement after treatment (medical, surgical, or a prescribed program of progressive physical activity) vary with the nature and extent of the disorder, the type of treatment, and other factors. Depending upon the timing of this treatment in relation to the alleged onset date of disability, we may need to defer evaluation of the impairment for a period of up to 3 months from the date treatment began to permit consideration of treatment effects, unless we can make a determination or decision using the evidence we have. *See* 4.00B4.

3. *How do we evaluate impairments that do not meet one of the cardiovascular listings?*

a. These listings are only examples of common cardiovascular impairments that we consider severe enough to prevent you from doing any gainful activity. If your severe impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

b. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether the impairments(s) medically equals a listing. (See §§ 404.1526 and 416.926.) If your impairment(s) does not meet or medically equal a listing, you may or may not have the residual functional capacity to engage in substantial gainful activity. In that situation, we proceed to the fourth and, if necessary, the fifth steps of the sequential evaluation process in §§ 404.1520 and 416.920. If you are an adult, we use the rules in §§ 404.1594 or 416.994, as appropriate, when we decide whether you continue to be disabled.

4.01 Category of Impairments, Cardiovascular System.

4.02 *Chronic heart failure* while on a regimen of prescribed treatment with symptoms and signs described in 4.00D2. The required level of severity for this impairment is met when the requirements in *both A and B* are satisfied.

A. Medically documented presence of one of the following:

1. Left ventricular end diastolic dimensions greater than 6.0 cm or ejection fraction of 30 percent or less during a period of stability (see 4.00D2a(2)) (systolic failure); or

2. Left ventricular posterior wall plus septal thickness totaling 2.5 cm or greater on imaging, with an enlarged left atrium (greater than or equal to 4.5 cm), with normal or elevated ejection fraction during a period of stability (see 4.00D2a(2)) (diastolic failure); and

B. Resulting in one of the following:

1. Persistent symptoms of heart failure which very seriously limit the ability to independently initiate, sustain, or complete activities of daily living in an individual for whom an MC, preferably one experienced in the care of patients with cardiovascular disease, has concluded that the performance of an exercise test would present a significant risk to the individual; or

2. Three or more separate episodes of acute congestive heart failure within a consecutive 12-month period (see 4.00A3e), with evidence of fluid retention (see 4.00D2b(2)) from clinical and imaging methods at the time of the episodes, requiring acute extended physician intervention such as hospitalization or emergency room treatment for 12 hours or more, separated by periods of stabilization (see 4.00D4); or

3. Inability to perform on an exercise tolerance test at a workload equivalent to 5 METs or less (see 4.00C2b and 4.00C10) due to:

a. Dyspnea, fatigue, palpitations, or chest discomfort; or

b. Three or more consecutive premature ventricular contractions (ventricular tachycardia) or increasing frequency of ventricular ectopy with at least 6 premature ventricular contractions per minute; or

c. Decrease of 10 mm Hg or more below the baseline systolic blood pressure due to left ventricular dysfunction or the preceding systolic pressure measured during exercise; or

d. Signs attributable to inadequate cerebral perfusion, such as ataxic gait or mental confusion.

4.04 *Ischemic heart disease,* with symptoms due to myocardial ischemia, as described in 4.00E3–4.00E7, while on a regimen of prescribed treatment (see 4.00B3 if there is no regimen of prescribed treatment), with one of the following:

A. Sign- or symptom-limited exercise tolerance test demonstrating at least one of the following manifestations at a workload equivalent to 5 METs or less:

1. Horizontal or downsloping depression, in the absence of digitalis glycoside treatment or hypokalemia, of the ST segment of at least −0.10 millivolts (−1.0 mm) in at least 3 consecutive complexes that are on a level

baseline in any lead (other than aVR), and depression of at least −0.10 millivolts lasting for at least 1 minute of recovery; or

2. At least 0.1 millivolt (1 mm) ST elevation above resting baseline in non-infarct leads during both exercise and 1 or more minutes of recovery; or

3. Decrease of 10 mm Hg in systolic pressure below the baseline blood pressure due to left ventricular dysfunction or the preceding systolic pressure measured during exercise (see 4.00E9e) despite an increase in workload; or

4. Documented ischemia at an exercise level equivalent to 5 METs or less on appropriate medically acceptable imaging such as radionuclide perfusion scans or stress echocardiography; or

B. Three separate ischemic episodes (see 4.00E9f), each requiring revascularization or not amenable (see 4.00E9f) to revascularization, within a consecutive 12-month period (see 4.00A3e); or

C. Coronary artery disease, demonstrated by angiography (obtained independent of Social Security disability evaluation), and, in the absence of a timely exercise tolerance test or a timely normal drug-induced stress test, an MC, preferably one experienced in the care of patients with cardiovascular disease, has concluded that performance of exercise tolerance testing would present a significant risk to the individual, with both 1 and 2:

1. Angiographic evidence revealing:

a. 50 percent or more narrowing of a nonbypassed left main coronary artery; or

b. 70 percent or more narrowing of another nonbypassed coronary artery; or

c. 50 percent or more narrowing involving a long (greater than 1 cm) segment of a nonbypassed coronary artery; or

d. 50 percent or more narrowing of at least 2 nonbypassed coronary arteries; or

e. 70 percent or more narrowing of a bypass graft vessel; and

2. Resulting in very serious limitations in the ability to independently initiate, sustain, or complete activities of daily living.

4.05 *Recurrent arrhythmias*, not related to reversible causes such as electrolyte abnormalities or digitalis glycoside or antiarrhythmic drug toxicity, resulting in uncontrolled (see 4.00A3f), recurrent (see 4.00A3c) episodes of cardiac syncope or near syncope (see 4.00F3), despite prescribed treatment (see 4.00B3 if there is no prescribed treatment), and documented by resting or ambulatory (Holter) electrocardiography, or by other appropriate medically acceptable testing, coincident with the occurrence of syncope or near syncope.

4.06 *Symptomatic congenital heart disease* (cyanotic or acyanotic), documented by appropriate medically acceptable imaging (see 4.00A3d) or cardiac catheterization, with one of the following:

A. Cyanosis at rest, and:

1. Hematocrit of 55 percent or greater; or

2. Arterial O_2 saturation of less than 90 percent in room air, or resting arterial PO_2 of 60 Torr or less; or

B. Intermittent right-to-left shunting resulting in cyanosis on exertion (*e.g.*, Eisenmenger's physiology) and with arterial PO_2 of 60 Torr or less at a workload equivalent to 5 METs or less; or

C. Secondary pulmonary vascular obstructive disease with pulmonary arterial systolic pressure elevated to at least 70 percent of the systemic arterial systolic pressure.

4.09 *Heart transplant.* Consider under a disability for 1 year following surgery; thereafter, evaluate residual impairment under the appropriate listing.

4.10 *Aneurysm of aorta or major branches*, due to any cause (*e.g.*, atherosclerosis, cystic medial necrosis, Marfan syndrome, trauma), demonstrated by appropriate medically acceptable imaging, with dissection not controlled by prescribed treatment (see 4.00H7).

4.11 *Chronic venous insufficiency* of a lower extremity with incompetency or obstruction of the deep venous system and one of the following:

A. Extensive brawny edema involving approximately two-thirds of the leg between the ankle and knee; or

B. Superficial varicosities, stasis dermatitis, and either recurrent ulceration or persistent ulceration that has not healed following at least 3 months of prescribed treatment.

4.12 *Peripheral arterial disease*, as determined by appropriate medically acceptable imaging (see 4.00A3d, 4.00G2, and 4.00G11), causing intermittent claudication (see 4.00G1) and one of the following:

A. Resting ankle/brachial systolic blood pressure ratio of less than 0.50; or

B. Decrease in systolic blood pressure at the ankle on exercise (see 4.00G6–4.00G7 and 4 00C13–4.00C14) of 50 percent or more of pre-exercise level and requiring 10 minutes or more to return to pre-exercise level; or

C. Resting toe systolic pressure of less than 30 mm Hg (see 4.00G9); or

D. Resting toe/brachial systolic blood pressure ratio of less than 0.40 (see 4.00G9).

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Part B

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§ 104.00 Cardiovascular System

A. General

1. *What do we mean by a cardiovascular impairment?*

a. We mean any disorder that affects the proper functioning of either the heart or the circulatory system (arteries. veins, capillaries, and the lymphatic drainage). The disorder can be congenital or acquired.

b. Cardiovascular impairment results from one or more of four consequences of heart disease:

(1) Chronic heart failure or ventricular dysfunction:

(2) Discomfort or pain due to myocardial ischemia, with or without necrosis of heart muscle.

(3) Syncope, or near syncope, due to inadequate cerebral perfusion from any cardiac cause, such as obstruction of flow or disturbance in rhythm or conduction resulting in inadequate cardiac output.

(4) Central cyanosis due to right-to-left shunt, reduced oxygen concentration in the arterial blood, or pulmonary vascular disease.

c. Disorders of the veins and arteries (for example, obstruction, rupture, or aneurysm) may cause impairments of the lower extremities (peripheral vascular disease), the central nervous system, eyes, kidneys, and other organs. We will evaluate peripheral vascular disease under 4.11 or 4.12 and impairments of another body system(s) under the listings for that body system(s).

2. *What do we consider in evaluating cardiovascular impairments?* The listings in this section describe impairments of the cardiovascular system based on symptoms, signs, laboratory findings, response to a regimen of prescribed treatment, and functional limitations.

3. *What do the following terms or phrases mean in these listings?*

a. Medical consultant is an individual defined in §§ 404.1616(a) and 416.1016(a). This term does not include medical sources who provide consultative examinations for us. We use the abbreviation "MC" throughout this section to designate a medical consultant.

b. *Persistent* means that the longitudinal clinical record shows that, with few exceptions, the required finding(s) has been present, or is expected to be present, for a continuous period of at least 12 months, such that a pattern of continuing severity is established.

c. *Recurrent* means that the longitudinal clinical record shows that, within a consecutive 12-month period, the finding(s) occurs at least three times, with intervening periods of improvement of sufficient duration that it is clear that separate events are involved.

d. *Appropriate medically acceptable imaging* means that the technique used is the proper one to evaluate and diagnose the impairment and is commonly recognized as accurate for assessing the cited finding.

e. *A consecutive 12-month period* must occur within the period we are considering in connection with an application or continuing disability review.

f. *Currently present* means that the finding is present at the time of adjudication.

g. *Uncontrolled* means the condition does not respond adequately to standard prescribed medical treatment.

B. Documenting Cardiovascular Impairment

1. *What basic documentation do we need?* We need sufficiently detailed reports on history, physical examinations, laboratory studies, and any prescribed treatment and response to allow us to assess the severity and duration of your cardiovascular impairment. A longitudinal clinical record covering a period of not less than 3 months of observations and treatment is usually necessary, unless we can make a determination or decision based on the current evidence.

2. *Why is a longitudinal clinical record important?* We will usually need a longitudinal clinical record to assess the severity and expected duration of your impairment(s). If you have a listing-level impairment, you probably will have received medically prescribed treatment. Whenever there is evidence of such treatment, your longitudinal clinical record should include a description of the ongoing management and evaluation provided by your treating or other

medical source. It should also include your response to this medical management, as well as information about the nature and severity of your impairment. The record will provide us with information on your functional status over an extended period of time and show whether your ability to function is improving, worsening, or unchanging.

3. *What if there is no longitudinal record because you have not received ongoing medical treatment?*

a. You may not have received ongoing treatment or have an ongoing relationship with the medical community, despite the existence of a severe impairment(s). In such cases, we will base our evaluation on the current objective medical evidence and the other evidence we have. If you do not receive treatment, you cannot show an impairment that meets the criteria of these listings. However, you may have another impairment(s) that, in combination with your cardiovascular impairment, medically equals a listed impairment or that functionally equals the listings.

b. Unless your claim can be decided favorably on the basis of the current evidence, a longitudinal record is still important. In rare instances where there is no or insufficient longitudinal evidence, we may purchase any necessary examination(s) to establish the severity of your impairment.

4. *When will we wait before we ask for more evidence?*

a. We will wait when we have information showing that your impairment is not yet stable and the expected change in your condition might affect our determination or decision. In these cases, we need to wait to properly evaluate the severity and duration of your impairment during a stable period. Examples of when we might wait are:

(1) If you have had a recent acute event; for example, acute rheumatic fever.

(2) If you have recently had a corrective cardiac procedure; for example, open-heart surgery.

(3) If you have started new drug therapy and your response to this treatment has not yet been established; for example, beta-blocker therapy for dilated congestive cardiomyopathy.

b. In these situations, we will obtain more evidence 3 months following the event before we evaluate your impairment. However, we will not wait if we have enough information to make a determination or decision based on all of the relevant evidence in your case.

5. *Will we order any studies?* In appropriate cases, we will order additional studies necessary to substantiate the diagnosis or to document the severity of your impairment after we have evaluated the medical and other evidence we already have. We will order studies involving exercise testing only if there is no significant risk involved or if there is no other medical reason not to perform the test. We will follow sections 4.00C7 and 4.00C8 when we decide whether to order these studies. We will make a reasonable effort to obtain any additional studies from a qualified medical source in an office or center experienced in pediatric cardiac assessment. (See §§ 404.1519g and 416.919g.)

6. *What studies will we not order?* We will not order any studies involving cardiac catheterization, such as coronary angiography, arteriograms, or electrophysiological studies. However, if the results of catheterization are part of the existing evidence we have, we will consider them together with the other relevant evidence.

7. *Will we use exercise tolerance tests (ETTs) for evaluating children with cardiovascular impairment?*

a. ETTs, though increasingly used, are still less frequently indicated in children than in adults, and can rarely be successfully performed in children under 6 years of age. An ETT may be of value in the assessment of some arrhythmias, in the assessment of the severity of chronic heart failure, and in the assessment of recovery of function following cardiac surgery or other treatment.

b. We will purchase an ETT in a childhood claim only if we cannot make a determination or decision based on the evidence we have and an MC, preferably one with experience in the care of children with cardiovascular impairments, has determined that an ETT is needed to evaluate your impairment. We will not purchase an ETT if you are less than 6 years of age. If we do purchase an ETT for a child age 12 or younger, it must be performed by a qualified medical source in a specialty center for pediatric cardiology or other facility qualified to perform exercise testing for children.

c. For full details on ETT requirements and usage, see 4.00C.

C. Evaluating Chronic Heart Failure

1. *What is chronic heart failure (CHF)?* CHF is the inability of the heart to pump enough oxygenated blood to body tissues. This syndrome is characterized by symptoms and signs of pulmonary or systemic congestion (fluid retention) or limited cardiac output. Certain laboratory findings of cardiac functional and structural abnormality support the diagnosis of CHF. CHF is considered in these listings as a single category whether due to atherosclerosis (narrowing of the arteries), cardiomyopathy, hypertension, or rheumatic, congenital, or other heart disease. However, if the CHF is the result of primary pulmonary hypertension secondary to disease of the lung (*cor pulmonale*), we will use 3.09 under the respiratory system listings.

2. *What evidence of CHF do we need?*

a. Cardiomegaly or ventricular dysfunction must be present and demonstrated by appropriate medically acceptable imaging, such as chest x-ray, echocardiography (M-Mode, 2-dimensional, and Doppler), radionuclide studies, or cardiac catheterization.

(1) Cardiomegaly is present when:

(a) Left ventricular diastolic dimension or systolic dimension is greater than 2 standard deviations above the mean for the child's body surface area;

(b) Left ventricular mass is greater than 2 standard deviations above the mean for the child's body surface area; or

(c) Chest x-ray (6 foot PA film) is indicative of cardiomegaly if the cardiothoracic ratio is over 60 percent at 1 year of age or less, or 55 percent or greater at more than 1 year of age.

(2) Ventricular dysfunction is present when indices of left ventricular function, such as fractional shortening or ejection fraction (the percentage of the blood in the ventricle actually pumped out with each contraction), are greater than 2 standard deviations below the mean for the child's age. (Fractional shortening, also called shortening fraction, reflects the left ventricular systolic function in the absence of segmental wall motion abnormalities and has a linear correlation with ejection fraction. In children, fractional shortening is more commonly used than ejection fraction.)

(3) Other findings on appropriate medically acceptable imaging may include increased pulmonary vascular markings, pleural effusion, and pulmonary edema. These findings need not be present on each report, since CHF may be controlled by prescribed treatment.

b. To establish that you have *chronic* heart failure, there should also be characteristic symptoms and signs of pulmonary or systemic congestion, or limited cardiac output described in the medical history and on physical examinations, associated with the abnormal findings on appropriate medically acceptable imaging. When an acute episode of heart failure is triggered by a remediable factor, such as an arrhythmia, dietary sodium overload, or high altitude, cardiac function may be restored and a chronic impairment may not be present.

(1) Symptoms of congestion or of limited cardiac output include easy fatigue, weakness, shortness of breath (dyspnea), cough, or chest discomfort at rest or with activity. Children with CHF may also experience shortness of breath on lying flat (orthopnea) or episodes of shortness of breath waking them from sleep (paroxysmal nocturnal dyspnea). They may also experience cardiac arrhythmias resulting in palpitations, lightheadedness, or fainting. Fatigue or exercise intolerance in an infant may be manifested by prolonged feeding time, often associated with excessive respiratory effort and sweating.

(2) During infancy, other manifestations of chronic heart failure may include failure to gain weight or involuntary loss of weight and repeated lower respiratory tract infections.

(3) Signs of congestion may include hepatomegaly, ascites, increased jugular venous distention or pressure, rales, peripheral edema, quick shallow breathing (tachypnea), or rapid weight gain. However, these signs need not be found on all examinations, because fluid retention may be controlled by prescribed treatment.

D. Evaluating Congenital Heart Disease

1. *What is congenital heart disease?* Congenital heart disease is any abnormality of the heart or the major blood vessels that is present at birth. Examples include:

a. *Abnormalities of cardiac septation*, such as ventricular septal defect or atrioventricular canal;

b. *Abnormalities resulting in cyanotic heart disease*, such as tetralogy of Fallot or transposition of the vessels;

c. *Valvular defects or obstructions to ventricular outflow,* including pulmonary or aortic stenosis or coarctation of the aorta; and

d. *Major abnormalities of ventricular development,* including hypoplastic left heart syndrome or pulmonary tricuspid atresia with hypoplastic right ventricle.

2. *Will we accept pulse oximetry measurements for use under 104.06A2?* We will accept pulse oximetry measurements instead of arterial O_2, but if the arterial O_2 values are available, they are preferred.

3. *What congenital heart defects will we evaluate under 104.06D?* Examples of impairments that in most instances will require life-saving surgery or a combination of surgery and other major interventional procedures (for example, multiple "balloon" catheter procedures) before age 1, include, but are not limited to, the following:

a. Hypoplastic left heart syndrome;

b. Critical aortic stenosis with neonatal heart failure;

c. Critical coarctation of the aorta, with or without associated anomalies;

d. Complete atrioventricular canal defects;

e. Transposition of the great arteries;

f. Tetralogy of Fallot;

g. Pulmonary atresia with intact ventricular septum;

h. Single ventricle;

i. Tricuspid atresia, and

j. Multiple ventricular septal defects.

4. *How will we evaluate symptomatic congenital heart disease?* Because of improved treatment methods, more children with congenital heart disease are living longer. Although some types of congenital heart disease may be corrected through surgery, many children with treated congenital heart disease continue to have problems throughout their lives (symptomatic congenital heart disease). If you have congenital heart disease that results either in chronic heart failure with evidence of ventricular dysfunction or in recurrent arrhythmias, we will evaluate your impairment under 104.02 or 104.05. Otherwise, we will evaluate your impairment under 104.06.

E. Evaluating Arrhythmias

1. *What is an arrhythmia?* An arrhythmia is a change in the regular beat of the heart. Your heart may seem to skip a beat, beat irregularly, very quickly (tachycardia) or very slowly (bradycardia).

2. *What are the different types of arrhythmias?*

a. There are many types of arrhythmias. Arrhythmias are identified by where they occur in the heart (atria or ventricles) and by what happens to the heart's rhythm when they occur.

b. Arrhythmias arising in the atria (upper chambers of the heart) are called atrial or supraventricular arrhythmias. Ventricular arrhythmias begin in the ventricles (lower chambers). In general, ventricular arrhythmias caused by heart disease are the most serious.

3. *What do we mean by "near syncope" in 104.05?* We consider "near syncope" to be a period of altered consciousness, since syncope is a loss of consciousness or a faint. It is not merely a feeling of light-headedness, momentary weakness, or dizziness. For purposes of 104.05, there has to be a documented association between the symptom and the medically determinable arrhythmia to satisfy the requirements of the listing and it must be recurrent arrhythmia causing the recurrent episodes of syncope or near syncope. The arrhythmia, not some other cardiac or non-cardiac disorder, must be established as the cause of the symptom. Thus, for purposes of this listing, tilt table findings are not acceptable, as they may provoke syncope or near syncope not related to a cardiac condition.

4. *Will we evaluate arrhythmias under 104.05 when an implantable cardiac defibrillator is present?* If you have arrhythmias that are not fully controlled by drug or implantable cardiac defibrillator treatment such that you have uncontrolled recurrent episodes of syncope or near syncope, we will evaluate the arrhythmias under 104.05. If your arrhythmias are controlled, we will evaluate your underlying heart disease using the appropriate listing. For other considerations when we evaluate arrhythmias in the presence of an implantable cardiac defibrillator, see 104.00E5.

5. *What will we consider when we evaluate arrhythmias that do not meet 104.05 and an implantable cardiac defibrillator is present?*

a. Implantable cardiac defibrillators are used to prevent sudden cardiac death in children who have had, or are at high risk for, cardiac arrest from life-threatening ventricular arrhythmias. The largest group of children at risk for sudden cardiac death consists of children with cardiomyopathy (ischemic or non-ischemic) and reduced ventricular function. However, life-threatening ventricular arrhythmias can also occur in children with little or no ventricular dysfunction. The shock from the implantable cardiac defibrillator is a unique form of treatment; it rescues a child from what may have been cardiac arrest. As a consequence of the shock(s), children may experience psychological distress, which we may evaluate under the mental disorders listings.

b. Most implantable cardiac defibrillators have rhythm-correcting and pacemaker capabilities. In some children, these functions may result in the termination of ventricular arrhythmias without an otherwise painful shock. (The shock is like being kicked in the chest.) Implantable cardiac defibrillators may deliver inappropriate shocks, often repeatedly, in response to benign arrhythmias or electrical malfunction. Also, exposure to strong electrical or magnetic fields, such as an MRI (magnetic resonance imaging), can trigger or reprogram an implantable cardiac defibrillator, resulting in inappropriate shocks. We must consider the frequency of and the reason(s) for the shocks when evaluating the severity and duration of your impairment.

c. In general, the exercise limitations imposed on children with an implantable cardiac defibrillator are those dictated by the underlying heart condition. However, the exercise limitations may be lowered further when the implantable cardiac defibrillator delivers an inappropriate shock in response to the increase in heart rate with exercise, or when there is exercise-induced ventricular arrhythmia.

F. Evaluating Other Cardiovascular Impairments

1. *What is ischemic heart disease and how will we evaluate it in children?* Ischemic heart disease results when one or more of the coronary arteries is narrowed or obstructed or, in rare cases, constricted due to vasospasm, interfering with the normal flow of blood to the heart muscle (ischemia). The obstruction may be the result of an embolus, a thrombus, or plaque. When heart muscle tissue dies as a result of the reduced blood supply, it is called a myocardial infarction (heart attack). Ischemia is rare in children and its effects on children and adults are the same. We will evaluate it in children using the guidance and criteria found in 4.00E and 4.04.

2. *How will we evaluate hypertension?* Because hypertension (high blood pressure) generally causes disability through its effects on other body systems, we will evaluate it by reference to the specific body system(s) affected (heart, brain, kidneys, or eyes) when we consider the effects of hypertension under the listings. If you are a child seeking supplemental security income payments based on disability, we will also consider your hypertension when we consider whether you have an impairment that functionally equals the listings.

3. *How will we evaluate valvular heart disease?* We will evaluate valvular heart disease under the listing appropriate for its effect on you. Thus, we may use 104.02, 104.05, 104.06, 4.04, or the appropriate neurological listing under 111.00ff or 11.00ff.

4. *What do we consider when we evaluate heart transplant recipients?*

a. After your heart transplant, we will consider you disabled for 1 year following the surgery because there is a greater likelihood of rejection of the organ and infection during the first year.

b. However, heart transplant patients generally meet our definition of disability before they undergo transplantation. We will determine the actual onset of your disability based on the facts in your case.

c. We will not assume that you became disabled when your name was placed on a transplant waiting list. This is because you may be placed on a waiting list soon after diagnosis of the cardiac disorder that may eventually require a transplant. Physicians recognize that candidates for transplantation often have to wait months or even years before a suitable donor heart is found, so they place their patients on the list as soon as permitted.

d. When we do a continuing disability review to determine whether you are still disabled, we will evaluate your residual impairment(s), as shown by symptoms, signs, and laboratory findings, including any side-effects of medication. We will consider any remaining symptoms, signs, and laboratory findings indicative of cardiac dysfunction in deciding whether medical improvement (as defined in § 416.994a(c)) has occurred.

5. *How will we evaluate chronic rheumatic fever or rheumatic heart disease?* The diagnosis should be made in accordance with

the current revised Jones criteria for guidance in the diagnosis of rheumatic fever. We will evaluate persistence of rheumatic fever activity under 104.13. If you have evidence of chronic heart failure or recurrent arrhythmias associated with rheumatic heart disease, we will use 104.02 or 104.05.

6. *What is hyperlipidemia and how will we evaluate it?* Hyperlipidemia is the general term for an elevation of any or all of the lipids (fats/cholesterol) in the blood; for example, hypertriglyceridemia, hypercholesterolemia, and hyperlipoproteinemia. These disorders of lipoprotein metabolism and transport can cause defects in various organs. The effects most likely to interfere with function are those produced by atherosclerosis (narrowing of the arteries) and coronary artery disease. Treatment of all of these disorders has improved, which lessens or delays the resulting functional limitations. We will evaluate all of these lipoprotein disorders under the listing appropriate to its effects on you, which may include myocardial ischemia, arterial stenosis, liver transplant (as a form of treatment), pancreatitis, or joint effusions.

7. *How will we evaluate Kawasaki disease?* We will evaluate Kawasaki disease under the listing appropriate to its effects on you, which may include major coronary artery aneurysm or heart failure. A major coronary artery aneurysm may cause ischemia or arrhythmia, which we will evaluate under 4.04 or 104.05. We will evaluate heart failure under 104.02.

8. *What is lymphedema?* Edema of the extremities due to a disorder of the lymph circulation is called lymphedema or, at its worst, elephantiasis. Primary lymphedema is caused by abnormal development of lymph vessels and may be present at birth (congenital lymphedema), but more often develops during the teens (lymphedema praecox). Secondary lymphedema is due to obstruction or destruction of normal lymphatic channels due to tumor, surgery, repeated infections, or parasitic infection such as filariasis. Lymphedema most commonly affects one extremity.

9. *How do we evaluate lymphedema?* We will evaluate lymphedema by considering whether the underlying cause meets or medically equals any listing or whether the lymphedema medically equals a cardiovascular listing, such as 4.11, or a musculoskeletal listing. If you are a child seeking supplemental security income payments based on disability, we will also consider your lymphedema when we consider whether you have an impairment that functionally equals the listings.

G. Other Evaluation Issues

1. *What effect does obesity have on the cardiovascular system and how will we evaluate it?* Obesity is a medically determinable impairment that is often associated with disorders of the cardiovascular system. Disturbance of this system can be a major cause of disability in children with obesity. Obesity may affect the cardiovascular system because of the increased workload the additional body mass places on the heart. Obesity may make it harder for the chest and lungs to expand. This can mean that the respiratory system must work harder to provide needed oxygen. This in turn would make the heart work harder to pump blood to carry oxygen to the body. Because the body would be working harder at rest, its ability to perform additional work would be less than would otherwise be expected. Thus, the combined effects of obesity with cardiovascular impairments can be greater than the effects of each of the impairments considered separately. If you have obesity, when we determine whether you have a severe cardiovascular impairment or a listing-level cardiovascular impairment (or a combination of impairments that medically equals a listing or, as appropriate, functionally equals the listings), we must consider any additional and cumulative effects of obesity.

2. *How do we relate treatment to functional status?* In general, conclusions about the severity of a cardiovascular impairment cannot be made on the basis of type of treatment rendered or anticipated. The amount of function restored and the time required for improvement after treatment (medical, surgical, or a prescribed program of progressive physical activity) vary with the nature and extent of the disorder, the type of treatment, and other factors. Depending upon the timing of this treatment in relation to the alleged onset date of disability, we may need to defer evaluation of the impairment for a period of up to 3 months from the date treatment began to permit consideration of treatment effects, unless we can make a determination or decision using the evidence we have. See 104.00B4.

3. *How do we evaluate impairments that do not meet one of the cardiovascular listings?*

a. These listings are only examples of common cardiovascular disorders that we consider severe enough to result in marked and severe functional limitations. If your severe impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

b. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. In the case of a claim for SSI payments, if your impairment(s) does not meet or medically equal a listing, we will consider whether it functionally equals the listings. (See §§ 404.1526, 416.926, and 416.926a.) If you are receiving SSI payments, when we decide whether you continue to be disabled, we use the rules in § 416.994a.

104.01 Category of Impairments, Cardiovascular System

104.02 *Chronic heart failure* while on a regimen of prescribed treatment with symptoms and signs described in 104.00C2 and with one of the following:

A. Persistent tachycardia at rest (see Table I); or

B. Persistent tachypnea at rest (see Table II) or markedly decreased exercise tolerance (see 104.00C2b); or

C. Growth disturbance with:

1. An involuntary weight loss or failure to gain weight at an appropriate rate for age, resulting in a fall of 15 percentiles from an established growth curve (on current NCHS/CDC growth chart) which is currently present (see 104.00A3f) and has persisted for 2 months or longer; or

2. An involuntary weight loss or failure to gain weight at an appropriate rate for age, resulting in a fall to below the third percentile from an established growth curve (on current NCHS/CDC growth chart) which is currently present (see 104.00A3f) and has persisted for 2 months or longer.

TABLE I.—TACHYCARDIA AT REST

Age	Apical heart rate (beats per minute)
Under 1 yr	150
1 through 3 yrs	130
4 through 9 yrs	120
10 through 15 yrs	110
Over 15 yrs	100

TABLE II.—TACHYPNEA AT REST

Age	Respiratory rate over (per minute)
Under 1 yr	40
1 through 5 yrs	35
6 through 9 yrs	30
Over 9 yrs	25

104.05 *Recurrent arrhythmias*, not related to reversible causes such as electrolyte abnormalities or digitalis glycoside or antiarrhythmic drug toxicity, resulting in uncontrolled (see 104.00A3g), recurrent (see 104.00A3c) episodes of cardiac syncope or near syncope (see 104.00E3), despite prescribed treatment (see 104.00B3 if there is no prescribed treatment), and documented by resting or ambulatory (Holter) electrocardiography, or by other appropriate medical testing, coincident with the occurrence of syncope or near syncope.

104.06 *Congenital heart disease*, documented by appropriate medically acceptable imaging (see 104.00A3d) or cardiac catheterization, with one of the following:

A. Cyanotic heart disease, with persistent, chronic hypoxemia as manifested by:

1. Hematocrit of 55 percent or greater on two evaluations 3 months or more apart within a consecutive 12-month period (see 104.00A3e); or

2. Arterial O_2 saturation of less than 90 percent in room air, or resting arterial PO_2 of 60 Torr or less; or

3. Hypercyanotic spells, syncope, characteristic squatting, or other incapacitating symptoms directly related to documented cyanotic heart disease; or

4. Exercise intolerance with increased hypoxemia on exertion; or

B. Secondary pulmonary vascular obstructive disease with pulmonary arterial systolic pressure elevated to at least 70 percent of the systemic arterial systolic pressure; or

C. Symptomatic acyanotic heart disease, with ventricular dysfunction interfering very seriously with the ability to independently initiate, sustain, or complete activities.

D. For infants under 12 months of age at the time of filing, with life-threatening congenital heart impairment that will require or already has required surgical treatment in the first year of life, and the impairment is expected to be disabling (because of residual impairment following surgery, or the recovery time required, or both) until the attainment of at least 1 year of age, consider the infant to be under disability until the attainment of at least age 1; thereafter, evaluate impairment severity with reference to the appropriate listing.

104.09 *Heart transplant.* Consider under a disability for 1 year following surgery; thereafter, evaluate residual impairment under the appropriate listing.

104.13 *Rheumatic heart disease,* with persistence of rheumatic fever activity manifested by significant murmurs(s), cardiac enlargement or ventricular dysfunction (see 104.00C2a), and other associated abnormal laboratory findings; for example, an elevated sedimentation rate or ECG findings, for 6 months or more in a consecutive 12-month period (see 104.00A3e). Consider under a disability for 18 months from the established onset of impairment, then evaluate any residual impairment(s).

* * * * *

[FR Doc. 04–20709 Filed 9–15–04; 8:45 am]

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Federal Register

Thursday,
September 16, 2004

Part III

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585
Federal Motor Vehicle Safety Standards; Tire Pressure Monitoring Systems; Controls and Displays; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

[Docket No. NHTSA 2004–19054]

RIN 2127–AJ23

Federal Motor Vehicle Safety Standards; Tire Pressure Monitoring Systems; Controls and Displays

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) proposes to establish a new Federal motor vehicle safety standard mandating tire pressure monitoring systems capable of detecting when a tire is significantly under-inflated. A prior version of the standard, adopted by the agency in June 2002 in response to a mandate in the Transportation Recall Enhancement, Accountability and Documentation Act, was vacated by a decision issued by the U.S. Court of Appeals for the Second Circuit in August 2003. This NPRM, which is consistent with the Court's decision, proposes to require installation in new light vehicles of a tire pressure monitoring system capable of four-tire, 25-percent under-inflation detection. This proposed rule differs from the final rule also in that it tentatively responds to issues raised in petitions for reconsideration of the June 2002 final rule and proposes to require a TPMS malfunction indicator.

DATES: Comments must be received on or before November 15, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number NHTSA 2004–19054 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Rulemaking Analyses and Notice regarding documents submitted to the agency's dockets.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call Mr. George Soodoo or Mr. Samuel Daniel, Office of Crash Avoidance Standards (Telephone: 202–366–2720) (Fax: 202–366–4329).

For legal issues, you may call Mr. Eric Stas, Office of Chief Counsel (Telephone: 202–366–2992) (Fax: 202–366–3820).

You may send mail to these officials at National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Court Decision and Agency Response

In August 2003, the U.S. Court of Appeals for the Second Circuit (Second Circuit) vacated Federal Motor Vehicle Safety Standard (FMVSS) No. 138, *Tire Pressure Monitoring Systems,* which NHTSA had established by a final rule published in the **Federal Register** on June 5, 2002 (67 FR 38704). The rule required the installation of tire pressure monitoring systems (TPMSs) in light vehicles, thereby implementing a mandate in the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000 for a rulemaking to require systems that warn consumers when a tire is significantly under-inflated.

The vacated standard covered an initial period from November 1, 2003 to October 31, 2006. Two compliance options were established for this time period. Under the first option, a vehicle's TPMS would have been required to warn the driver when the pressure in any single tire or in each tire in any combination of tires, up to a total of four tires, had fallen to 25 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the tires, or a minimum level of pressure specified in the standard, whichever pressure was higher. Under the second option, a vehicle's TPMS would have been required to warn the driver when the pressure in any single tire had fallen to 30 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the tires, or a minimum level of pressure specified in the standard, whichever pressure was higher.

The agency stated in the document published in June 2002 that it planned to issue the second part of the final rule by March 1, 2005. The second phase was to establish performance requirements for the period beginning on November 1, 2006. In the meantime, NHTSA planned to leave the rulemaking docket open for the submission of new data and analyses concerning the performance of TPMSs. NHTSA also decided to conduct a study of real world performance of vehicles

equipped with TPMSs, which was nearly completed by the summer of 2003.

After issuance of the June 2002 final rule, three organizations filed suit to challenge the TPMS regulation (FMVSS No. 138), in a case before the U.S. Court of Appeals for the Second Circuit. The Second Circuit issued its opinion in *Public Citizen, Inc.* v. *Mineta)*[1] on August 6, 2003.

The Court held that the agency's inclusion in the standard of a one-tire, 30-percent compliance option was contrary to the intent of Congress expressed in the TREAD Act. The Court found that that Act unambiguously mandates TPMSs capable of monitoring each tire up to a total of four tires, effectively precluding that option or any similar option with less than a four-tire detection capability. While noting that the agency must, as a general matter, consider the reasonableness of cost in rulemaking regarding Federal motor vehicle safety standards, the court also held that including the one-tire, 30-percent requirement as an option was arbitrary and capricious under the Administrative Procedure Act, given that the one-tire, 30-percent requirement was less cost effective and that the agency did not sufficiently "explain why the costs saved were worth the benefits sacrificed." However, the Court upheld the agency's use of a phase-in to implement the standard's requirements and found that the agency had justification for adopting a four-tire, 25-percent option instead of the four-tire, 20-percent option proposed at an earlier stage of the rulemaking.

Consistent with the Second Circuit's opinion, NHTSA is proposing a new FMVSS No. 138 that would include a requirement for four-tire, 25-percent under-inflation detection. Most of the proposed standard's key provisions and underlying reasoning remain the same as in the June 2002 final rule, with the obvious exception of the one-tire, 30-percent option, which has been eliminated. In proposing this standard with its performance requirement, NHTSA reiterates its intention to adopt a standard that is technology-neutral and accommodates future technological innovation.

We note that, if adopted, the approach outlined in this NPRM would result in a consolidation of the rulemaking process, because, in light of the Court's decision, it is no longer necessary to conduct Part II of the rulemaking to determine longer-term compliance requirements after October 31, 2006. Similarly, NHTSA also decided to terminate its tire pressure survey designed to compare vehicles with direct and indirect TPMSs to other vehicles without a TPMS. Under the circumstances, the study's findings are no longer needed to help determine an appropriate detection level.

Originally, the phase-in period for the TPMS standard was scheduled to begin as of November 1, 2003. However, because the Court vacated the standard in its entirety, the agency must promulgate an updated final rule before a phase-in can commence. To determine the extent to which vehicle manufacturers must alter pre-vacation product plans to comply with the new final rule, the agency required all major automobile manufacturers and TPMS suppliers to respond to Special Orders it issued on September 9, 2003 (issued pursuant to 49 U.S.C. 30166(g)(1) and 49 CFR 510).[2] This NPRM proposes to establish a new phase-in schedule, accounting for these changed circumstances.

NHTSA is proposing the following phase-in schedule: 50 percent of a vehicle manufacturer's light vehicles would be required to comply with the standard during the first year (September 1, 2005 to August 31, 2006); 90 percent during the second year (September 1, 2006 to August 31, 2007); all light vehicles thereafter. This proposal would permit carry-forward credits for vehicles certified as complying with the standard that are produced after the effective date of the final rule.

As part of this NPRM, we also are addressing various issues raised in petitions for reconsideration of the June 2002 final rule. At the time of the Court's decision, the agency was nearing publication of its responses to the petitions, and the majority of those issues remain relevant to this updated TPMS rulemaking. Thus, we have decided to address them here. Accordingly, we have proposed some modifications, as compared to the vacated rule. These matters are discussed in further detail below.

Response to Issues Raised in Petitions for Reconsideration

Petitions for reconsideration of the June 2002 final rule raised a variety of issues, the more significant of them involving the standard's requirement that a vehicle's TPMS must work with all replacement tires of the tire size(s) authorized or recommended by the vehicle's manufacturer. Concerns were expressed that the requirement was overly broad and that some tire designs will prevent the proper functioning of the TPMS. The petitions also provided information indicating that there are as many as 600 tire models that could be used as replacements on some vehicle models.

After considering the arguments raised in the petitions and the supplemental information on TPMS compatibility with replacement tires, we have tentatively decided to alter our approach to this topic. Specifically, we are proposing only to require vehicle manufacturers to assure compliance with FMVSS No. 138 with the tires installed on the vehicle at the time of initial sale. We have tentatively decided upon this approach for the following reasons.

First, information presented to NHTSA in the petitions shows that there are currently over four million TPMS-equipped vehicles,[3] and neither the agency nor vehicle manufacturers have received reports indicating any significant performance problems with those TPMSs when replacement tires are installed on the vehicle. Further, there are a variety of aftermarket TPMSs, and again, there has not been any significant number of reports of incompatibility problems between those systems and replacement tires. Thus, this significant real world population suggests that TPMSs are expected to

[1] 340 F.3d 39 (2d Cir. 2003).

[2] In comments submitted to the Office of Management and Budget related to the agency's Special Order, the Alliance of Automobile Manufacturers (Alliance) suggested that its members' product plans were predicated on the agency's amending the final rule in a manner acceptable to its members (see Docket No. NHTSA–2000–8572–277). Specifically, the Alliance in its September 5, 2003 letter stated, *"It is important to note that those plans were predicated on the assumption that the major issues raised by the Alliance in its July 22, 2002 petition for reconsideration (with supplement on October 30, 2002) and its April 29, 2003 petition for rulemaking (with supplement on June 30, 2003) of FMVSS 138 would be satisfactorily resolved"* (emphasis in original). This expectation was repeated in several vehicle manufacturer responses to the Special Order.

We believe that a clarification of the regulatory process is in order. NHTSA carefully considers petitions for reconsideration of final rules that raise new issues arising from resolution of matters addressed in response to rulemaking proposals. After careful review, the agency decides whether to grant the petitions and whether to modify the rule. In any event, NHTSA's response to such petitions is prospective. In the interim, the final rule remains effective as originally promulgated. Because manufacturers cannot assume that requested changes will be made in response to such petitions, they must plan to comply with the final rule as issued, without reservation. At the same time, the agency recognizes its responsibility to grant or deny petitions for reconsideration of its rules in a timely fashion.

[3] Letter from Robert Strassburger, Vice President, Alliance of Automobile Manufacturers, to NHTSA (October 20, 2003) (Docket No. NHTSA–2000–8572–277).

continue to work with replacement tires in the vast majority of cases.

However, NHTSA has been presented with data demonstrating that a very small number of replacement tires may cause a vehicle's TPMS to exhibit functional problems for which there is currently no clear solution. The identified problems are primarily related to the tires' construction (*e.g.*, run-flat tires) and material content (*e.g.*, high carbon content in low aspect-ratio tires, thicker sidewall, or steel body ply sidewall).

In many instances, TPMSs may function properly even when equipped with replacement tires with the above-mentioned characteristics, but to date, it has not been possible to develop an appropriate performance measure that would reliably identify those anomalous tires that would prevent proper TPMS functioning. However, available data show that, in 2002, light vehicle tires having either steel body ply cords (steel casing tires) or run-flat capability accounted for less than 0.5 percent of tires distributed in the United States.[4]

Based upon the above new information, we now believe that there is not a sufficient basis to require vehicle manufacturers to assure compliance with all replacement tires. While the number of tires expected to be incompatible with a given TPMS is expected to be small, such a requirement would nonetheless raise significant practicability concerns. For example, vehicle manufacturers will not be able to anticipate future tire construction changes; therefore, a replacement tire requirement similar to the one contained in the June 2002 final rule could force vehicle manufacturers to halt vehicle sales over a problem they could not correct. We continue to believe, however, that the TPMS should continue to function properly beyond the point at which the vehicle's original tires are replaced, a clearly foreseeable event. At a minimum, consumers need to know if the TPMS is not functioning with the replacement tires. Otherwise, an unilluminated low tire pressure telltale would give consumers a false sense of security in those cases.

The Alliance has recommended a framework for resolution of the problem of incompatible replacement tires, predicated upon a requirement for a TPMS malfunction indicator coupled with a related statement in the vehicle's owner's manual.[5] We believe that this approach could provide not only a relatively low-cost solution to the replacement tire incompatibility problem, but also additional warnings regarding other types of TPMS malfunctions (*e.g.*, sensor damage, signal attenuation, and dead batteries).

Therefore, in this NPRM, we are proposing to require the TPMS to be equipped with a telltale that would alert the driver of a TPMS malfunction, tire-related or otherwise. We are proposing that the malfunction warning be provided either through a separate, dedicated telltale or through a distinctive warning delivered by the low tire pressure telltale.

In addition, we are proposing to require that the owner's manual include a statement that would make consumers aware of this potential problem. Specifically, we are proposing to require vehicle manufacturers to alert consumers regarding: (1) Potential problems related to compatibility between the vehicle's TPMS and various types of replacement tires, and (2) the presence and operation of the TPMS malfunction indicator.

Manufacturers also asked the agency to provide greater specificity in the TPMS test procedures in order to increase objectivity. After consideration of these recommendations, we are proposing to make the standard's test procedures more specific. However, we also seek to ensure that the test procedures continue to be broad enough to replicate a range of real world driving conditions, rather than encourage development of systems that are designed and tested for effectiveness only in a narrow set of driving circumstances. Specifically, we are proposing to designate a course for compliance testing (*i.e.*, the Southern Loop of the Treadwear Test Course), which is both objective and representative of a range of driving conditions. In addition, we are proposing to refine the calibration and system detection provisions to specify that driving times in the designated speed range will be cumulative (not continuous) and that system calibration or low tire detection time will not accumulate during periods when the brake is applied. Further, we also are proposing to specify that the vehicle's tires will be shaded from direct sun when parked. We believe that the proposed modifications would sufficiently address calls for greater specificity in the standard's test procedures, while ensuring that the TPMS will function on a variety of roadways and road conditions.

In response to other issues raised in the petitions, we are proposing to incorporate additional changes in this NPRM, including revision of the definition of "small volume manufacturer" and clarification of specific issues that may arise under FMVSS No. 138.

II. Background

A. The TREAD Act

Congress enacted the TREAD Act;[6] on November 1, 2000. Section 13 of that Act[7] required the Secretary of Transportation, within one year of the statute's enactment, to complete a rulemaking "to require a warning system in new motor vehicles to indicate to the operator when a tire is significantly under inflated." Section 13 also required the regulation to take effect within two years of the completion of the rulemaking. Responsibility for this rulemaking was delegated to NHTSA.

B. The June 2002 Final Rule Requiring TPMSs

1. The Notice of Proposed Rulemaking

NHTSA initiated the TPMS rulemaking with the publication of a Notice of Proposed Rulemaking (NPRM) on July 26, 2001 (*see* 66 FR 38982, Docket No. NHTSA–2000–8572–30). That NPRM proposed to require passenger cars, light trucks, multipurpose passenger vehicles, and buses with a gross vehicle weight rating of 10,000 pounds or less, except those with dual wheels on an axle, to be equipped with a TPMS.

The agency sought comment on two alternative sets of performance requirements for TPMSs and indicated that it contemplated adopting only one of them in the final rule. The first alternative would have required that the driver be warned when the pressure in any single tire or in each tire in any combination of tires, up to a total of four tires, had fallen to 20 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the vehicle's tires (the placard pressure), or a minimum level of pressure specified in the standard, whichever was higher. (This alternative is referred to below as the four-tire, 20-percent alternative.) The second alternative would have required that the driver be warned when the pressure in any single tire or in each tire in any combination of tires, up to a total of

[4] Letter from Steven Butcher, Vice President, Rubber Manufacturers Association, to NHTSA (October 31, 2003) (Docket No. NHTSA–2000–8572–282).

[5] Letter from Vann Wilber, Vehicle Safety and Harmonization Director, Alliance of Automobile Manufacturers, to NHTSA (December 9, 2003) (Docket No. NHTSA–2000–8572–285).

[6] Public Law 106–414, 114 Stat. 1800 (2000).

[7] *See* 49 U.S.C. § 30123 note (2003).

three tires, had fallen to 25 percent or more below the placard pressure, or a minimum level of pressure specified in the standard, whichever was higher. (This alternative is referred to below as the three-tire, 25-percent alternative.)

There are two types of TPMSs currently available, direct TPMSs and indirect TPMSs.[8] Direct TPMSs have a pressure sensor in each wheel that transmit pressure information to a receiver. In contrast, indirect TPMSs do not have tire pressure sensors, but instead rely on the wheel speed sensors, typically a component of an anti-lock braking system (ABS), to detect and compare differences in the rotational speed of a vehicle's wheels, which correlate to differences in tire pressure.

To meet the four-tire, 20-percent alternative within the timeframe envisioned in the NPRM, vehicle manufacturers likely would have had to install direct TPMSs because it is unlikely that even improved indirect systems would be able to detect loss of pressure until pressure has fallen 25 percent and to detect all combinations of significantly under-inflated tires. To meet the three-tire, 25-percent alternative, vehicle manufacturers would have been able to install either direct TPMSs or improved indirect TPMSs.

2. The Preliminary Determination About the Final Rule

After consideration of the comments submitted in response to the NPRM, NHTSA preliminarily determined to issue a final rule that would have specified a four-year phase-in schedule and that would have allowed compliance with either of two options during the phase-in period (*i.e.*, between November 1, 2003 and October 31, 2006). Under the first option, a vehicle's TPMS would have had to warn the driver when the pressure in one or more of the vehicle's tires, up to a total of four tires, was 25 percent or more below the placard pressure, or a minimum level of pressure specified in the standard, whichever pressure was higher. (This option is referred to below as the four-tire, 25-percent option.) Under the second option, a vehicle's TPMS would have had to warn the driver when the pressure in any one of the vehicle's tires was 30 percent or more below the placard pressure, or a minimum level of pressure specified in the standard, whichever pressure was higher. (This option is referred to below as the one-tire, 30-percent option.) The minimum levels of pressure specified in the standard were the same for both compliance options.

After the phase-in (*i.e.*, after October 31, 2006), the second option would have been terminated, and the provisions of the first option would have become mandatory for all new vehicles. Thus, all vehicles would have been required to meet a four-tire, 25-percent requirement.

3. OMB Return Letter

After reviewing the draft final rule, OMB returned it to NHTSA for reconsideration, with a letter explaining its reasons for doing so, on February 12, 2002. For a discussion of that letter and NHTSA's analysis of the issues it raised, see NHTSA's June 5, 2002 final rule at 67 FR 38704, 38712, 38718–22.

4. Highlights of the June 2002 Final Rule

Consistent with the OMB return letter, the agency divided the TPMS final rule into two parts because it decided to defer its decision as to which long-term performance requirements for TPMS would best satisfy the mandate of the TREAD Act. This deferral was intended to allow the agency to consider additional data on the effect and performance of TPMSs currently in use.

The first part of the final rule was published in the **Federal Register** on June 5, 2002 (67 FR 38704) (Docket No. NHTSA 2000–8572). It established requirements for vehicles manufactured during the first three years (*i.e.*, between November 1, 2003 and October 31, 2006) and phased TPMSs in by increasing percentages of production. The agency stated that the second part of the final rule would establish requirements for vehicles manufactured on or after November 1, 2006.

a. Part One—November 2003 Through October 31, 2006

The June 2002 final rule provided two compliance options during the interim period. Under the first compliance option, vehicle manufacturers would have been required to equip their light vehicles (*i.e.*, those with a GVWR of 4,536 kg (10,000 pounds) or less) with TPMSs to warn the driver when the pressure in any single tire or in each tire in any combination of tires, up to a total of four tires, is 25 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the tires, or a minimum level of pressure specified in the standard, whichever pressure is higher. Under the second compliance option, the vehicle's TPMS would have been required to warn the driver when the pressure in any single tire is 30 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the tires, or a minimum level of pressure specified in the standard, whichever pressure is higher.[9]

The two compliance options were outgrowths of the alternative sets of requirements proposed in the NPRM. In response to comments indicating that current indirect TPMSs could not meet the proposed three-tire, 25-percent under-inflation requirements, the agency adopted the one-tire, 30-percent option. That option would have allowed those systems to be used during the phase-in. The four-tire, 25-percent under-inflation option could have been met by installing either direct TPMSs or hybrid TPMSs (*i.e.*, TPMSs that combine direct and indirect TPMS technologies). One TPMS supplier indicated the potential for developing and producing hybrid systems, although it also indicated that it did not currently have plans for doing so.

The owner's manual for vehicles certified to either compliance option would have been required to include an explanation of the purpose of the yellow low tire pressure warning telltale, the potential consequences of driving on significantly under-inflated tires, the meaning of the telltale when it is illuminated, and the actions that drivers should take in response.

To facilitate compliance with the options, the rule included a phase-in of the standard's requirements by increasing percentages of production. Ten percent of a vehicle manufacturer's light vehicles were to be required to comply with either compliance option during the first year (November 1, 2003 to October 31, 2004), 35 percent during the second year (November 1, 2004 to October 31, 2005), and 65 percent during the third year (November 1, 2005 to October 31, 2006). The agency permitted carry-forward credits for vehicles that were manufactured during the phase-in and equipped with TPMSs that comply with the four-tire, 25-percent option.

NHTSA also provided in the June 2002 final rule that small volume manufacturers would be given to the end of the phase-in period to comply with the TPMS requirements. Later, similar treatment was accorded to final stage manufacturers and alterers through a correcting amendment to the

[8] We anticipate that new types of TPMS technology may be developed in the future that will be capable of meeting the NPRM's proposed requirements. For example, such systems might incorporate aspects of both direct and indirect TPMS (*i.e.*, hybrid systems). In concert with TPMS suppliers, tire manufacturers might be able to incorporate TPMS sensors directly into the tires themselves. In proposing a performance standard, NHTSA is cognizant of and seeks to encourage technological innovation.

[9] The minimum levels of pressure were the same for both compliance options.

final rule published in the **Federal Register**.[10] As with previous phase-ins, NHTSA adopted reporting requirements to aid it in monitoring the implementation of the phase-in. The agency included these reporting requirements in 49 CFR Part 590.

b. Part Two—November 2006 and Thereafter

The June 2002 final rule provided that beginning November 1, 2006, all covered vehicles would be required to comply with the requirements in the second part of the final rule. The agency stated its intention to publish the second part of the final rule by March 1, 2005, in order to provide sufficient lead time to manufacturers.

In anticipation of making its decision about long-term requirements, the agency left the rulemaking docket open for the submission of new data and analyses. The agency also committed to conduct and place in the docket a tire pressure survey comparing the tire pressures of vehicles without any TPMS to the pressure of vehicles with TPMSs not complying with the four-tire, 25-percent performance option. After consideration of the rulemaking record, as supplemented by the tire pressure study and any other new information submitted to the agency, NHTSA would issue the second part of the rule.

Based upon the record before the agency at the time of publication of the first part of the final rule, NHTSA stated its tentative belief that the four-tire, 25-percent option would best meet the mandate in the TREAD Act. However, NHTSA remained open to the possibility of obtaining or receiving new information sufficient to justify a continuation of the compliance options established by the first part of the final rule, or the adoption of some other alternative.

C. Petitions for Reconsideration of the June 2002 Final Rule

NHTSA received thirteen petitions for reconsideration of the June 5, 2002 final rule from: (1) Ferrari S.p.A.; (2) Delphi Auto, Inc. (Delphi); (3) Japan Automobile Tyre Manufacturers Association, Inc. (JATMA); (4) Johnson Controls, Inc.; (5) Volkswagen of America, Inc. (Volkswagen); (6) Bureau de Normalisation de l'Automobile (BNA) ISO/TC22; (7) Porsche Cars North America, Inc. (Porsche); (8) Alliance of Automobile Manufacturers (Alliance); (9) Rubber Manufacturers Association (RMA); (10) Aviation Upgrade Technologies; (11) Vehicle Services Consulting, Inc. (VSC); (12) DENSO International America, Inc. (DENSO); and (13) Maserati S.p.A.

The petitioners raised a variety of issues, including ones related to the rule's requirements for functioning of the TPMS with replacement tires, system calibration, tire reserve load, the compliance testing procedures, system disablement and reset, the TPMS telltale (*e.g.*, issues related to color, extinguishment time, reconfigurable displays, and bulb check), definitions, alternative systems, and policy and procedures for the second part of the rulemaking.

NHTSA was in the process of finalizing its responses to the various petitions for reconsideration at the time of the Second Circuit's decision. However, because the majority of the issues raised in the petitions for reconsideration remain relevant, we have decided to address them substantively in this proposed rule.

D. The Court of Appeals' Opinion

After issuance of the June 2002 final rule, Public Citizen, Inc., New York Public Interest Research Group, and the Center for Auto Safety filed a suit challenging certain aspects of the TPMS regulation.

The Second Circuit issued its opinion in *Public Citizen, Inc.* v. *Mineta* on August 6, 2003, which held that the agency's adoption in the standard of a one-tire, 30-percent compliance option is "contrary to the intent of the TREAD Act and, in light of the relative shortcomings of indirect systems, arbitrary and capricious."[11] The Court found that the TREAD Act unambiguously mandates TPMSs capable of monitoring each tire, up to a total of four tires, effectively precluding the one-tire, 30-percent option, or any similar option that cannot detect under-inflation in any combination of tires up to four tires.

The Court concluded that, against a backdrop of more efficacious performance of direct systems, current indirect systems (*i.e.*, those unable to meet a four-tire, 25-percent standard) are not sufficiently effective as would permit NHTSA to allow automakers to install those indirect systems in new motor vehicles.[12] The court opinion went on to note that the record, as reflected in NHTSA's final rule, suggested that the four-tire, 25-percent option would not only prevent more injuries and save more lives, but also that it would be more cost-effective on a per-life, per-injury basis than adopting both options together.

However, the Court stated that the agency was correct to consider the relative costs of adopting or rejecting different compliance options. Further, the Court did not preclude the use of indirect systems, to the extent that they are able to meet the performance requirements proposed in this NPRM. This point is noteworthy because it is NHTSA's practice to issue performance standards that seek to give manufacturers as broad a choice as possible in selecting the technology to be used in meeting those standards. Thus, as TPMS technology develops, it may become possible for new types of systems to meet the proposed performance requirements.

In all of the other areas of challenge, the Court supported the agency's actions. Specifically, the Court upheld NHTSA's use of a phase-in as part of the TPMS final rule. The Court also held that NHTSA's decision not to adopt the four-tire, 20-percent compliance option proposed in the NPRM was not arbitrary and capricious. The Court found that the agency had explained adequately that the four-tire, 25-percent option may permit improved indirect TPMSs and hybrid TPMSs to be used to comply with the standard and that this option was substantially more cost-effective than the proposed four-tire, 20-percent option.

Ultimately, the Court vacated the rule (FMVSS No. 138) in its entirety and directed the agency to issue a new rule consistent with its August 6, 2003 opinion. NHTSA published a final rule in the **Federal Register** on November 20, 2003, vacating FMVSS No. 138. The agency stated that, at present, vehicle manufacturer have no certification or reporting responsibilities. 68 FR 65404.

III. The Proposed Rule

A. Requirement for Four-Tire, 25-Percent Under-Inflation Detection

This NPRM proposes to re-establish FMVSS No. 138, *Tire Pressure Monitoring System,* in a manner consistent with the Second Circuit's opinion. Specifically, it proposes to require passenger cars, multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 pounds) or less, except those with dual wheels on an axle, to be equipped with a TPMS to alert the driver when one or more of the vehicle's tires, up to all four

[10] 68 FR 4107 (January 28, 2003).

[11] 340 F.3d 39, 54 (2d Cir. 2003).

[12] The Court found that given current technological limitations, indirect systems cannot meet the requirements of the four-tire, 25-percent under-inflation option under the June 2002 final rule, and even under the one-tire, 30-percent compliance option, indirect systems cannot detect low tire pressure in all cases (*e.g.*, when two tires on the same side of the vehicle or on the same axle are under-inflated, or when all four tires are equally under-inflated).

of its tires, are significantly under-inflated. The rule proposes requirements for covered vehicles manufactured on or after September 1, 2005 (*i.e.*, Model Year (MY) 2006), subject to the proposed phase-in schedule discussed below. The proposed standard is intended to be technology-neutral so as to permit compliance with any available TPMS technology that meets the performance requirements.

Because the Second Circuit vacated the entire TPMS standard in striking down the one-tire, 30-percent option, it is necessary for NHTSA again to propose the complete regulatory text for FMVSS No. 138. The following points highlight the key provisions of the proposed requirements.

- The TPMS would be required to warn the driver when the pressure in one or more of the vehicle's tires, up to a total of four tires, is 25 percent or more below the vehicle manufacturer's recommended cold inflation pressure for the tires, or a minimum level of pressure specified in the standard, whichever pressure is higher.[13]
- Vehicle manufacturers would be required to certify vehicle compliance under the standard with the tires installed on the vehicle at the time of initial vehicle sale.[14]
- The TPMS would be required to include a low tire pressure-warning telltale [15] (yellow) that must remain illuminated as long as any of the vehicle's tires remains significantly under-inflated and the vehicle's ignition locking system is in the "On" ("Run") position. The telltale must be extinguished when all of the vehicle's tires cease to be significantly under-inflated.[16] The TPMS's low tire pressure-warning telltale would be required to perform a bulb-check at vehicle start-up.
- The TPMS also would be required to include a malfunction indicator to alert the driver when the system is non-operational, and thus unable to provide the required low tire pressure warning. We are proposing that TPMS malfunction could be indicated by either:

(1) Installing a separate, dedicated telltale (yellow) that illuminates upon detection of the malfunction and remains continuously illuminated as long as the ignition locking system is in the "On" ("Run") position and the situation causing the malfunction remains uncorrected, or

(2) Designing the low tire pressure telltale so that it flashes for one minute when a malfunction is detected, after which the telltale would remain illuminated as long as the ignition locking system is in the "On" ("Run") position. This flashing and illumination sequence would be repeated upon each subsequent vehicle start-up until the situation causing the malfunction has been corrected.

If the option for a separate telltale is selected, the TPMS malfunction telltale would be required to perform a bulb-check at vehicle start-up.

- The TPMS would not be required to monitor the spare tire (if provided), either when it is stowed or when it is installed on the vehicle.
- For vehicles certified under the standard, vehicle manufacturers would be required to provide in the owner's manual an explanation of the purpose of the low tire pressure warning telltale, the potential consequences of significantly under-inflated tires, the meaning of the telltale when it is illuminated, and what actions drivers should take when the telltale is illuminated. Vehicle manufacturers also would be required to provide a specified statement in the owner's manual regarding: (1) Potential problems related to compatibility between the vehicle's TPMS and various replacement tires, and (2) the presence and operation of the TPMS malfunction indicator.

B. Lead Time and Phase-In

The Second Circuit decision vacating FMVSS No. 138, while affirming the use of a phase-in as part of the TPMS rulemaking, necessitates a change in the phase-in schedule in order to ensure the practicability of the standard's implementation. First, for those vehicle manufacturers that had intended to certify to the June 5, 2002 final rule's one-tire, 30-percent option, redesign and a change in production plans may be necessary in order to meet the proposed four-tire, 25-percent detection requirements of this NPRM. Second, there must be an adequate supply of TPMSs available that meet the proposed requirements of the standard so that vehicle manufacturers would be capable of meeting the phase-in requirements.

To help determine appropriate lead time and phase-in percentages, NHTSA issued a number of Special Orders on September 9, 2003. NHTSA issued Special Orders to 14 vehicle manufacturers to ascertain what their production plans had been for compliance with the June 2002 final rule, including the option(s) under which they intended to certify and the technologies they intended to use in doing so. NHTSA also issued Special Orders to 13 TPMS suppliers in order to determine their current and planned production, as well as their current capacity and their ability to produce beyond their current capacity. The majority of the information submitted pursuant to these Special Orders is confidential business information (CBI) under the relevant NHTSA regulation.[17] We believe that the information obtained in response to these Special Orders provides the agency with the necessary data to propose and ultimately set a fair and reasonable phase-in schedule.

From the responses to these Special Orders, NHTSA learned that, in anticipation of the start of the phase-in under the June 2002 final rule, most vehicle manufacturers were moving aggressively toward installation of TPMSs capable of meeting the four-tire, 25-percent detection requirement, but some were not. The information provided by TPMS suppliers indicated sufficient capacity to supply TPMSs with a four-tire, 25-percent detection capability in quantities that would

[13] As proposed, these minimum activations pressures (MAPs) are included in Table 1 of the standard, which is identical to the Table 1 that appeared in the June 5, 2002 final rule. However, we note that the Alliance submitted a Petition for Rulemaking on April 29, 2003 that asks NHTSA to make certain changes to the minimum activation pressures in Table 1 (Docket No. NHTSA–2000–8572–265). NHTSA is in the process of evaluating the issues raised in the Alliance petition.

[14] We note that some vehicle manufacturers authorize their dealers to replace the vehicle's factory-installed tires with other tires, including ones with a different size and/or recommended cold tire inflation pressure. The TPMS would have to perform properly with any such tires, because the vehicle could be equipped with those tires at the time of initial sale. Of course, the manufacturer would not have that responsibility if the dealer installed other tires without manufacturer authorization. However, the dealer would violate the Motor Vehicle Safety Act if it installed tires on a new vehicle that prevented the TPMS from functioning properly. *See* 49 U.S.C. 30112(a).

[15] As part of this notice proposing to re-establish FMVSS No. 138, we are proposing to add two versions of the TPMS low tire pressure telltale and a TPMS malfunction telltale to Table 2 of FMVSS No. 101, *Controls and Displays*. The proposed regulatory text in this NPRM incorporates the TPMS telltales in Table 2, as that table currently exists in the Code of Federal Regulations. However, we note that NHTSA published an NPRM in the **Federal Register** on September 23, 2003 that proposes to update and expand FMVSS No. 101 (68 FR 55217). Publication of the present version of Table 2 here is not intended to suggest a change in approach to the ongoing FMVSS No. 101 rulemaking. We anticipate that the TPMS telltales would be incorporated in a revised Table 2, once a final decision is reached on updating Standard No. 101.

[16] For some systems, extinguishment may occur automatically upon re-inflation of the tires to the proper pressure. Other systems may require manual reset in accordance with the vehicle manufacturer's instructions. However, manual reset of the system may not result in extinguishment of the low tire pressure telltale prior to correction of the under-inflation situation.

[17] 49 CFR Part 512 (as amended, 68 FR 44209 (July 28, 2003)).

easily meet the newly proposed phase-in requirements.

Based upon the information obtained from the data submitted in response to the Special Orders, NHTSA is proposing to adopt the following phase-in schedule: 50 percent of a vehicle manufacturer's light vehicles would be required to comply with the standard during the first year (September 1, 2005 to August 31, 2006); 90 percent during the second year (September 1, 2006 to August 31, 2007); and all vehicles thereafter.[18]

To encourage early compliance, NHTSA is proposing to permit carry-forward credits for vehicles that are certified as complying with the standard[19] and that are manufactured on or after the effective date of the final rule.[20] However, beginning September 1, 2007, all covered vehicles would be required to comply with the standard, without regard to any earlier carry-forward credits.

As before, NHTSA is proposing to exclude from the phase-in requirements final stage manufacturers, alterers, and small volume manufacturers (SVMs) (although the criteria for designation as an SVM has been revised). We also are proposing to maintain the phase-in reporting requirements, as modified to reflect the newly proposed phase-in schedule.[21] We request public comment on the schedule that NHTSA has proposed.

C. Responses to Issues Raised in Petitions for Reconsideration

As noted previously, NHTSA was nearing the point of issuing its response to petitions for reconsideration of the June 5, 2002 final rule for TPMS, when the Second Circuit issued its opinion in *Public Citizen, Inc.* v. *Mineta*. Most issues raised in the petitions for reconsideration were not directly related to the one-tire, 30-percent option nullified by the Court and thus remain relevant. Accordingly, NHTSA decided to address those issues in this notice, as discussed below.

1. Replacement Tires

As expressed in paragraph S4.4 of the standard, the June 5, 2002 final rule required that each TPMS-equipped vehicle meet the requirements of FMVSS No. 138 when the vehicle's original tires are replaced with optional or replacement tires (for simplicity of discussion, we refer below to these tires as replacement tires) of the size(s) authorized or recommended for use on the vehicle by the vehicle manufacturer. Paragraph S6(l) set out test procedure provisions applicable to replacement tires.

TPMS operation with replacement tires was the issue most frequently raised and extensively discussed in the petitions for reconsideration. Five petitioners (Delphi, DENSO, the Alliance, Johnson Controls, and JATMA) raised this issue. The petitioners generally argued that the standard's replacement tire requirements are not practicable because there are a large number of replacement tires available in the tire sizes authorized or recommended for each vehicle model and the construction characteristics of some of those tires may prevent proper functioning of the TPMS, even within a given size.

The Delphi petition asked us to amend FMVSS No. 138 S4.4 and S6(l) so that manufacturers need only certify TPMS operation with replacement tires that are of the same size and "type" recommended by the vehicle manufacturer. According to Delphi, tire "type" is a critical factor that will affect TPMS operation, and takes into account properties such as construction, speed rating, and manufacturer's brand. Tire "construction" involves the number of plies and the material of the plies in both the tread and the sidewall.

The Delphi petition argued that adding a tire type limitation to the requirement for TPMS compliance with replacement tires is necessary, not only from a practical standpoint, but in order to render the standard objective, as required under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. Chapter 301) (Safety Act). The Johnson Controls petition argued that the current, above-mentioned provisions of the standard related to replacement tires are not "reasonable, practicable, and appropriate," as required by section 30111(b)(3) of the Safety Act. It argued that the requirement for TPMS compliance with the standard for all replacement tires would go beyond the limitations of current TPMS capabilities.

Delphi argued that lack of specificity regarding the type of tire would force manufacturers to anticipate future tire designs in order to certify a vehicle under the TPMS rule, rendering the rule insufficient to meet the objectivity requirements of the Safety Act. Further, Delphi argued that in practical terms, without a tire type limitation, manufacturers would have to certify certain TPMS-equipped vehicle models for compliance with over 100 replacement tire options, if size is the only limiting factor.

DENSO's petition expressed similar concerns and added that, for indirect TPMSs, tire pressure sensitivity (*i.e.*, the relationship between tire radius and tire inflation pressure) is a design parameter of significant operational importance. However, according to DENSO, tire pressure sensitivity varies by tire manufacturer or brand even if such tires are of an identical size, thereby making it difficult to ensure that a TPMS would be able to comply with the standard for all replacement tires of the specified size. According to the petitioner, similar concerns apply to direct TPMSs because some aftermarket tires are constructed with materials (*e.g.*, steel) that, to varying degrees, may shield the radio signal transmitted from the TPMS tire sensor to the receiver. The DENSO petition asked NHTSA to limit the universe of replacement tires for which manufacturers must certify TPMS functionality under FMVSS No. 138 by revising paragraph S4.4 of the standard to require vehicle manufacturers to certify TPMS compliance only for tires released as original equipment.

The Alliance petition also objected to the final rule's requirement that the TPMS operate properly with all replacement tires. The Alliance argued that just because different brands and styles of the same size tire meet the same tire industry standards, it does not mean that such tires are equivalent in form and function. For example, it argued that different tires of the same size are often designed to perform under a variety of road and weather conditions, and at varying levels of durability, performance, and cost. Thus, according to the petitioner, there may be fundamental differences in tire construction, even though such tires may meet the same basic performance standards. The Alliance also stated in its petition that the current availability of aftermarket direct TPMSs does not guarantee that these systems will be sensitive to all tire constructions, and

[18] The responses to the Special Orders also contained information indicating that a 20% phase-in would be appropriate for MY 2005. The agency, however, does not believe the rulemaking process will be completed in time to allow for the adoption of a MY 2005 requirement, so we are not proposing one in this NPRM.

[19] Any such certification of compliance with the standard is irrevocable.

[20] The effective date of the amendments made to the Code of Federal Regulations by the final rule would likely be specified as 30 days after the issuance of the final rule.

[21] Since the issuance of the June 5, 2002 final rule, NHTSA has published an unrelated NPRM in the **Federal Register** that, in part, proposes to consolidate the placement of phase-in reporting requirements for various standards (including the TPMS standard) in a renamed Part 585, *Phase-in Reporting Requirements*. *See* 68 FR 46546 (August 6, 2003). Consequently, in this notice, we are proposing ultimately to incorporate the TPMS phase-in reporting requirements as Subpart D to Part 585.

such problems may be even more pronounced for indirect TPMSs.

In its petition, the Alliance argued also that the replacement tire requirement is not practicable. According to the Alliance, there may be hundreds of aftermarket tires of the same size as a vehicle's original equipment tires, but in some cases, differences in tire properties may pose insurmountable problems for proper functioning of the TPMS. It argued that the mere existence of a non-compatible tire would render compliance with S4.4 impossible. In addition, because tire manufacturing is largely beyond the control of vehicle manufacturers, the Alliance argued that it is unfair to ask vehicle manufacturers to certify TPMS compliance with all replacement tires of a given size. Finally, the Alliance contended that existing TPMSs work in an acceptable fashion with replacement tires in the field and that the agency has not provided any evidence to support an assumption to the contrary.

The Alliance supplemented its petition with a letter providing data intended to support its position that a vehicle's TPMS should not be required to comply with FMVSS No. 138 with replacement tires. Among other things, the letter provided data on the number of tires of the same size for various vehicles and on characteristic differences between original equipment and replacement tires of the same size. More specifically, the Alliance presented data on the specifications for 33 replacement tires (P195/75R14), showing differences in overall diameter and revolutions per mile, among other specifications. However, the Alliance did not explain in its petition how these differences in overall diameter and revolutions per mile, for each of the 33 tires, affected compliance for vehicles with indirect TPMSs.

The supplementary letter also included data from a study of the number of replacement tires that are available for a given vehicle model. For 61 vehicle models, an average of 5 tire sizes are recommended by the manufacturer, and an average of 162 different tire models are available per vehicle. Data were provided to show also the negative effect that steel reinforcement in the sidewall of a tire can have on the signal transmission by direct TPMSs.

The Alliance also asserted that NHTSA has not established a safety need that would justify requiring manufacturers to certify that TPMSs will function with replacement tires. Alternatively, the Alliance argued that if the agency does identify such a safety need, NHTSA should undertake rulemaking to standardize and tighten the performance requirements for replacement tires to ensure that their revolutions per kilometer (RPK) profiles are within the range that can work with TPMSs designed to meet the requirements of FMVSS No. 138.

The Alliance also argued that there is no precedent for such a broad requirement, noting that manufacturers are not required to certify vehicle compliance with FMVSS Nos. 105 and 135 for all available replacement brake linings, or to certify vehicle compliance with crashworthiness performance requirements for all aftermarket body, restraint, or interior components. The Alliance and Johnson Controls petitions also objected to high testing costs associated with the TPMS requirements for replacement tires, which the Alliance estimates to be between $3.2 million and $106.5 million.

Consequently, the Alliance requested that the agency revise FMVSS No. 138 to delete paragraph S4.4, so that vehicle manufacturers are only required to certify compliance with the TPMS standard with any tire released as original equipment on the vehicle.

The JATMA petition took a view contrary to the other petitions regarding TPMS compliance with replacement tires, urging NHTSA to strengthen that portion of the standard so as to require the TPMS to function properly even with tires of a type different than the standard and optional tires recommended by the manufacturer. JATMA reasoned that failure of the TPMS to function properly with such tires could lead to significant confusion among consumers.

In a letter dated September 11, 2003, General Motors (GM) submitted information to NHTSA intended to illustrate additional difficulties associated with the TPMS standard's replacement tire requirement, specifically problems associated with certifying run-flat tires with direct TPMSs.[22] According to GM, on the basis of validation testing, it certified a MY 2004 vehicle equipped with run-flat tires to the requirements of the June 5, 2002 final rule. However, the company later decided to test the vehicle with a set of replacement run-flat tires. During testing with those replacement tires, the TPMS produced a series of erroneous warnings. GM stated that the root cause was an attenuated signal from the TPMS sensors as a result of the replacement tires' thicker sidewall construction. GM stated that its test further demonstrates that it is not practicable to require vehicle certification under FMVSS No. 138 for all replacement tires.

Since the Second Circuit's decision, NHTSA has continued to gather information regarding the benefits and limitations of a requirement that a TPMS continue functioning when any replacement tires of a size recommended or authorized by the vehicle manufacturer are installed on the vehicle. On October 20, 2003, the Alliance and several of its members presented additional data regarding their research into direct TPMS operation with replacement tires.[23] Although by no means a comprehensive analysis of all replacement tires, the Alliance data identified 20 replacement tires with which the TPMS would reportedly not function properly.

The Alliance stated that there are a small number of replacement tires that are problematic for direct TPMSs due to signal attenuation. Problems may arise from aspects of tire design and construction, such as high carbon content in low aspect-ratio tires, thicker sidewall, or steel body ply sidewall. Some tires with these characteristics may weaken the radio frequency signal from a direct TPMS's sensors to its receiver, potentially resulting in inaccurate tire inflation pressure information or overt failure of the system to operate. These data suggest that the scope of the signal attenuation problem is broader than just the issue of steel sidewall tires documented in earlier Alliance submissions.

RMA also submitted information on the prevalence of tires with characteristics identified as being incompatible with proper TPMS functioning, at least in some cases. As noted above, these problems are primarily related to the tires' construction (*e.g.*, run-flat tires) and material content (*e.g.*, high carbon content in low aspect-ratio tires, thicker sidewall, or steel body ply sidewall). According to the RMA, in 2002, light vehicle tires having either steel body ply cords (steel casing tires) or run-flat capability accounted for less than 0.5 percent of tires distributed in the United States.[24]

In an effort to develop a test protocol to evaluate a tire's radio frequency signal attenuation (the most significant problem for direct TPMSs), the Alliance conducted an analysis of nearly 100 tires, including 28 of the most popular replacement tires with 14, 15, and 16-

[22] Docket No. NHTSA–2000–8572–275.

[23] Docket No. NHTSA–2000–8572–277

[24] Letter from Steven Butcher, Vice President, Rubber Manufacturers Association, to NHTSA (October 31, 2003) (Docket No. NHTSA–2000–8572–282).

inch rim sizes.[25] The Alliance stated that its testing included both original equipment (OE) tires and high-volume, non-OE replacement tires. According to the Alliance, the proper functioning of a TPMS is dependent upon the interaction of the system's various components. It said that factors such as wheel material, wheel shape, and the mounting of the sensor in the wheel all can affect transmission of the TPMS signal.

The Alliance presented its findings and a proposed solution to the replacement tire issue in a December 9, 2003 letter to NHTSA.[26] Based upon the results of its testing, the Alliance reached two basic conclusions. First, the Alliance stated that most replacement tires were found to be compatible with the TPMS tested. Second, the Alliance asserted that "to date we have not been able to identify appropriate performance measures that would reliably identify those few replacement tires that are likely to undermine the proper functioning of tire pressure monitoring systems."[27] The Alliance stated that other than steel sidewall construction, there was no obvious construction or size characteristics that distinguished run-flat, low profile, and non-steel sidewall tires that permit proper TPMS functioning from those that preclude proper TPMS functioning.

In its December 9, 2003 letter, the Alliance recommended that NHTSA consider a two-step approach that would provide information to consumers regarding replacement tire compatibility with TPMSs, as a substitute for the replacement tire certification requirement. First, the Alliance recommended that the vehicle owner's manual should contain specified language alerting consumers to select appropriate replacement tires that are compatible with the vehicle's TPMS. Second, the Alliance recommended that NHTSA should require vehicle manufacturers to provide an in-vehicle indication when there is inadequate signal reception from one or more of the TPMS sensors (either through a dedicated telltale, a separate function of the low tire pressure telltale, a message on a reconfigurable display, or some other means). In an attachment to its letter, the Alliance also provided draft regulatory language that would implement its recommended approach.

After considering the arguments in the petitions and the supplemental information on TPMS compatibility with replacement tires, we have tentatively decided to alter our approach to this topic. However, we emphasize that it would not be permissible for dealers to install tires on a new vehicle that would take the vehicle out of compliance with the TPMS standard. In addition, we are proposing to only require vehicle manufacturers to assure TPMS compliance with the tires installed on the vehicle at the time of initial vehicle sale. However, we are proposing certain new requirements designed to address the issue of continuing TPMS functionality, including incorporation of a TPMS malfunction indicator and additional language in the owner's manual discussing replacement tire compatibility with the tire pressure monitoring system. The portions of our proposal related to replacement tires build upon the approach recommended by the Alliance.

Several factors contributed to our decision to alter how we would address the need to have the TPMS continue functioning properly after the vehicle's original tires are replaced. First, information presented to NHTSA shows that there are currently over four million TPMS-equipped vehicles.[28] Neither the agency nor vehicle manufacturers have received reports indicating any significant performance problems with those TPMSs when replacement tires are installed on the vehicle. In addition, the agency has noted previously that aftermarket direct TPMSs are available and that such systems may be capable of functioning regardless of the construction of the tires.[29] NHTSA does not have any information to suggest a significant problem with the operation of aftermarket TPMSs, although the performance capabilities of these systems are not known. This significant real world population of TPMSs suggests that TPMSs will continue to work with replacement tires in the vast majority of cases.

However, NHTSA has been presented with data demonstrating that a very small number of replacement tires (estimated at less than 0.5 percent of production) may have construction characteristics and material content that cause the vehicle's TPMS to exhibit functional problems. There is no clear design solution for this problem. In many instances, TPMSs may function properly even when equipped with replacement tires with the previously discussed characteristics. However, to date, it has not been possible to develop an appropriate performance measure that would reliably identify those anomalous tires that would prevent proper TPMS functioning.

Further, it is NHTSA's understanding that some of the reported compatibility problems between direct TPMSs and certain replacement tires may have been related to vehicle manufacturer use of TPMS transmitters and receivers produced by different suppliers.[30] Incompatibility between different parts of the TPMS may have contributed to the overall problem in those cases. Thus, cognizance of this problem may limit further the number of incidents of incompatibility between TPMSs and replacement tires.

Based upon the above new information, we now believe that there is not a sufficient basis to require vehicles to comply with FMVSS No. 138 with all replacement tires. While the number of tires expected to be incompatible with the TPMS is small, such a requirement would nonetheless raise significant practicability concerns.

We continue to believe, however, that the TPMS should continue to function properly beyond the point at which the vehicle's original tires are replaced, a clearly foreseeable event. Continued TPMS functionality with replacement tires is consistent with Congress's intention to improve tire and vehicle safety, as expressed in the TREAD Act. Moreover, there are other TPMS failure modes (*e.g.*, pressure sensor battery life, pressure sensor failure, antenna failure, TPMS power loss), and unless drivers are made aware of such failures, they could have a false sense of security. Therefore, in this NPRM, we are proposing to require the TPMS to be equipped with a telltale indicator that would alert the driver of a TPMS malfunction, tire-related or otherwise. In addition, we are proposing owner's manual requirements to make consumers aware of this potential problem. The details of these proposed requirements immediately follow.

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[25] Letter from Vann Wilber, Vehicle Safety and Harmonization Director, Alliance of Automobile Manufacturers, to NHTSA (December 17, 2003) (Docket No. NHTSA–2000–8572–287).

[26] Letter from Vann Wilber, Vehicle Safety and Harmonization Director, Alliance of Automobile Manufacturers, to NHTSA (December 9, 2003) (Docket No. NHTSA–2000–8572–285).

[27] *Id.*

[28] Letter from Robert Strassburger, Vice President, Alliance of Automobile Manufacturers, to NHTSA (October 20, 2003) (Docket No. NHTSA–2000–8572–277).

[29] 67 FR 38704, 38731 (June 5, 2002).

[30] GM submitted a letter to NHTSA on September 11, 2003, outlining the problems that their direct TPMS was experiencing when different run-flat tires were installed on the vehicle. (Docket No. NHTSA–2000–8572–275) Subsequent discussions revealed that TPMS components from different TPMS manufacturers were used and that the same tires permitted proper TPMS functioning when TPMS components from a single TPMS manufacturer were used.

We believe that this approach offers a reasonable alternative that would not only facilitate continued proper TPMS operation with replacement tires, but also would provide the driver with valuable information regarding malfunction of the TPMS.

a. TPMS Malfunction Indicator

In proposing to require a malfunction indicator, NHTSA sees an opportunity not only to provide a means of warning when incompatible replacement tires have been installed on the vehicle, but at the same time also to provide the driver with notice when some other problem has rendered the TPMS inoperative. We are proposing to require a TPMS malfunction indicator that "illuminates whenever there is a malfunction that affects the generation or transmission of control or response signals in the vehicle's tire pressure monitoring system." Examples of malfunctions that would trigger the TPMS malfunction indicator include, but are not limited to, the following: (1) Loss of power or insufficient power to the TPMS control unit; (2) loss of power or insufficient power from one or more wheel sensors due to a low or dead battery; (3) inadequate signal transmission from one or more TPMS sensors, or (4) inadequate signal reception by the system's antenna/receiver, attributable to a defective wheel sensor, a defective antenna, or incompatible replacement tire.[31] We believe that operational details of when the malfunction indicator would be triggered will depend upon the strengths and limitations of a given TPMS. We request comment on whether our proposed requirement for malfunction detection is sufficiently broad to detect and report TPMS malfunctions, regardless of the type of system installed. We also request comment on whether our proposed requirement is sufficiently specific to enable manufacturers to know the types of malfunctions the system must be capable of detecting and reporting. If not, we request comments on how it should be made more specific.

Under the proposal, the malfunction indicator would not be required to specify the cause of the malfunction. We have tentatively decided not to establish such a requirement for several reasons. First, a multiplicity of TPMS malfunction messages could confuse the consumer. Second, there are obvious space limitations on the instrument panel or reconfigurable display, space that might more prudently be reserved for some other safety warning in the future. In addition, we believe that for most consumers, correction of a TPMS malfunction will necessitate vehicle servicing by a trained professional.

We believe that it is important that the message for TPMS malfunction be distinct from the message for low tire pressure. We are proposing to allow manufacturers to choose from two options[32] for the TPMS malfunction indicator to ensure that distinctness.

(1) Separate TPMS Malfunction Telltale

Under the first proposed option, a vehicle manufacturer would be required to install a dedicated yellow telltale (pictured below) that is separate from the low tire pressure warning indicator and that would illuminate upon detection of a malfunction and remain continuously illuminated as long as the malfunction exists, whenever the ignition locking system is in the "On" ("Run") position. It also would be required to perform a bulb-check at vehicle start-up. This TPMS malfunction telltale would be required to be labeled with the symbol below, or that symbol and the word "TPMS."

TPMS

[31] We are not proposing to require the TPMS malfunction indicator to illuminate when a spare tire without a TPMS transmitter is used, because we believe that a consumer would not be lulled into a false sense of security under that scenario.

[32] We note that, under either proposed option, it would be permissible to incorporate the TPMS malfunction indicator as part of a reconfigurable display, provided all proposed requirements are met.

We are proposing yellow (as opposed to red) as the appropriate color for the dedicated malfunction telltale because, in most cases, malfunction of the TPMS would not constitute an imminent safety problem necessitating immediate driver action. A vehicle's tires may be properly inflated, even if the malfunction indicator is triggered. Therefore, we believe that a yellow cautionary telltale would be appropriate to indicate that while a problem with the TPMS exists, the vehicle may be driven safely until the opportunity arises to have the situation corrected.

We are proposing that, once triggered, this separate TPMS malfunction indicator would be continuously illuminated as long as the malfunction exists, whenever the ignition locking system is in the "On" ("Run") position. We are making this proposal because the TPMS is an important piece of safety equipment, and we believe that the driver should be constantly reminded when such equipment is not operating properly. The requirement for constant illumination is consistent with the operation of other warning telltales.

After conducting an evaluation of possible icons, NHTSA selected the proposed symbol for TPMS malfunction, which is based upon an international ISO design used to signal low tire pressure. In selecting the proposed symbol, we sought to choose an icon that could be recognized by consumers, that would help achieve the desired response, and that at the same time would be consistent with the ISO standard. If the consumer were not already familiar with the telltale, the preferred response would be to lead people to consult the owner's manual for further information, rather than an extreme response (*e.g.*, stopping the vehicle immediately).

As in the case of the requirement for bulb checks for other telltales, we believe that the proposed requirement for a bulb check for the malfunction telltale would provide an important safety benefit (*i.e.*, ensuring that the telltale is capable of illuminating in order to deliver its message) at minimal cost.

(2) *Combination Low Tire Pressure/TPMS Malfunction Telltale*

Under the second proposed option, a vehicle manufacturer could incorporate the TPMS malfunction indicator function as part of the required low tire pressure telltale. Proposed requirements for color, wording, bulb check, and illumination format for the low tire pressure function (all discussed elsewhere in this proposal), would be unaffected by the incorporation of the TPMS malfunction indicator within the same telltale.

In order to indicate a malfunction, the low tire pressure telltale would be required to flash for a period of one minute, after which time the telltale would remain continuously illuminated as long as the malfunction exists and the ignition locking system is in the "On" ("Run") position. We limited the period to one minute to avoid distracting or bothering the driver. This flashing and illumination sequence would be repeated upon subsequent vehicle start-ups until the situation causing the malfunction has been corrected. We believe that flashing the low tire pressure telltale to indicate TPMS malfunction is a sufficiently distinct message to enable the driver to differentiate between the two warnings; any confusion between the messages would be resolved easily by consulting the owner's manual.

The agency is especially interested in comments related to the specific details of the mode of operation of the proposed TPMS malfunction indicators, as well as possible alternatives. We invite views on the telltales' malfunction symbol(s) and how the signal is presented to the driver, in order to assess its effectiveness in delivering a clear message.

b. Owner's Manual Requirements Related to Replacement Tires and the TPMS Malfunction Indicator

The second part of our proposed approach for addressing continued operation of the TPMS with replacement tires involves requiring vehicle manufacturers to provide relevant information to consumers in the vehicle owner's manual. Generally, we are proposing to require language to alert consumers regarding: (1) Potential problems related to compatibility between the vehicle's TPMS and various types of replacement tires, and (2) the presence and operation of the TPMS malfunction indicator. For those vehicles without an owner's manual, we are proposing to require that this information be supplied to the purchaser in writing at the time of initial vehicle sale. We request comments on our proposed owner's manual language, including any suggestions for modifications and accompanying rationale.

Specifically, under paragraph S4.5 of the standard, we are proposing to require the following language to be printed in the vehicle's owner's manual:

> Your vehicle has also been equipped with a TPMS malfunction telltale to indicate when the system is not operating properly. When the malfunction telltale is illuminated, the system may not be able to detect or signal low tire pressure as intended. TPMS malfunctions may occur for a variety of reasons, including the installation of incompatible replacement tires on the vehicle. Always check the TPMS malfunction telltale after replacing one or more tires on your vehicle to ensure that the replacement tires are compatible with the TPMS.

2. Spare Tires

In the June 5, 2002 final rule, we decided not to require the TPMS to monitor the pressure in a spare tire (either compact or full-sized), either while stowed or when installed on the vehicle (67 FR 38704, 38731). We came to this decision for a number of reasons, including the knowledge on the part of drivers that temporary tires are not intended for extended use, the fact that compact spare tires pose operational problems for both direct and indirect TPMSs, the potential disincentive for manufacturers to supply a full-size spare if TPMS compliance were required, and the increased cost of the rule, with little if any safety benefit, if a spare tire must be monitored. NHTSA stated that it would not conduct compliance testing under Standard No. 138 with spare tires installed on the vehicle.

The Alliance petition asked NHTSA to further clarify the final rule to acknowledge that a properly calibrated TPMS will activate the TPMS telltale after a small spare tire or a full-sized spare tire without a pressure sensor is installed. According to the Alliance, in situations in which a spare tire is in use, information regarding the inflation pressure of the remaining three tires may or may not be indicated by the TPMS, depending upon the type of system and display used. The Alliance asked for an explicit statement that the standard does not require a TPMS to indicate low pressure in any of the remaining three tires when a spare tire is installed on a vehicle.

We acknowledge that in certain instances, use of a spare tire on a vehicle may prevent the proper operation of the TPMS. However, we believe that the Alliance's recommended regulatory language is unnecessary, because the proposed language in paragraph S4.5, *Written Instructions*, of the NPRM adequately addresses this issue. That provision proposes to permit a vehicle manufacturer to include in the vehicle owner's manual a statement of "whether the tire pressure monitoring system functions with the vehicle's spare tire (if provided)." This proposed language is sufficient to cover all aspects of a

TPMS's capability to function when a spare tire is in use.

In addition, during the course of this rulemaking, GM suggested a clarification in paragraph S4.5.1 of the standard, which deals with TPMS-related written instructions in the vehicle owner's manual (*see* Docket No. NHTSA–2000–8572–258 in the DOT Docket Management System Web site at *http://dms.dot.gov*). Specifically, GM noted that vehicle manufacturers are not required to provide a spare tire, and some vehicles do not come equipped with spare tires. Consequently, GM suggested that the standard be amended to reflect this possibility, thereby preventing consumer confusion.

We agree with GM that not all vehicles are equipped with spare tires and that consumers might be confused to see language in the owner's manual, as contained in the June 2002 final rule, for a vehicle that is not equipped with a spare tire. Accordingly, in the NPRM, we have drafted proposed paragraph S4.5 to reflect the potential absence of a spare tire.[33]

3. Low Tire Pressure Telltale

Paragraph S4.3 of FMVSS No. 138 required that each vehicle be equipped with a yellow telltale that is mounted in plain view of the driver and is identified by the symbols and phrases specified for low tire pressure in S5.2.3 and Table 2 of FMVSS No. 101, *Controls and Displays*.[34] It also stated the conditions under which the TPMS telltale must illuminate and the conditions under which the TPMS must extinguish or deactivate the telltale.

Specifically, the TPMS telltale was required to be illuminated continuously when low tire pressure is detected under the parameters set forth in S4.2 of FMVSS No. 138. In addition, it was required to be illuminated as a bulb check when the ignition locking system is in the "on" position and the engine is not operating, or when the ignition locking system is in a position between "on" and "start" that is designated by the manufacturer as a check position. Paragraph S6(j) of the standard provided a test procedure, in which the TPMS telltale is to be extinguished automatically, although it does not specify a time limit for the telltale to be turned off.

A number of the petitioners raised issues about the TPMS warning telltale requirements, including issues related to permissible color, use of reconfigurable displays, extinguishment time, bulb check, and indication of TPMS malfunction. A discrepancy also was identified between FMVSS No. 138 S4.3.1(b) and FMVSS No. 101 S5.2.3 and Table 2. Each of these issues will be discussed in turn. (Please note that all relevant telltale issues related to the newly proposed TPMS malfunction indicator are discussed above in Section III.C.1 (*Replacement Tires*).)

Color

Petitions submitted by Volkswagen, the Alliance, and BNA's ISO/TC22 all raised issues related to TPMS telltale color. The petition of BNA's ISO/TC22 recommended replacement of the yellow TPMS telltale required under the June 5, 2002 final rule with a red lamp, arguing that illumination of the TPMS telltale should be treated as an alert to the driver to check the tire pressure and to take corrective action immediately. The petitioner reasoned that the TPMS should have a red telltale, consistent with other failure telltales, rather than a yellow "warning" telltale, which does not connote a need for immediate corrective action. It was mentioned that ISO, an international standard-setting body, is currently preparing a new standard for "Tyre Pressure Monitoring Systems," which can be expected to have a requirement for a red telltale.[35]

Volkswagen's petition also asked the agency to modify its requirement in FMVSS No. 101 for the color of the TPMS telltale. However, Volkswagen seeks to have the standard permit a dual-color TPMS telltale, which would switch from yellow to red when tire pressure falls below a specified level deemed to be dangerously low. The petitioner acknowledged the possibility that such TPMS telltales may display as red immediately if air loss is sufficiently rapid or is below a safe driving level upon start-up. However, Volkswagen believes that a TPMS telltale with dual yellow/red illumination capabilities would provide an enhanced level of warning to drivers in urgent situations and notes that such TPMS telltales are currently in use on some vehicles.

Volkswagen also asked that the final rule be modified to permit the use of a white lamp in the event the TPMS telltale is permitted to be part of a reconfigurable (multi-function) display. In line with its recommendations, Volkswagen's petition asked the agency to require vehicle owner's manuals to explain the functional meaning of the colors utilized for the TPMS telltale.

The Alliance believes that the final rule's specified requirements for telltale color are unnecessarily design-restrictive. Its petition also recommended amendment of the standard to permit both the yellow/red TPMS telltale color combination and the white TPMS telltale for reconfigurable displays.

We continue to believe that yellow is the most appropriate color for the low tire pressure telltale, consistent with the reasoning set forth in the final rule, so in this NPRM, we are again proposing a yellow telltale requirement as part of the standard. We will briefly restate our reasoning. The use of the color red usually is reserved for telltales warning of an imminent safety hazard. An example is the brake system warning telltale, which is red because a failure in a vehicle's brake system results in an imminent safety hazard that requires immediate attention. In contrast, NHTSA requires a yellow telltale for driver warnings when the safety consequences of the malfunctioning system do not constitute an emergency and the vehicle does not require immediate servicing.

Tire pressure monitoring systems are designed to detect a relatively slow loss of tire pressure so that the driver can seek the necessary tire maintenance and prevent a major tire failure that could result in catastrophic consequences (*i.e.*, the type of situation where a red telltale would be suitable). Based upon the agency's testing of tires at 20 pounds per square inch (psi) (the minimum activation pressure for the TPMS telltale), we do not believe that a significantly under-inflated tire represents an imminent safety hazard, particularly because we are proposing a requirement for under-inflation detection and warning at a point when the vehicle may still be operated safely.

If we were to require a red telltale, we would be conveying a very different message regarding the urgency of the low tire pressure situation and the action to be taken (*i.e.*, the need for an immediate stop). If we were to permit a telltale that changes color from yellow to red, we are concerned that this could confuse consumers, particularly if it is left to the discretion of individual vehicle manufacturers to decide the

[33] NHTSA has eliminated the owner's manual requirement contained in S4.5.2, due to the Second Circuit's invalidation of the underlying one-tire, 30-percent option. Accordingly, as part of this proposal, we have consolidated the remaining owner's manual requirements under S4.5 and included the change related to spare tires in that section.

[34] We note that if a vehicle manufacturer elects to install a low tire pressure telltale that indicates which tire is under-inflated, the telltale must correctly identify the under-inflated tire. *See* S4.3.2.

[35] NHTSA understands that ISO had made plans to convene a meeting in April 2004, in order to obtain agreement on performance specifications and test procedures for a "Tyre Pressure Monitoring Systems" standard, with the intention of presenting a draft document to its members for balloting in June 2004. A date for issuance of a final ISO standard has not been set.

level of under-inflation at which the red telltale is triggered. Conceivably, a manufacturer could program the TPMS to illuminate a yellow telltale for a fraction of a second, after which time it would immediately turn red; such a result would meet the letter of the requirement, but foil its intent. Accordingly, we stand by our conclusion that yellow is the appropriate color for the low tire pressure telltale because it conveys the message that the driver may continue driving, but should check and adjust the tire pressure at the earliest opportunity.

Although we are proposing to retain the yellow color requirement for the low tire pressure telltale in this NPRM, it has traditionally been our practice to permit manufacturers to take additional measures, consistent with Federal motor vehicle safety standards, that are designed to further enhance safety. Consequently, we are proposing to permit manufacturers to incorporate a second, red light to accompany the continuously-illuminated yellow TPMS telltale, which would be illuminated when pressure in one or more tires becomes dangerously under-inflated, as determined by the manufacturer. If a manufacturer chooses to add a second, red warning light, its meaning and function would have to be discussed in the vehicle's owner's manual.

NHTSA has not adopted the recommendation that the agency waive the yellow color requirement to also permit a white color for TPMS telltales that are part of a reconfigurable display. We believe that color imparts meaning in the context of warning telltales, and the petitioners have provided insufficient data to justify exempting TPMS telltales in reconfigurable displays from being subject to the standard's proposed yellow color requirement.

Reconfigurable Display

The petitions for reconsideration submitted by Johnson Controls, Volkswagen, and the Alliance all raised concerns related to the permissibility of incorporating the TPMS telltale in reconfigurable, multi-function displays. Reconfigurable displays utilize a common space to provide a variety of information to the driver; typically, these displays have a screen on which different messages may occupy the same position at different times.

While acknowledging the agency's concerns regarding the safety implications of permitting a vehicle operator to deactivate the TPMS telltale or reconfigure the display so that the TPMS telltale is not visible, the Johnson Controls petition stated that reconfigurable displays can be designed to meet the requirements of the June 5, 2002 final rule. Specifically, a reconfigurable telltale could be produced that automatically illuminates and remains continuously illuminated while one or more tires are significantly under-inflated and that is extinguished only when the tires cease to be significantly under-inflated. (We assume that other messages that normally share the same position on the reconfigurable display as the TPMS telltale either would be suppressed or migrate to a different position on the display.) Johnson Controls asked the agency to clarify the TPMS rule to acknowledge that the TPMS telltale may be part of a reconfigurable display, provided that the above two conditions are met. The petitioner noted that this clarification would not require any substantive change to the TPMS standard, but it would allow manufacturers to continue to have the option of utilizing multi-function display technology while fully complying with the requirements of the regulation.

Volkswagen's petition argued that the final rule's telltale requirements are too design restrictive and requested that the TPMS telltale be permitted as part of a reconfigurable display that illuminates the TPMS telltale when the vehicle is shifted into a forward driving gear and which displays the telltale on an interruptible but persistent basis until the tire pressure is corrected or until the system is reset manually in accordance with the vehicle manufacturer's instructions.

In the interest of safety, we incorporated a requirement in the June 5, 2002 final rule for continuous illumination of the TPMS telltale as long as one or more of a vehicle's tires is significantly under-inflated. While the TPMS rule did not explicitly prohibit the incorporation of the TPMS telltale into a reconfigurable display, we questioned the ability of a reconfigurable display to meet the requirements of S4.2 of the standard, due to the constant illumination requirement. In drafting the June 2002 final rule, we were concerned also that a vehicle operator may be able to reconfigure the display in such a way that the important safety message provided by the TPMS telltale is no longer visible, which is not acceptable.

In the current proposal, FMVSS No. 138 once again would not prohibit outright the inclusion of the TPMS telltale as part of a reconfigurable display, and we note Johnson Controls' statement that reconfigurable displays currently exist which can meet the proposed requirements of the standard, including the provision for continuous illumination. Thus, we want to make it clear that we are proposing that it would be permissible to incorporate the TPMS telltale as part of a reconfigurable display, provided that illumination of the yellow telltale is continuous while one or more tires is under-inflated. However, we want to emphasize that under this proposal, the TPMS telltale would not be permitted to flash or cycle when performing its under-inflation detection function. Further, the display could not be controlled by the driver so as to disable the TPMS safety message prior to remedying the low pressure condition, including by scrolling the message down such that it is no longer visible. Thus, reconfigurable displays that provide a persistent, but cycling, TPMS warning would not meet the standard's proposed requirement for continuous illumination.

Extinguishment Time

The Johnson Controls petition asked the agency to amend the June 2002 final rule to specify a timing requirement for TPMS telltale extinguishment, in cases in which the tire pressure deficiency has been corrected and there is no manual reset feature. In recommending a timeframe for extinguishment, the petitioner stated that because both illumination and extinguishment of the telltale involve the same detection considerations from a technological standpoint, extinguishment should occur within ten minutes. Accordingly, Johnson Controls petitioned NHTSA to amend the testing procedures in FMVSS No. 138 S6(j) of the June 5, 2002 final rule to provide that unless there is a manual reset feature, the manufacturer must record the time to extinguishment after the vehicle reaches 50 km/hr and that the TPMS telltale must extinguish within ten minutes. The petitioner also asked that the testing procedures in FMVSS No. 138 S6(i) be amended to require verification of telltale extinguishment if the TPMS system has a manual reset feature.

We are not adopting the suggestion of Johnson Controls to require a time limit for TPMS telltale extinguishment. Telltale extinguishment is addressed already under FMVSS No. 101. Specifically, paragraph S5.3.1 of FMVSS No. 101 provides, "A telltale shall not emit light except when identifying the malfunction or vehicle condition for whose indication it is designed or during a bulb check upon vehicle starting." The TPMS telltale is not excluded from this requirement.

NHTSA has not imposed specific time limits for extinguishment of other telltales, and given the existing

requirements of FMVSS No. 101, we do not believe it is necessary to do so for the TPMS telltale at this time, although we acknowledge that TPMS technology may require a certain period of time to detect that the low-pressure situation has been corrected before extinguishing the telltale.

Bulb Check

Paragraph S4.3.3 of the June 5, 2002 final rule provided that the TPMS warning telltale must be activated as a check of lamp function either when the ignition locking system is turned to the "On" ("Run") position when the engine is not running, or when the ignition locking system is in a position between "On" ("Run") and "Start" that is designated by the manufacturer as a check position. However, the telltale need not be activated when a starter interlock is in operation.

The petitions of both Volkswagen and the Alliance recommended changes to the June 2002 final rule's requirements related to a bulb check for the TPMS telltale. Volkswagen expressed agreement with the Alliance's recommendation in its comments on the earlier NPRM that a bulb check function should not be required because manufacturers routinely include serviceability provisions as a normal design practice, thereby rendering that regulatory provision unnecessary. Volkswagen also stated that if the TPMS telltale were permitted as part of a multi-functional display, the telltale would not necessarily illuminate because internal vehicle diagnostics monitor the system, and illumination of the display itself constitutes the bulb check function. Consequently, Volkswagen asked NHTSA to eliminate the requirement for the bulb check function. Alternatively, Volkswagen asked the agency to amend S4.3.3(a) to clarify that the bulb check function does not apply if the TPMS telltale is part of a reconfigurable display.

We are proposing to retain a requirement for a bulb check for the TPMS low tire pressure telltale as part of this NPRM, because a bulb check helps ensure the functionality of the TPMS warning system in a consistent and uniform fashion. The safety benefits associated with the TPMS will only be realized if the TPMS telltale can illuminate so as to provide the requisite warning to the vehicle operator. Consequently, NHTSA continues to believe that a bulb check will provide vehicle operators with useful information (*i.e.*, that the warning telltale bulb is functional), and these benefits will come at little, if any, additional cost. (This same reasoning applies to the bulb check for the proposed dedicated TPMS malfunction telltale, if the vehicle is so equipped.)

For the safety-related reasons discussed above, we believe that the proposed bulb check requirement also should apply when the TPMS telltale is part of a reconfigurable display. However, we are proposing that illumination of the reconfigurable display itself would constitute a sufficient bulb check under the standard, as long as the low tire pressure telltale is one of the displays activated.

Harmonization of FMVSS 138 S4.3.1(b) and FMVSS 101 Table 2

The petitions of Johnson Controls and the Alliance asked NHTSA to resolve an apparent discrepancy under the June 5, 2002 final rule between S4.3.1(b) of FMVSS No. 138 and S5.2.3 and Table 2 of FMVSS No. 101. These provisions discussed the permissible use of words and symbols as part of the TPMS telltale. As the petitioners point out, FMVSS No. 101 S5.2.3 stated that for a TPMS telltale that does not identify which tire has low pressure, the TPMS telltale may include the symbol in Table 2 or the symbol *and* the words "Low Tire." That same provision provided that for a TPMS telltale that does indicate which of the four tires is experiencing low pressure, the telltale may either use the symbol *or* the words indicated in Table 2. However, FMVSS No. 138 S4.3.1(b) stated that the TPMS telltale must be identified by one of the symbols shown for the low tire pressure telltale in Table 2 of Standard No. 101. Consequently, the petitioners contended that these two provisions are unclear as to the content requirements for the TPMS telltale for systems that identify which tire has low pressure.

The two petitions, however, recommended different remedies. Johnson Controls recommended resolving the discrepancy by modifying FMVSS No. 138 S4.3.1(b) so as to remove the language "one of the symbols shown for the 'Low Tire Pressure Telltale' in Table 2" and replace that phrase with "a telltale permitted by Section 5.2.3." The Alliance recommended modifying FMVSS No. 101 S5.2.3 so as to eliminate the two parenthetical phrases stating "(that does not identify which tire has low pressure)." Elimination of that phrase would have the effect of requiring either a symbol from Table 2 or both a symbol and words from Table 2.

We agree with the petitioners that the identified provisions in FMVSS No. 101 and FMVSS No. 138 must be reconciled in order to denote clearly what constitutes a permissible TPMS telltale and thus have addressed this issue in the NPRM. The preamble to the June 2002 final rule made clear the agency's intent regarding the visual content of the TPMS telltale for those systems that identify which tire has low pressure. Specifically, the preamble stated, "Thus, the final rule requires the use of this image, with lamps at the image's tires to indicate which tire is significantly under-inflated, if a vehicle manufacturer provides a display that identifies which tire is significantly under-inflated." 67 FR 38704, 38732. Without the symbol, the words "Low Tire" would not indicate which of the vehicle's four tires had low pressure.

In order to resolve the discrepancy, as part of this NPRM, we are proposing to adopt the recommended solution put forth by the Alliance and rejecting the solution suggested by Johnson Controls. The recommended solution in the Johnson Controls petition would permit a manufacturer to choose a telltale displaying the words "Low Tire" without a symbol. Not only would such an outcome be at odds with the agency's clear intent articulated in the June 2002 final rule's preamble, but it would also be an inappropriate result for a TPMS designed to "identify which tire has low pressure." Accordingly, as part of this NPRM, we are proposing that FMVSS No. 101 S5.2.3 require a TPMS symbol in all cases, with optional supplementation by the words "Low Tire."

Indication of TPMS Malfunction

The Alliance petition requested that NHTSA modify the June 2002 final rule specifically to allow the TPMS telltale to alert the vehicle operator in the event of a TPMS system malfunction. The Alliance argued that the agency has permitted other required telltales to flash to indicate malfunctioning systems, but it also noted that the preamble and the regulatory text of FMVSS No. 138 S4.2.1 and S4.2.2 required constant illumination once the telltale is triggered until the low-pressure situation is resolved. To indicate TPMS system malfunction, the Alliance recommended permitting the telltale to flash, as distinct from a steady activation pattern indicating low tire pressure, and it asked the agency to amend paragraphs S4.2, S4.3, and S4.5 of FMVSS No. 138 accordingly.

Consistent with our proposed resolution of the replacement tire issue, NHTSA is proposing to require the TPMS to include a TPMS malfunction indicator. Details of the proposed requirements for the TPMS malfunction

indicator and related matters are fully discussed under Section III.C.1 (Replacement Tires) above.

4. Test Procedures

A number of petitions raised issues about testing procedures under the June 2002 final TPMS rule, including petitions submitted by Delphi, DENSO, Volkswagen, and the Alliance. Concerns were raised regarding what petitioners perceived to be inadequate specificity and objectivity of those test procedures. Specifically, petitioners raised issues related to rim position, calibration, test specificity, and reset, each of which will be addressed in further detail below. In addition, DENSO's petition asked the agency to issue a TPMS Compliance Test Procedure on an expedited basis, because DENSO stated that manufacturers will need sufficient lead time (*e.g.*, DENSO estimated one year) to implement the TPMS design specifications and to begin installation of TPMSs in new vehicles.

Petitioners argued that in light of the capabilities of TPMS systems, specific test procedures are necessary. While we do not agree with all of the petitioners' contentions, in order to ensure objectivity, we are proposing to identify a specific test course and to incorporate it in the standard as part of this NPRM. This proposed course is the Southern Loop of the Treadwear Course, as defined in Appendix A and Figure 2 of 49 CFR 575.104, which is located on various highways in and around San Angelo, Texas. We propose that testing would be conducted starting at any point on the course.

We see several benefits to this approach, foremost of which is that this test course could be incorporated into the standard in a timely fashion. It would not be necessary to design or build a new test track for compliance testing purposes or to conduct extensive research to describe such a test course.

Further, the proposed course is well known and has been used for decades by NHTSA and the tire industry for uniform tire quality grading (UTQG) testing. Testing on a section of public highway would help to ensure that any required TPMS calibration will be performed appropriately and that low tire pressure detection would be evaluated appropriately during testing. Also, vehicle manufacturers would be able to review the course and to use it to verify compliance of their TPMS prior to vehicle certification. Thus, by proposing to require vehicles to satisfy the TPMS requirement when tested at any portion of this course, TPMSs would be designed to operate properly on a variety of roadways and conditions, and the standard would satisfy the requirement of objectivity.

Designation of a specific test course in and around San Angelo could pose some potential problems if that section of highway were to experience closures related to major road repairs or damage due to extreme weather conditions or natural disasters. However, we believe that the probability of such occurrences is very small, particularly to the extent that the entire test course would be unavailable. Because the proposed test course is approximately 140 miles in length, if one portion were to become unavailable, testing could be conducted on a different segment of the course. Again, we note that this particular test course has been used successfully for UTQG testing purposes for a number of years, and we believe that it would be suitable for TPMS testing as well.

Additional details are provided below regarding proposed changes to the standard's test conditions and procedures that reflect differences between the June 5, 2002 final rule and this NPRM.

Rim Position

Under the June 5, 2002 final rule, paragraph S6(l) of the standard stated that the original rims are to be used with any replacement tires recommended by the manufacturer (that are of a suitable size to fit the OE rims; otherwise, appropriately sized OE rims will be used).

The petition for reconsideration filed by Johnson Controls asked the agency to revise the test procedures in paragraph S6(l) to specify that the original rim position (*i.e.*, left front, left rear, right front, right rear) will be preserved when replacement tires are placed on the vehicle. According to the petition, such positioning is important to preserve the integrity of the original training of the TPMS. Johnson Controls stated that most direct TPMSs require that the system initially be trained to recognize the transmitters on the rims and their relative positions on the vehicle, with such training routinely occurring during vehicle assembly. This change was recommended to prevent compliance testing in a manner that would foil the proper functioning of the TPMS.

We anticipate that there will be many instances in which consumers and vehicle repair/service technicians will not maintain original rim position, either intentionally or unintentionally. As a primary example, many vehicle manufacturers direct owners to rotate their tires on a regular basis, based on time, mileage, or both. Maintaining original rim position during tire rotation would necessitate the additional time and expense of removing each tire from its wheel rim prior to rotation, rather than simply shifting the entire wheel and tire assembly, which is the normal way tires are rotated. Moreover, contrary to the implication of the Johnson Controls petition, some manufacturers of vehicles with a direct TPMS provide instructions in the owner's manual regarding how to reprogram the TPMS sensors following wheel rotation (*see, e.g.*, the TPM sensor identification codes section of the MY 2004 GMC Yukon owner's manual, at page 5–74).

However, after considering the Johnson Controls petition, we have drafted a new paragraph S5.3.3, *Rim position*, in the NPRM to provide that we would maintain the original rim positions when conducting compliance testing in those cases in which the vehicle manufacturer directs owners to retain the original rim positions in the owner's manual. We would also follow any instructions contained in the vehicle owner's manual related to tire rotation and rim position, regardless of whether such instructions are included in a discussion of the TPMS or in some other portion of the owner's manual. If a vehicle manufacturer does not make such rim position recommendations, the agency would be free to mount the rims in any position on the vehicle when conducting compliance testing. (If the tires and rims on the front and rear axles were not the same size, the tires and rims would remain on the appropriate axle. We would ensure also that unidirectional tires are mounted appropriately.[36]) Before conducting such compliance tests, the agency would follow all manufacturer recommendations with respect to reprogramming the TPMS to account for changes in rim positions.

Calibration

As part of the June 2002 final rule's test procedures, paragraph S6(d) specified that the vehicle be driven at any speed between 50 km/hr and 100 km/hr for 20 minutes prior to conducting the TPMS low inflation pressure detection test. This procedure was designed to calibrate or to establish a baseline for the TPMS. As noted in the June 5, 2002 final rule, indirect TPMSs need time to calibrate the system under certain circumstances, such as when a vehicle is driven for the first time (*i.e.*, when it is new), when pressure in a tire is changed, and when the tires are replaced or rotated. 67 FR 38704, 38730.

[36] Unidirectional tires are tires that are designed to rotate in one specified direction during forward motion. This directional limitation is primariliy based upon tread pattern design.

Until the system is properly calibrated, the TPMS may not be available to monitor the vehicle's tire inflation pressure fully.

The petitions submitted by both Volkswagen and the Alliance raised issues involving TPMS calibration and related test procedures. The two petitioners argued that the test procedures in paragraph S6(d) do not include sufficient detail and are design restrictive.

Volkswagen's petition sought clarification that TPMS calibration is necessary when any one of the above-discussed three conditions occurs. We acknowledge that calibration (or recalibration) of an indirect TPMS may be necessary when any one of the above-stated conditions occurs. Beyond this statement of clarification, we have also drafted this NPRM so as to further accommodate the need for TPMS calibration, as discussed below. These proposed changes include designation of a specific test course and the inclusion of an expanded test procedure for the "system calibration/learning phase" (S6(d)). We believe that these measures would address the issues raised by the petitioner regarding calibration.

Volkswagen's petition also asked the agency to modify the test procedures in paragraph S6(d), which are designed to provide sufficient initial driving time for indirect TPMSs to properly calibrate. Again, that provision specified that the vehicle be driven for 20 minutes at any speed specified in paragraph S5.3.2 (*i.e.*, between 50 km/h (31.1 mph) and 100 km/h (62.2 mph)). However, Volkswagen argued that paragraph S6(d) is not sufficiently specific to simulate the reasonable and common driving conditions necessary for calibration of the TPMS. Volkswagen asserted that for proper calibration of the TPMS, the vehicle must be driven at least a minimal amount of time in various speed ranges and within limits of forward and lateral acceleration. According to Volkswagen, driving for calibration purposes should be on reasonably straight roads, at controlled and reasonable speeds in the turns, and with limited and moderated acceleration and braking.

Consequently, Volkswagen asked NHTSA to amend S6(d) to include a statement that the vehicle shall be driven in accordance with the manufacturer's specification. The Volkswagen petition stated that this change would be consistent with the procedure in other standards in which the vehicle manufacturer specifies test parameters, such as those for fuel tank capacity, seat back angle and vehicle seat track position, and vehicle weight.

The Alliance petition also supported greater specificity in the TPMS test procedures, including paragraph S6(d). The petitioner argued that those test procedures are overly design-restrictive and may hamper development and performance of indirect TPMSs. The Alliance provided a detailed discussion of the various TPMS algorithms and the corresponding relationship between the complexity, capabilities, and timing requirements of such algorithms. The Alliance asked the agency to substitute a calibration procedure specified by the manufacturer in the specified range of test speeds from 50 to 100 km/hr.

Although the Second Circuit's decision likely will lead to increased use of direct TPMSs in the near term, NHTSA has decided to address the calibration issue in any event, in anticipation of the use of indirect TPMSs (or other systems for which calibration issues may be important) that can meet the requirements of the standard. Because NHTSA strives for standards that are technology-neutral, issues raised in the petitions for reconsideration related to test procedures, including but not limited to calibration, remain ripe for resolution.

While NHTSA acknowledges that the performance of an indirect TPMS may be sensitive to road conditions and vehicle operating conditions, it is important to ensure that each TPMS performs its intended function during normal driving by the public. The purpose of paragraph S6(d) of the TPMS test procedure, under both the June 5, 2002 final rule and this NPRM, is to provide an opportunity for the vehicle to learn the variables associated with distinct tire types under varying conditions. Thus, we reject the suggestion that NHTSA be required to conduct its compliance testing in accordance with the manufacturer's specifications. That would allow a manufacturer to design a TPMS that would function only in very limited circumstances, as opposed to the wide variety of circumstances found in real-world driving.

We also believe that it is necessary to specify some objective limit on calibration time for the following reasons. First, if the calibration period is excessively long (*e.g.*, several hours), there is an increased chance that the vehicle could develop a serious leak leading to significant tire under-inflation for which the TPMS would provide no warning. Second, the public is likely to expect that, after they follow the reset instructions in the vehicle owner's manual, the TPMS will function as intended within a brief period of time. Further, TPMS manufacturers have stated that their systems can properly calibrate within 20 minutes, which demonstrates that such a timeframe is practicable.[37]

In order to ensure that our test procedures for calibration reflect normal driving situations and to ensure objectivity, in the NPRM, we are proposing to change paragraphs S5 and S6 as follows:

(1) We are proposing that the road test surface for compliance testing, including calibration, would be any portion of the Southern Loop of the Treadwear Course defined in Appendix A and Figure 2 of 49 CFR 575.104. (*See* S5.2);

(2) We are proposing a new paragraph entitled *System calibration/learning phase* which would specify that the vehicle be driven in one direction for 10–15 minutes cumulatively (not necessarily continuously) within a speed range of 50–100 km/h, and then driven for 5–15 minutes under similar conditions in the opposite direction. The sum of the total cumulative driving time in both directions would not be less than 20 minutes. Time would not accumulate during periods when the brake pedal is applied. (*See* S6(d)).

Detection of Low Tire Pressure Within Ten Minutes

The June 2002 final rule specified performance requirements for the TPMS to detect when tire pressure drops below a specified level and to then illuminate a telltale mounted on the instrument panel. Under S6(e) of the standard, the inflation pressure in a tire or tires was to be reduced to the specified level, depending on the option selected by the manufacturer. Paragraph S6(f) stated that the vehicle is then driven at any speed between 50 km/hr and 100 km/hr, and the TPMS telltale must illuminate within 10 minutes after the vehicle has reached 50 km/hr.

The Delphi petition raised a concern regarding the ability of the TPMS, in certain cases, to detect under-inflation within 10 minutes, as required by FMVSS No. 138 S4.2.2(a) and the related test procedure at S6(f). Delphi stated that in most cases, the TPMS should detect under-inflation within the June 2002 final rule's 10-minute time limit; however, the petitioner asserted that certain periods of non-linear driving (*e.g.*, sudden start-ups, sudden decelerations, shifting weight conditions) could impact the rolling of a vehicle's tires on the road, and thereby delay the TPMS's detection of tire

[37] *See e.g.*, Docket No. NHTSA–2000–8572–259.

under-inflation. If such driving conditions constitute a sizable portion of the standard's testing time, the petitioner argued that the TPMS may fail to illuminate within the allotted 10-minute detection time period. Delphi contended that this variance, based upon real world conditions, could render the compliance test unobjective and unrepeatable. Consequently, Delphi petitioned NHTSA to revise S4.2.2 and S6(f) to specify that the calculation of the 10-minute driving time for detection of significant tire under-inflation and illumination of the TPMS telltale will occur after not more than ten minutes of straight line, smooth driving.

The Alliance petition argued that the June 5, 2002 final rule for TPMS lacked specificity in its test procedures, thereby causing the standard not to be objective. Although the TPMS rule specified ambient temperature, test surface, test weight, and vehicle speed, the Alliance petition argued that the rule fails to specify other essential parameters for the compliance test, such as whether the vehicle is to be driven on a straight or curved road, or whether there are any constraints on acceleration, braking, and steering inputs during testing. The Alliance argued that without specific direction regarding how these inputs will be controlled during compliance testing, manufacturers could never be sure that their vehicles would pass NHTSA's tests, because they could not predict what driving conditions would be used by the agency to verify compliance. Consequently, the Alliance recommended revision of the final rule's test procedure to require that a minimum of eight minutes cumulatively (although not continuously) of the total 10-minute detection time under the standard be driven on smooth, dry, level, and straight segments of roadway.

These arguments regarding the specificity of the test procedures for TPMS warning lamp activation are similar to those raised about calibration test procedures. We again reiterate that, to provide an appropriate degree of safety, TPMSs must be designed so that they function properly under a full range of normal driving conditions, and vehicle manufacturers must ensure that their TPMSs function properly across the full range of such conditions.

In order to ensure that our test procedures for detection of low tire pressure reflect normal driving situations and to ensure objectivity, we are proposing to incorporate the following elements in paragraphs S5 and S6 of the NPRM:

(1) The road test surface for compliance testing would be any portion of the Southern Loop of the Treadwear Course defined in Appendix A and Figure 2 of 49 CFR 575.104 (*See* S5.2); and

(2) We are proposing a new paragraph entitled *System detection phase*, which would specify that the vehicle will be driven in one direction up to 7 minutes cumulatively (not necessarily continuously) within the speed range of 50–100 km/h, or until the low tire pressure telltale illuminates, whichever occurs first. Time would not accumulate during periods when the brake pedal is applied. If the telltale does not illuminate during that period, vehicle direction would be reversed, and the vehicle would be driven an additional period of time up to a total of 10 minutes (counting both directions), or until the low tire pressure telltale illuminates. (*See* S6(f)).

Inflation Pressure

As discussed earlier, NHTSA is proposing to require vehicles to comply with the TPMS standard with the tires that are installed on the vehicle at the time of initial sale.[38]

We are proposing that vehicles must meet the standard when tested at any weight between the lightly loaded vehicle weight (LLVW) and the GVWR. We believe the TPMS should operate properly at all vehicle weights within the likely load range, and this requirement should not impose a burden on vehicle manufacturers.

Under the proposed test procedures, the vehicle's tires would be inflated to the vehicle manufacturer's recommended cold tire inflation pressure at GVWR, as specified on the vehicle placard or the tire information label, regardless of the test weight. We are proposing this approach for two reasons. First, as discussed in further detail in the next section, we expect that consumers would consult the vehicle placard or tire inflation pressure label in order to obtain the recommended inflation pressure for their tires, and based upon new regulatory requirements, the placard or label will include only a single tire size and the recommended inflation pressure for that tire size at GVWR. In addition, most consumers generally do not increase or decrease their tire inflation pressure every time they change the amount of load they are carrying.

[38] In most cases, vehicles are equipped with four tires of the same size. However, in some cases, vehicle manufacturers or dealers may install different size tires on different axles. We are proposing that the TPMS must comply with the standard in those cases as well.

Reset Inflation Pressures

Paragraph S6(a) of FMVSS No. 138 in the June 5, 2002 final rule stated that the vehicle's tires would be inflated to the manufacturer's recommended cold inflation pressure for the applicable vehicle load conditions specified in paragraph S5.3.1 of the standard (*i.e.*, at the vehicle's lightly loaded vehicle weight and at its GVWR). Paragraph S6(c) of the standard stated that the TPMS would be reset in accordance with the instructions specified in the vehicle owner's manual.

The Volkswagen petition stated that for some vehicles, the manufacturer specifies distinct tire pressures for fully-loaded and partially-loaded vehicles to provide optimum ride, handling, and occupant comfort. Volkswagen stated that its direct TPMS does not have a vehicle loading or weight sensor, so the system must be reset manually to accommodate the different tire pressures that correspond to current vehicle loading conditions. Volkswagen sought confirmation that the testing procedure under section S6(c) of the standard will include programming or setting the TPMS for the applicable vehicle loading condition.

As we explained when we adopted new tire information requirements in late 2002 (*see* 67 FR 69600, 69610, November 18, 2002), we anticipate that consumers will increasingly rely upon the tire information found on the vehicle placard or tire inflation pressure label as their primary source for tire pressure information. A primary reason for this assumption is that effective September 1, 2004, FMVSS No. 110, *Tire Selection and Rims*, will require the vehicle placard (and optional tire inflation pressure label) to specify only one tire size and one inflation pressure appropriate for the maximum loaded vehicle weight, which must be applicable to the original tires installed on the vehicle at the time of initial vehicle sale.[39] Beginning September 1, 2004, that standard will apply to all motor vehicles with a GVWR of 4,536 kg or less, except motorcycles.[40]

[39] See 68 FR 33655 (June 5, 2003).

[40] FMVSS No. 120, *Tire Selection and Rims for Motor Vehicles Other Than Passenger Cars*, presently applies to multi-purpose passenger vehicles (MPVs), trucks, and buses. Currently, FMVSS No. 120 requires tire information either on the vehicle's certification label or on a separate label located in the same vicinity as the certification label. The label must provide the tire size designation and the recommended cold inflation pressure for those tires appropriate for the vehicle's front and rear gross axle weight ratings. FMVSS No. 120 does not require that the tire size installed on the vehicle and the inflation pressure for those tires be listed. However, beginning September 1, 2004, the tire labeling requirements of FMVSS No. 110

Therefore, NHTSA is proposing to use only the vehicle manufacturer's recommended inflation pressure required to be provided under FMVSS No. 110 when testing for compliance. Most consumers will not add or reduce their tire inflation pressure every time they change the amount of load they are carrying, nor are they likely to recalibrate their TPMS in such situations. NHTSA has drafted paragraph S6(a) of the standard in the NPRM to reflect this approach.

As noted previously, NHTSA is proposing to require vehicles to meet the requirements of the standard at any weight between LLVW and GVWR. NHTSA would follow the entire proposed test procedures section (S6), including paragraph S6(c), which states that the TPMS will be reset in accordance with the instructions specified in the vehicle owner's manual, to the extent that such a reset is consistent with the discussion above.

The Delphi petition requested a further change to paragraph S6(c) of the June 5, 2002 standard. It requested the addition of language stating that as part of the testing procedures, the system will be reset and recalibrated, as explained in the vehicle's owner's manual. According to Delphi, recalibration may be necessary in certain instances, for example, to reflect changes in rolling radius or other characteristics accompanying a new replacement tire.

We find it unnecessary to alter paragraph S6(c) of the NPRM to add language regarding the need for system calibration after reset, because the next sequential step in the proposed testing procedure (S6(d)) specifies a calibration process.

5. System Disablement

The June 2002 final rule did not permit disablement of the TPMS, as it is the agency's normal practice not to allow safety systems to be disabled. Paragraphs S4.2.1 and S4.2.2 stated that the TPMS telltale must continue to illuminate as long as any of the vehicle's tires is experiencing under-inflation at the level specified under each option when the ignition locking system is in the "On" ("Run") position. The preamble to the TPMS final rule specifically stated that NHTSA decided to prohibit any control that automatically disables the TPMS under any condition, dismissing arguments for even temporary disablement of the system.

The issue of system disablement was raised in the petitions of both Porsche and the Alliance. In keeping with its own planned direct TPMS, Porsche asked the agency to reconsider its position on system disablement to permit a TPMS automatically to disable and then reactivate itself when it encounters confusing signals. The Porsche-designed TPMS would illuminate a yellow telltale and text such as "system not active—brief disturbance" when one of the following situations is encountered: (1) When the customer transports snow tires on rims with wheel sensors in the trunk when driving to the tire shop; (2) when a full-size spare tire without a wheel sensor is installed on the vehicle; (3) when the vehicle is in an area of considerable high frequency density; and (4) when components of the system are damaged. Porsche's suggestion in this regard is similar to the request made by the Alliance that the TPMS be allowed to indicate a system malfunction.

The agency acknowledged in the June 5, 2002 final rule that all technology has limitations, and situations may arise in which the TPMS may not function properly. 67 FR 38704, 38730. However, while acknowledging such limitations, we are concerned that allowing system disablement in specified situations would remove manufacturers' incentives to improve the TPMS technology in order to overcome such limitations. Consequently, rather than permitting disablement of the TPMS in such instances such as those described by Porsche, NHTSA hopes that additional improvements in technology may overcome these instances of system malfunction. Although under the NPRM we are proposing to require manufacturers to certify TPMSs to the requirements of S4 of the standard, NHTSA has designed its proposed test conditions and procedures in S5 and S6 so as to avoid these anomalous situations.

In general, the types of situations described by Porsche for which it requests system disablement are very different from the sort of voluntary and active disablement by the vehicle operator which the agency had considered and addressed previously. Instead, most situations raised by the petitioner are more akin to instances of TPMS malfunction, which are infrequent events that may be beyond the control of the vehicle operator. As discussed in Section III.C.1 above, the agency is proposing to require the TPMS to indicate a system malfunction to the vehicle operator.

We continue to believe as a general matter that it would be inappropriate to permit any manual or automatic disablement of the TPMS. However, should the unusual events cited above occur, manufacturers would be required to alert the driver regarding impairment of the TPMS through a system malfunction warning.

The Alliance petition asked the agency to revise the TPMS standard to permit one instance in which an indirect or hybrid TPMS may be disabled temporarily, namely when a differential or transfer case is locked. According to the Alliance, in such instances, relative wheel speed data are affected and, therefore, cannot be relied upon in making an inference of low inflation pressure. The Alliance stated that in such situations, the TPMS may provide false warnings if left activated.

We note that the locking differential or transfer case scenario presented by the Alliance is quite different from the situations described in the Porsche petition, and we tentatively believe that it is not a good reason for TPMS disablement. Unlike the situations presented in the Porsche petition, which would be expected to be infrequent and of short duration, the locking transfer case situation presented by the Alliance could be encountered with some degree of frequency. It would not be appropriate to allow a vehicle to operate without a functioning TPMS when the transfer case is locked, since the situation can continue for extended periods, especially during the winter.

6. Instruction Manuals and Other Public Awareness Efforts

In its petition, RMA asked NHTSA to revise the June 2002 TPMS rule's requirements for written instructions in owner's manuals under S4.5.1 and S4.5.2. The petitioner asked NHTSA to add language to make consumers aware that inclusion of a TPMS in a vehicle does not relieve them of their responsibility to routinely check tire pressure. RMA recommended the following language:

> The tire pressure monitoring system installed in your vehicle, required by government regulation, is not designed to warn you if the air pressure in one or more of your tires drops below the recommended cold inflation pressure (known as "placard pressure") established by the vehicle manufacturer.

NHTSA does not believe that it is necessary to change the language as RMA has requested because paragraph S4.5, as included in the June 2002 final rule, already contains an express statement regarding the importance of maintaining proper tire pressure. As proposed, paragraph S4.5 specifies mandatory language to be included in

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will apply also to those types of vehicles currently covered under FMVSS No. 120.

the vehicle's owner's manual, including: "Each tire, including the spare (if provided), should be checked monthly when cold and set to the inflation pressure recommended by the vehicle manufacturer."

Further, we believe that the language suggested by RMA would have the unintended effect of confusing consumers. The purpose of the TPMS, consistent with the TREAD Act, is to provide a safety warning to the vehicle operator when one or more tires become significantly under-inflated. It is not designed to alert the driver whenever a tire deviates from placard pressure. RMA's recommended language could cause the consumer to doubt the capability of the TPMS to warn about *any* drop in air pressure. Consequently, we believe that the proposed language in S4.5 and long-standing agency advisories make clear that vehicle operators routinely should monitor and maintain proper tire pressure.

The JATMA petition stated that the tire industry and automobile industry need to conduct an educational campaign to increase consumer awareness about the importance of maintaining proper tire pressure, and JATMA asked NHTSA to help promote such a campaign. NHTSA supports industry efforts to make consumers aware of the importance of maintaining adequate tire pressure. The agency has produced a tire safety brochure in conjunction with tire manufacturers and tire dealers that is titled "Tire Safety, Everything Rides On It." This brochure is part of a public campaign to provide information on tire pressure monitoring, tire inspection, and the selection of replacement tires. The brochure also stresses the importance of tires to overall vehicle performance. (Please note that newly proposed owner's manual language related to replacement tires and the TPMS malfunction indicator is discussed under Section III.C.1 (*Replacement Tires*).)

7. Reserve Load

The concept of "tire reserve load" refers to a tire's remaining load-carrying capabilities when a tire is inflated to a specific cold inflation pressure and the vehicle is loaded to a particular level. NHTSA did not address the issue of reserve load requirements in the TPMS rulemaking, and the June 2002 final rule for TPMS did not discuss tire reserve load in either the preamble or the regulatory text.

JATMA expressed concern that if vehicle owners allow their tires to remain in an under-inflated condition for an extended period of time, these tires would deteriorate from fatigue and would be more likely to experience tire breakdown, even if the level of under-inflation were not great enough to trigger the TPMS warning. Consequently, JATMA asked the agency to set a reserve load of at least 10 percent.

RMA stated that unless a sufficient reserve is built into placard pressure so that such pressure is sufficiently above the minimum required pressure, a TPMS detection level cannot safely be tied to placard pressure. RMA contended that without an adequate reserve load, tires operating at an inflation pressure almost 25–30% below placard pressure could have insufficient pressure to carry the vehicle's maximum load yet still not trigger the TPMS telltale.

In order to address its concerns about reserve load, RMA filed a petition for rulemaking with the agency to amend FMVSS No. 110, *Tire Selection and Rims*, to establish a reserve load requirement, with an effective date consistent with the scheduled implementation of Part I of FMVSS No. 138. RMA recommended that the reserve load be determined based primarily on the vehicle placard pressure, the type of TPMS on the vehicle, and the load/pressure relationship for the selected tires, according to the Tire and Rim Association tables.

We believe that the issue of reserve load is a tire issue most properly considered under FMVSS No. 110, as amended (*see* 67 FR 69600 (November 18, 2002) and 68 FR 37981 (June 26, 2003)). NHTSA has issued Special Orders to both tire manufacturers and vehicle manufacturers requiring them to submit comprehensive information on real world tire failures and the tire reserve load associated with the tires and vehicles on which those failures occurred. We are in the process of analyzing the information received in response to these Special Orders to determine whether there is any correlation between tire reserve load and real world tire failures. A 1981 study of tire failure and reserve load did not demonstrate such a correlation.[41] If new data indicate a sufficiently strong correlation, NHTSA will propose appropriate amendments to its standards.

8. Temperature-Corrected Inflation Pressure

The concept of "temperature-corrected inflation pressure" involves determining cold tire inflation pressure by compensating for the increased tire inflation pressure resulting from the rise in internal temperature caused by driving. The issue of temperature compensation was discussed in the preamble to the June 2002 final rule, but the agency decided not to specify any test procedure that explicitly relates to temperature correction. Therefore, the June 2002 final rule did not include a procedure that compensates for pressure build-up that might occur due to increased temperature resulting from a vehicle being driven.

JATMA's recommended language for revising S4.2 introduces the concept of "temperature-corrected inflation pressure" which it defines as "an inflation pressure that has been corrected to the cold inflation pressure from the increased inflation pressure due to the rise of internal temperature caused by driving a vehicle." However, JATMA's petition did not provide any explanation for its recommendation related to "temperature-corrected inflation pressure" beyond the above language.

NHTSA again declines to adopt the recommendation of the JATMA petition regarding temperature compensation. The procedure suggested by JATMA would introduce unnecessary complexity to the standard. NHTSA agrees that if a TPMS-equipped vehicle is tested immediately after the vehicle has been driven for some time, the stringency of the proposed standard's requirements could be reduced, because the tire from which pressure is released will be at 25 percent below the manufacturer's recommended cold tire inflation pressure, while the other tires may be up to 4 psi above that recommended pressure. However, nothing in the proposed standard requires NHTSA to test the performance of the TPMS immediately following calibration of the system. The agency plans to wait for up to an hour after calibration before releasing any pressure, which should allow all of the tires to cool down to approximately the ambient temperature. See paragraph S6(e).

9. Standardization of TPMS Parts

In its petition, JATMA urged NHTSA to require standardization of TPMS parts and service methods, in order to increase the number of facilities that are available to consumers to service and maintain the TPMS. While NHTSA supports broad availability of vehicle maintenance and repair, JATMA has not provided any evidence to suggest that existing vehicle repair facilities would be unable to service TPMSs produced

[41] "The Relationship Between Tire Reserve Load Percentage and Tire Failure Rate," Crash Avoidance Division, Office of Vehicle Safety Standards, NHTSA (81–09–NPRM–N01–002) (1981).

pursuant to either the June 5, 2002 final rule or this NPRM. Consequently, we do not find it necessary or advisable to impose additional design restrictions on TPMS manufacturers.

10. Definitions

"Significant Under-Inflation"

As published in the June 5, 2002 final rule, FMVSS No. 138 did not include a definition for the term "significant under-inflation" in paragraph S3, Definitions. The term is used in section 13 of the TREAD Act, which requires the Secretary of Transportation to issue "a regulation to require a warning system in new motor vehicles to indicate to the vehicle operator when a tire is significantly under inflated." In recognition of the difficulty in determining precisely when tire under-inflation becomes "significant," NHTSA chose to link the concept of "significant under-inflation" to a performance requirement that would provide a warning before significant safety concerns would be implicated. The TPMS standard also used the term as part of the required statement for inclusion in the owner's manual for vehicles covered under this standard.

RMA petitioned the agency to define the term "significant under-inflation." Citing section 13 of the TREAD Act, RMA argued that NHTSA's approach of linking "significant under-inflation" to illumination of the TPMS telltale provides an inadequate and misleading message to the public.

In reiteration of its comments submitted pursuant to the NPRM, RMA urged NHTSA to adopt RMA's definition of "significant under-inflation," meaning "any inflation pressure that is less than the pressure required to carry the actual vehicle load on the tire per industry standards (or any pressure less than the pressure to carry the maximum vehicle load on the tire if the actual load is unknown)." RMA reasoned that consumers should not be encouraged to believe that under-inflated tires only require attention when the TPMS telltale illuminates. Instead, RMA argued that tires may require attention at an earlier point of pressure loss below the tire industry's recommended pressure. According to RMA, consumers should be discouraged from substituting reliance on TPMSs for regular maintenance and monitoring of their vehicles' tire pressure.

In addition, JATMA's petition asked NHTSA to revise S4.2.1 of the standard to set the TPMS telltale's warning threshold at 20 percent below the vehicle manufacturer's recommended cold inflation pressure.

We agree that it is important for consumers to maintain tire pressure in a manner consistent with vehicle specifications. In the June 2002 final rule, we explained our (still valid) reasoning for rejecting RMA's suggestion to tie the definition of "significantly under-inflated" to the load carrying capacity of the tire rather than the placard pressure (see 67 FR 38704, 38725). We declined to adopt this recommendation because the vehicle manufacturer's recommended pressure assumes loading at GVWR and also takes into consideration ride, handling, and other factors for safe vehicle operation. Therefore, we believe that it could be counterproductive for the agency to substitute this new frame of reference without a strong reason for doing so.

RMA's petition for reconsideration did not provide any new justification for changing NHTSA's approach to defining "significantly under-inflated" or substituting load carrying capacity for placard pressure, beyond RMA's earlier arguments in its comments presented at the earlier NPRM stage. We continue to believe that under-inflation becomes significant when safe operation of the vehicle is threatened. As we explained in the June 2002 final rule, our new performance standard for tires requires that standard load P-metric tires be able to operate without failure when the tire is inflated to only 20 pounds per square inch (psi) and tested under full loading for at least 90 minutes at 75 mph with no failure. We are proposing 20 psi as the minimum activation pressure for standard load P-metric tires under FMVSS No. 138, which is consistent with both the results of NHTSA's own tire testing and the values listed in the handbooks of the European Tyre and Rim Technical Organization (ETRTO), the Japanese Automobile Tyre Manufacturers Association (JATMA), and the Tire & Rim Association (T&RA). Consequently, we are not including RMA's recommendation as part of this NPRM.

Regarding JATMA's request to amend the standard to set the TPMS telltale's warning threshold at 20 percent below the vehicle manufacturer's recommended cold inflation pressure, JATMA did not provide convincing evidence to support such a change, and we are not incorporating its suggestion.

"Small Volume Manufacturer"

The June 2002 final rule excluded small volume manufacturers (SVMs) from compliance with the TPMS standard and associated reporting requirements during the phase-in period (*i.e.*, November 1, 2003 to October 31, 2006). A SVM was defined under the standard as a manufacturer that produces fewer than 5,000 vehicles worldwide during the year. The SVM exclusion from compliance only applied to the three-year phase-in period. According to the June 2002 final rule, beginning on November 1, 2006, new vehicles covered under Part II of the final rule would have had to be equipped with a TPMS that meets the requirements of FMVSS No. 138, regardless of the size of the vehicle manufacturer.

The petitions of Ferrari S.p.A., Maserati S.p.A., and Vehicle Services Consulting, Inc. all asked the agency to modify the final rule's definition of "small volume manufacturer" to make it consistent with the definition of SVM in the agency's final rule for advanced air bags under FMVSS No. 208 (66 FR 65375, Dec. 18, 2001). Specifically, the petitioners requested a revision to paragraph S7.6 of the standard to exclude from the phase-in requirements those manufacturers that produce or assemble fewer than 5,000 vehicles annually for sale in the United States.

We note that the agency strives for consistency in its regulations to the extent possible, but the complexity of technical requirements and their safety implications may vary considerably in the context of different rulemakings. Thus, provisions for implementation of one rule may not be appropriate for implementation of another. Therefore, we retain our discretion regarding how we may structure phase-in requirements for small volume manufacturers and will make such determinations on a case-by-case basis.

However, we agree with the petitioners that in the case of the TPMS rule, it would be appropriate to grant the request to modify the definition of SVM so as to extend the exclusion from the phase-in requirements to manufacturers that produce fewer than 5,000 vehicles annually for sale in the United States. The TPMS standard will necessitate a change in vehicle design, and the United States is the only country that currently has such a standard. Consequently, NHTSA is proposing to change the way in which we define SVMs for phase-in purposes under S7.6 of the NPRM, moving from a 5,000 vehicle calculation based upon worldwide production to one of 5,000 vehicles produced for the U.S. market. We note that in the NPRM, we are proposing a modified phase-in schedule (S7), to which paragraph S7.6 is related.

"Tire Pressure Monitoring System"

The June 2002 final TPMS rule defined "tire pressure monitoring

system" as a system that detects when one or more of a vehicle's tires are under-inflated and illuminates a low tire pressure warning telltale. 67 FR 38704, 38746.

RMA petitioned NHTSA to modify the final rule's definition of the term "tire pressure monitoring system" to delete that portion of the definition stating that the TPMS "detects when one or more of a vehicle's tires are under-inflated." RMA stated that its recommendation is intended to make clear to vehicle operators that TPMSs do not activate automatically whenever a tire experiences *any* under-inflation, but only when under-inflation reaches a certain level consistent with available technology and current policy.

In drafting the NPRM, NHTSA did not incorporate RMA's recommended modification of the definition of "tire pressure monitoring system." Although it is true that a TPMS will not alert a vehicle operator as soon as a tire deviates from recommended placard pressure, the original definition did not state that a vehicle's tires are properly inflated until the moment the telltale illuminates. However, to further minimize any possible confusion, we have added the word "significantly" before the word "under-inflated" in the definition of "tire pressure monitoring system."

11. Alternative Systems

As noted earlier, section 13 of the TREAD Act required the Secretary of Transportation to issue a regulation requiring a warning system in new motor vehicles that indicates to the operator when a tire is significantly under-inflated (a responsibility delegated to NHTSA). Based upon this requirement, the June 2002 final rule stated in paragraph S4.3 that the TPMS must include a low tire pressure-warning telltale that is mounted inside the occupant compartment in front of and in clear view of the driver.

Aviation Upgrade Technologies submitted a petition for reconsideration seeking to modify the TPMS standard so as to permit use of its valve cap system for monitoring tire pressure, which does not include a telltale mounted inside the occupant compartment. The petitioner's system is external to the vehicle, being located on the valve stem of each tire, and it is designed to constantly flash a red light whenever tire pressure drops by 4 psi or more. Aviation Upgrade Technologies indicated that the wheel rim-mounted TPMS telltale would alert a driver of a tire with low pressure before that person enters and starts the vehicle, if a tire loses air pressure while the vehicle is not in operation. The petitioner also stated that when a wheel-mounted telltale illuminates while the vehicle is in operation, the driver may be alerted by fellow motorists who see the illuminated telltale and warn the driver.

The petitioner made a number of claims as to why its system is superior to the TPMSs permitted under the June 2002 final rule, including the significantly lower cost of its system, ease of installation and self-calibration features, ease of maintenance, its efficacy with all types of tires and rims, and its suitability for use on both new and used vehicles.

In drafting this NPRM, we decided not to propose language to accommodate Aviation Upgrade Technologies' system for the following reasons. First, we believe that the language of and the safety need addressed by section 13 of the TREAD Act would be best satisfied by requiring that the TPMS warning display be inside the motor vehicle in order to indicate to the driver when a tire is significantly under-inflated. We believe that external TPMS warning indicators do not provide a clear, timely, and effective safety warning, as compared to TPMS indicators in the vehicle's occupant compartment.

Specifically, TPMSs with external indicators cannot provide a warning to the driver about low tire inflation pressure while the vehicle is in operation, which is the most critical time period from a safety perspective. If a vehicle developed a significant pressure loss while it is being driven, the driver would not receive a prompt warning from the system and is unlikely to be aware of the under-inflation problem. We do not believe, as asserted in the Aviation Upgrade Technologies petition, that reliance on possible gestures or other signals from persons in passing vehicles would provide an adequate safety warning in those situations.

Even in those cases in which the vehicle is stopped, we believe that external TPMS warning indicators would not provide as effective a warning as a TPMS telltale inside the occupant compartment. People routinely do not walk around their vehicle prior to driving, so it is likely that many drivers would miss the message provided when there is an under-inflated tire. Therefore, we believe that valve cap devices would not provide an adequate warning to the driver.

Second, NHTSA also finds benefit to the centralization of warning indicators in a single, highly visible location, where they can provide important safety-related information to the driver. Historically, NHTSA has required safety warnings to be provided to the vehicle operator inside the vehicle.

Therefore, we are not accommodating TPMSs that do not include an on-board telltale as part of this NPRM.

IV. Benefits

In preparing its June 5, 2002 final rule, NHTSA prepared a Final Economic Analysis (FEA), which was placed in the docket.[42] In that document, we discussed the costs and benefits of both the four-tire, 25-percent option and the one-tire, 30-percent option incorporated in the final rule. However, in *Public Citizen, Inc.* v. *Mineta,* the Second Circuit determined that the TREAD Act requires TPMSs to be four-tire systems and invalidated the one-tire, 30-percent option. Accordingly, that option has not been included in this NPRM.

Although the FEA included analyses related to TPMSs with a four-tire, 25-percent under-inflation detection capability (the same performance standard proposed in this NPRM), circumstances have changed to a certain extent since the June 2002 final rule. New technologies are emerging (*e.g.*, batteryless direct TPMSs that could greatly reduce maintenance costs for such systems), and new requirements have been proposed (*e.g.*, requirement for a TPMS malfunction indicator). Accordingly, the agency has prepared a new Preliminary Regulatory Impact Analysis (PRIA) to accompany this proposed rule for tire pressure monitoring systems. The PRIA has been submitted to the Docket under the docket number for this notice.

The purpose of the PRIA is to reassess the costs and benefits of TPMS requirements, particularly in light of our proposed resolution of the replacement tire issue and the proposed requirement for a TPMS malfunction indicator. (The PRIA states that incorporation of a TPMS malfunction indicator may save an additional two equivalent lives, assuming a one-percent malfunction rate for replacement tires.) The PRIA examines various technologies suitable for compliance with the proposed standard, as well as additional regulatory alternatives considered by the agency. It also discusses the uncertainties analyses and sensitivities analyses conducted by the agency as part of the PRIA, per OMB Circular A–4, Regulatory Analysis, issued September 2003.

The following discussion summarizes the benefits associated with this NPRM and its proposed four-tire, 25-percent

[42] Docket No. NHTSA–2000–8572–216.

requirement. Estimates of monetary impacts (both in the section IV. Benefits and section V. Costs) are presented using a 3% discount rate; however, the PRIA also presents these impacts using a 7% discount rate.

The agency notes that the PRIA estimates 90% confidence bounds for many of the benefit and cost statistics. Those bounds reflect a 90% certainty level that the value is within that range (both for a 3% and a 7% discount rate). However, to simplify the discussion here, we are presenting the mean values for the benefit estimates in this section and the cost estimates in the next section, with the ranges below reflecting differences in the mean values based upon manufacturers' technology selection. The mean values are our best estimates. Please consult the PRIA for a more complete discussion of benefits and costs. The full ranges of benefits and costs, as well as their 90% confidence bounds, can be found in the PRIA's uncertainty analysis (Chapter X).

Under-inflation of tires affects the likelihood of many different types of crashes. These include crashes which result from: (1) Skidding and/or losing control of the vehicle in a curve, such as a highway off-ramp, or in a lane-change maneuver; (2) hydroplaning on a wet surface, which can cause increases in stopping distance and skidding or loss of control; (3) increases in stopping distance; (4) flat tires and blowouts, and (5) overloading the vehicle. In assessing the impact of this proposal on those crashes, the agency assumes that 90 percent of drivers will respond to a low tire pressure warning by re-inflating their tires to the placard pressure.

Based upon this assumption and depending upon the specific technology chosen for compliance, the agency estimates that the total quantified safety benefits from reductions in crashes due to skidding/loss of control, stopping distance, and flat tires and blowouts will be 119–121 fatalities prevented and 8,373–8,568 injuries prevented or reduced in severity each year, if all light vehicles met the TPMS requirement.

Further, NHTSA anticipates additional economic benefits from the standard due to improved fuel economy, longer tread life, property damage savings, and travel delay savings. Correct tire pressure improves a vehicle's fuel economy. Based upon data provided by Goodyear, we have determined that a vehicle's fuel efficiency is reduced by one percent for every 2.96 psi that its tires are below the placard pressure. The agency estimates that if all light vehicles met the TPMS requirement, vehicles' higher fuel economy would translate into an average discounted value of $19.07–$23.08 per vehicle over the lifetime of the vehicle, depending upon the specific technology chosen for compliance.

Correct tire pressure also increases a tire's tread life. Data from Goodyear indicate that, for every 1-psi drop in tire pressure, tread life decreases by 1.78 percent. NHTSA estimates that if all light vehicles met the proposed four-tire, 25-percent compliance requirement, average tread life would increase by 740 to 900 miles. The agency estimates that the average discounted value of resulting delays in new tire purchases would be $3.42–$4.24 per vehicle, depending upon the specific technology chosen for compliance.

To the extent that TPMSs provide improvements related to stopping distance, blowouts, and loss of control in skidding, we expect that some crashes would be prevented and that in others, the severity of the impacts and the injuries that result would be reduced. As a related matter, we expect that property damage and travel delays would also be mitigated by these improvements. To the extent that crashes are avoided, both property damage and travel delay would be completely eliminated. Crashes that still occur, but do so at less serious impact speeds, would still cause property damage and delay other motorists, but to a lesser extent than they otherwise would have. The value of property damage and travel delay savings is estimated to be from $7.70–$7.79 per vehicle.

V. Costs

The PRIA also contains an in-depth analysis of the costs associated with the proposed TPMS standard. It analyzes the cost of different TPMS technologies, overall vehicle costs, maintenance costs, testing costs, and opportunity costs. The PRIA also analyzes the cost impact of the proposed requirement for a TPMS malfunction warning and its effectiveness in resolving the replacement tire issue.[43] Again, please consult the PRIA for a more complete discussion of costs.[44] The following points summarize the key tentative determinations related to costs.

The agency examined three types of technology that manufacturers could use to meet the proposed TPMS requirement. Assuming that manufacturers will seek to minimize compliance costs, the agency expects that manufacturers would install hybrid TPMSs on the 67 percent of vehicles that are currently equipped with an ABS and direct TPMSs on the 33 percent of vehicles that are not so equipped. The highest costs for compliance would result if manufacturer installed direct TPMSs with an interactive readout of individual tire pressures that included sensors on all vehicle wheels. Thus, the agency estimates that the average incremental cost for all vehicles to meet the proposed requirement would range from $48.44–$69.89 per vehicle, depending upon the specific technology chosen for compliance. Since approximately 17 million vehicles are produced for sale in the U.S. each year, the total annual vehicle cost would range from approximately $823–$1,188 million per year.

The agency estimates that the net cost per vehicle [vehicle cost + maintenance costs + opportunity costs − (fuel savings + tread life savings + property damage and travel delay savings)] would be $26.63–$100.25, assuming a one-percent TPMS malfunction rate for replacement tires. (Maintenance costs would be variable, depending upon whether the TPMS has batteries or is batteryless.) As noted above, the agency estimates the total annual vehicle cost for the fleet would be about $823–$1,188 million. Thus, using the same equation, the agency estimates the total annual net cost would be about $453–$1,704 million.

NHTSA estimates that the net cost per equivalent life saved would be approximately $2.4–$9.1 million, depending upon the specific technology chosen for compliance. Placing 90% confidence bounds around the cost per equivalent life saved results in a range of $1.5–$14.5 million.

Net benefits-costs (benefits, including fatalities and injuries, valued in dollars minus costs) were also calculated per OMB Circular A–4. The value of a statistical life is uncertain, and a wide range of values has been established in the literature. (In general, the statistical value of a life is valued in the range of $1 million to $10 million per life, with a mean of $5.5 million.) For this analysis, we have examined values of

[43] As noted in the discussion of benefits in the section immediately above, the following discussion of costs estimates monetary impacts using a 3% discount rate and provides the mean values for cost statistics based upon manufacturers' technology selection. The mean values are our best estimates. However, the PRIA provides a full range of costs, as well as their 90% confidence bounds, and it also presents these impacts using a 7% discount rate.

[44] With future technological development, it may become possible for indirect TPMSs and other types of systems to meet the proposed four-tire, 25-percent requirement. However, until such new, compliant TPMSs are developed, it is impossible to accurately estimate their costs.

$3.5 million and $5.5 million, both of which fall within the range of accepted values. The mean value for net benefits-costs ranges from a net cost of $650 million to a net benefit of $599 million, depending upon the specific technology chosen for compliance. A 90 percent confidence bound around the net benefits-costs results in a range of a net cost of $1,156 million to a net benefit of $1,302 million.

VI. Regulatory Alternatives

The proposed performance requirements contain two key variables: the number of tires monitored and the threshold level for providing tire pressure warnings. As noted elsewhere in this preamble, the Second Circuit determined in *Public Citizen, Inc.* v. *Mineta* that the TREAD Act unambiguously mandates TPMSs capable of monitoring each tire up to a total of four tires, effectively precluding any option with less than a four-tire detection capability. Further, the Court found that the agency had justification for adopting a four-tire, 25-percent option instead of the four-tire, 20-percent option proposed at an earlier stage of the rulemaking.

Although NHTSA is proposing a 25 percent below placard threshold, technically, other threshold levels could also be established. Selecting an appropriate notification threshold level is a matter of balancing the safety benefits achieved by alerting consumers to low tire pressure against over-alerting them to the point of becoming a nuisance and causing consumers to ignore the warning, thus negating the potential of this proposal to produce safety benefits. Degradation in vehicle braking and handling performance does not become a significant safety issue at small pressure losses. There does not appear to be a specific threshold level at which benefits are maximized by a combination of minimum reduction in placard pressure and maximum response by drivers. NHTSA is confident that existing technology can meet the proposed 25 percent threshold. Setting a lower threshold might result in the opportunity for more savings if drivers' response levels were maintained; however, we are concerned that setting a lower threshold could result in a higher rate of non-response by drivers who regard the more frequent notifications as a nuisance. Current direct TPMS systems have a margin of error of 1–2 psi. That means, for example, that for a 30-psi tire, manufacturers would have to set the system to provide a warning when tires are 4 psi below placard if we were to require a 20 percent threshold. We tentatively conclude that this may be approaching a level at which a portion of the driving public would begin to regard the warning as a nuisance. We have not examined lower threshold levels in this analysis because we believe that the net impact of these offsetting factors (quicker notification, but lower frequency of driver response) is unknown and unlikely to produce a significant difference in safety benefits. We note that a 20 percent 4-tire option was examined in the March 2002 analysis, and that the total benefit for the 20 percent threshold was about 15 percent higher than from the 25 percent threshold. However, that calculation assumed the same level of driver response for both thresholds. It is also possible that lower thresholds might limit technology and discourage innovation.

Overall, we tentatively conclude that the 25 percent threshold adequately captures the circumstances at which low tire pressure becomes a safety issue. We also believe that this level would be acceptable to most drivers and would not be considered a nuisance to the point that it would be ignored by large numbers of drivers. We also believe there is no reason to examine higher thresholds (*e.g.*, a 30 percent threshold), since they would provide fewer benefits for similar costs.

VII. Public Participation

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are filed correctly in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (*see* 49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given under **ADDRESSES.**

You may also submit your comments to the docket electronically by logging onto the Dockets Management System website at *http://dms.dot.gov.* Click on "Help & Information," or "Help/Info" to obtain instructions for filing the document electronically.

How Can I Be Sure That My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT.** In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES.** When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR Part 512).

Will the Agency Consider Late Comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES.** To the extent possible, we also will consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider it in developing the final rule, we will consider that comment as an informal suggestion for future rulemaking action.

How Can I Read The Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given under **ADDRESSES.** The hours of the Docket are indicated above in the same location.

You also may see the comments on the Internet. To read the comments on the Internet, take the following steps:

1. Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov/*).
2. On that page, click on "search."
3. On the next page (*http://dms.dot.gov.search/*), type in the four-digit docket number shown at the beginning of this document. Example: If the docket number were "NHTSA–1998–1234," you would type "1234." After typing the docket number, click on "search."

4. On the next page, which contains docket summary information for the docket you selected, click on the desired comments. Although the comments are imaged documents, instead of word processing documents, the "pdf" versions of the document are word searchable.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

VIII. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to OMB review and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Since the June 5, 2002 final rule, to which this NPRM is directly related, was determined to be economically significant, the agency prepared and placed in the docket a Final Economic Analysis (FEA). This proposed rule likewise was determined to be economically significant. As a significant notice, it was reviewed under Executive Order 12866. The rule is also significant within the meaning of the Department of Transportation's Regulatory Policies and Procedures. The agency has estimated that compliance with this proposed rule would cost $823—$1,188 million per year, since approximately 17 million vehicles are produced for the United States market each year. Thus, this rule would have greater than a $100 million effect.

As noted above, this NPRM was necessitated by the August 6, 2003 opinion of the Court of Appeals for the Second Circuit in *Public Citizen, Inc.* v. *Mineta*. In that case, the court determined that the TREAD Act requires TPMSs to be four-tire systems, invalidated the one-tire, 30-percent option contained in the June 5, 2002 final rule, and vacated the standard. As part of the NPRM, NHTSA also has responded substantively to issues raised in the 13 petitions for reconsideration filed in response to the June 5, 2002 final rule, the majority of which remain relevant even after that court decision. Accordingly, the agency has prepared and placed in the docket a Preliminary Regulatory Impact Analysis (PRIA) for this NPRM.

B. Regulatory Flexibility Act

Pursuant to 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 effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR Part 121 define a small business, in part, as a business entity "which operates primarily within the United States." (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an 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.

NHTSA has considered the effects of this proposed rule under the Regulatory Flexibility Act. I certify that this proposed rule would not have a significant economic impact on a substantial number of small entities. The rationale for this certification is that currently there are only four small motor vehicle manufacturers (*i.e.*, only four with fewer than 1,000 employees) in the United States that would have to comply with this proposed rule. These manufacturers would have to rely on suppliers to provide the TPMS hardware, and then they would have to integrate the TPMS into their vehicles.

There are a few small manufacturers of recreational vehicles that would have to comply with this proposed rule. However, most of these manufacturers use van chassis supplied by the larger manufacturers (*e.g.*, GM, Ford, or DaimlerChrysler) and could use the TPMSs supplied with the chassis. These manufacturers should not have to test the TPMS for compliance with this proposed rule since they should be able to rely upon the chassis manufacturer's incomplete vehicle documentation.

Under the June 5, 2002 final rule, commenters expressed concerns about the final rule's impact upon aftermarket wheel and rim manufacturers, many of which are small businesses. These manufacturers were concerned that certain provisions of the final rule would have had the effect of restricting their ability to provide a full range of wheel and tire combinations to consumers, thereby negatively impacting their business. However, these concerns have largely been resolved by the agency's current proposal, which does not contain requirements for spare tires and aftermarket rims.

We also analyzed the impact of this proposal on 14 identified suppliers of TPMS systems. However, of these companies, only three have fewer than 750 employees. Of these three companies, one (SmarTire) has its headquarters located outside of the United States, and another (Cycloid) has only ten employees and outsources the manufacturing of its products.

In conclusion, the agency believes that this proposal would not affect a substantial number of small businesses.

C. Executive Order 13132 (Federalism)

Executive Order 13132, "Federalism" (64 FR 43255, August 10, 1999), 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" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance 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, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. NHTSA also may not issue a regulation with Federalism implications and that preempts a State law unless the agency consults with State and local officials early in the process of developing the regulation.

Although statutorily mandated, this proposed rule for TPMS was analyzed in accordance with the principles and criteria set forth in Executive Order 13132, and the agency determined that the rule would not have sufficient Federalism implications to warrant consultations with State and local officials or the preparation of a Federalism summary impact statement. This proposed rule would not have any substantial effects on the States, or on the current distribution of power and responsibilities among the various local officials.

D. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996), the agency has considered whether this rulemaking would have any retroactive effect. This proposed rule does not have any retroactive effect. Under 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. 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 a suit in court.

E. Executive Order 13045 (Protection of Children From Environmental Health and Safety Risks)

Executive Order 13045, "Protection of Children from Environmental Health and Safety Risks" (62 FR 19855, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental, health, or safety risk that the agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

Although the TPMS rule has been determined to be an economically significant regulatory action under Executive Order 12866, the problems associated with under-inflated tires equally impact all persons riding in a vehicle, regardless of age. Consequently, this proposed rule does not involve decisions based upon health and safety risks that disproportionately affect children, as would necessitate further analysis under Executive Order 13045.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), 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. In the NPRM, it is proposed that each of the estimated 21 affected vehicle manufacturers provide one phase-in report for each of two years, beginning, at the earliest, in the fall of 2006.

Pursuant to the June 5, 2002 TPMS final rule, the OMB has approved the collection of information "Phase-In Production Reporting Requirements for Tire Pressure Monitoring Systems," assigning it Control No. 2127–0631 (expires 6/30/06). NHTSA has been given OMB clearance to collect a total of 42 hours a year (2 hours per respondent) for the TPMS phase-in reporting. However, until a new final rule is issued specifying phase-in reporting requirements, NHTSA will not collect any information pursuant to Control No. 2127–0631. If it should be necessary to do so, NHTSA may ask OMB for an extension of this clearance for an additional period of time.

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, (15 U.S.C. 272) directs the agency to evaluate and use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or is 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) with explanations when the agency decides not to use available and applicable voluntary consensus standards. The NTTAA does not apply to symbols.

There are no voluntary consensus standards related to TPMS available at this time. However, NHTSA will consider any such standards as they become available.

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 annually (adjusted for inflation with base year of 1995 (so currently about $109 million)). Before promulgating a NHTSA rule for which a written statement is needed, section 205 of the UMRA generally requires the agency 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 the agency 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 of why that alternative was not adopted.

This proposed rule would not result in the expenditure by State, local, or tribal governments, in the aggregate, or more than $109 million annually, but it would result in an expenditure of that magnitude by vehicle manufacturers and/or their suppliers. In the June 5, 2002 final rule, the precursor to the current proposal, the agency chose two compliance options (*i.e.*, four-tire, 25-percent and one-tire, 30-percent) in order to minimize compliance costs with the standard during the phase-in period.

However, the Second Circuit in *Public Citizen, Inc.* v. *Mineta* struck down the one-tire, 30-percent option. Thus, in this proposed rule, NHTSA is proposing to adopt a four-tire, 25-percent requirement, which we believe is consistent with safety and the mandate in the TREAD Act, as fully discussed in the June 5, 2002 final rule. We note that in proposing a performance standard,

NHTSA has left the door open for an array of technologies that may be used to meet the standard's proposed requirements. With further TPMS development, we expect that vehicle manufacturers would have a number of technological choices that will provide broad flexibility to minimize their costs of compliance with the standard.

I. National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

J. Regulatory 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.

K. Privacy Act

Please note that 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 Parts 571 and 585

Imports, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, NHTSA is proposing to amend 49 CFR Parts 571 and 585 as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for Part 571 of Title 49 would continue 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 571.101 would be amended by revising paragraph S5.2.3 and Table 2 to read as follows:

§ 571.101 Standard No. 101; Controls and displays.

* * * * *

S5.2.3 Except for the Low Tire Pressure Telltale and the TPMS Malfunction Telltale, any display located within the passenger compartment and listed in column 1 of Table 2 that has a symbol designated in column 4 of that table shall be identified by either the symbol designated in column 4 (or symbol substantially similar in form to that shown in column 4) or the word or abbreviation shown in column 3. The Low Tire Pressure Telltale (either the display identifying which tire has low pressure or the display which does not identify which tire has low pressure) and the TPMS Malfunction Telltale shall be identified by the appropriate symbol designated in column 4, or both the symbol in column 4 and the words in column 3. Additional words or symbols may be used at the manufacturer's discretion for the purpose of clarity. Any telltales used in conjunction with a gauge need not be identified. The identification required or permitted by this section shall be placed on or adjacent to the display that it identifies. The identification of any display shall, under the conditions of S6, be visible to the driver and appear to the driver perceptually upright.

* * * * *

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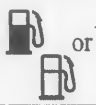
Table 2
Identification and Illustration of Displays

Column 1	Column 2	Column 3	Column 4	Column 5
Display	*Telltale Color*	*Identifying Words or Abbreviation*	*Identifying Symbol*	*Illumination*
Turn Signal Telltale	Green	Also See FMVSS 108	 1,5	———
Hazard Warning Telltale		Also See FMVSS 108	 2,5	———
Seat Belt Telltale	———4	Fasten Belts or Fasten Seat Belts Also See FMVSS 208	 or	———
Fuel Level Telltale		Fuel	 or	———
Gauge	———			Yes
Oil Pressure Telltale		Oil		———
Gauge	———			Yes
Coolant Temperature Telltale		Temp		———
Gauge	———			Yes
Electrical Charge Telltale		Volts, Charge or Amp		———
Gauge	———			Yes
Highbeam Telltale	Blue or Green 3	Also See FMVSS 108	 5	———
Brake System 8	Red 3	Brake, Also see FMVSS 105 and 135	———	———

1. The pair of arrows is a single symbol. When the indicator for left and right turn operate independently, however, the two arrows will be considered separate symbols and may be spaced accordingly.
2. Not required when arrows of turn signal telltales that otherwise operate independently flash simultaneously as hazard warning telltale.
3. Red can be red-orange. Blue can be blue-green.
4. The color of the telltale required by S4.5.3.3 of Standard No. 208 is red; the color of the telltale required by S7.3 of Standard No. 208 is not specified.
5. Framed areas may be filled.
8. In the case where a single telltale indicates more than one brake system condition, the word for Brake System shall be used.

Table 2 (continued)

Column 1	Column 2	Column 3	Column 4	Column 5
Display	*Telltale Color*	*Identifying Words or Abbreviation*	*Identifying Symbol*	*Illumination*
Malfunction in Anti-lock or	Yellow	Antilock, Anti-lock or ABS. Also see FMVSS 105 and 135	———	———
Variable Brake Proportioning System 8	Yellow	Brake Proportioning, Also see FMVSS 135	———	———
Parking Brake Applied 8	Red 3	Park or Parking Brake, Also see FMVSS 105 and 135	———	———
Malfunction in Anti-lock	Yellow	ABS, or Antilock; Trailer ABS, or Trailer Antilock, Also see FMVSS 121	———	———
Brake Air Pressure Position Telltale	———	Brake Air, Also see FMVSS 121	———	———
Speedometer	———	MPH, or MPH and km/h 7	———	Yes
Odometer	———	——— 6	———	———
Automatic Gear Position	———	Also see FMVSS 102	———	Yes
Low Tire Pressure Telltale (that does not identify which tire has low pressure)	Yellow	Low Tire. Also see FMVSS 138		———
Low Tire Pressure Telltale (that identifies which tire has low pressure)	Yellow	Low Tire. Also see FMVSS 138		———
Tire Pressure Monitoring System Malfunction Telltale	Yellow	TPMS		———

3. Red can be red-orange. Blue can be blue-green.
6. If the odometer indicates kilometers, then "KILOMETERS" or "km" shall appear, otherwise, no identification is required.
7. If the speedometer is graduated in miles per hour and in kilometers per hour, the identifying words or abbreviations shall be "MPH and km/h" in any combination of upper or lower case letters.
8. In the case where a single telltale indicates more than one brake system condition, the word for Brake System shall be used.

BILLING CODE 4910–59–C

3. Section 571.138 would be added to read as follows:

§ 571.138 Standard No. 138; Tire pressure monitoring systems.

S1 *Purpose and scope.* This standard specifies performance requirements for tire pressure monitoring systems (TPMSs) to prevent significant under-inflation of tires and the resulting safety problems.

S2 *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses that have a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less, except those vehicles with dual wheels on an axle, according to the phase-in schedule specified in S7 of this standard.

S3 *Definitions.* The following definitions apply to this standard:

Lightly loaded vehicle weight means unloaded vehicle weight plus the weight of a mass of 180 kg (396 pounds), including test driver and instrumentation.

Tire pressure monitoring system means a system that detects when one or more of a vehicle's tires is significantly under-inflated and illuminates a low tire pressure warning telltale.

Vehicle Placard and *Tire inflation pressure label* mean the sources of information for the vehicle manufacturer's recommended cold tire inflation pressure pursuant to section 571.110 of this Part.

S4 *Requirements.*

S4.1 *General.* To the extent provided in S7.1 through S7.3, each vehicle must be equipped with a tire pressure monitoring system that meets the requirements specified in S4 under the test conditions specified in S5 and the test procedures specified in S6 of this standard.

S4.2 *TPMS detection requirements.* The tire pressure monitoring system must:

(a) Illuminate a low tire pressure warning telltale not more than 10 minutes after the inflation pressure in one or more of the vehicle's tires, up to a total of four tires, is equal to or less than either the pressure 25 percent below the vehicle manufacturer's recommended cold inflation pressure, or the pressure specified in the 3rd column of Table 1 of this standard for the corresponding type of tire, whichever is higher;

(b) Continue to illuminate the low tire pressure warning telltale as long as the pressure in any of the vehicle's tires is equal to or less than the pressure specified in S4.2(a), and the ignition locking system is in the "On" ("Run") position, whether or not the engine is running. The telltale must be extinguished after the inflation pressure is corrected.

S4.3 *Low tire pressure warning telltale.*

S4.3.1 Each tire pressure monitoring system must include a low tire pressure warning telltale that:

(a) Is mounted inside the occupant compartment in front of and in clear view of the driver;

(b) Is identified by one of the symbols shown for the "Low Tire Pressure Telltale" in Table 2 of Standard No. 101 (49 CFR 571.101); and

(c) Is illuminated under the conditions specified in S4.2.

S4.3.2 In the case of a telltale that identifies which tire(s) is (are) under-inflated, each tire in the symbol for that telltale must illuminate when the tire it represents is under-inflated to the extent specified in S4.2.

S4.3.3:

(a) Except as provided in paragraph (b) of this section, each low tire pressure warning telltale must illuminate as a check of lamp function either when the ignition locking system is turned to the "On" ("Run") position when the engine is not running, or when the ignition locking system is in a position between "On" ("Run") and "Start" that is designated by the manufacturer as a check position.

(b) The low tire pressure warning telltale need not illuminate when a starter interlock is in operation.

S4.4 *TPMS malfunction.*

(a) The vehicle shall be equipped with a tire pressure monitoring system that includes a telltale that illuminates whenever there is a malfunction that affects the generation or transmission of control or response signals in the vehicle's tire pressure monitoring system and extinguishes when the malfunction has been corrected. The vehicle's TPMS malfunction indicator shall meet the requirements of either S4.4(b) or S4.4(c).

(b) *Dedicated TPMS malfunction telltale*

The vehicle meets the requirements of S4.4(a) when equipped with a dedicated TPMS malfunction telltale that:

(1) Is mounted inside the occupant compartment in front of and in clear view of the driver;

(2) Is identified by the symbol shown for "TPMS Malfunction Telltale" in Table 2 of Standard No. 101 (49 CFR 571.101);

(3) Is illuminated under the conditions specified in S4.4 for as long as the malfunction exists, whenever the ignition locking system is in the "On" ("Run") position; and

(4) (i) Except as provided in paragraph (ii), each dedicated TPMS malfunction telltale must be activated as a check of lamp function either when the ignition locking system is turned to the "On" ("Run") position when the engine is not running, or when the ignition locking system is in a position between "On" ("Run") and "Start" that is designated by the manufacturer as a check position.

(ii) The dedicated TPMS malfunction telltale need not be activated when a starter interlock is in operation.

(c) *Combination low tire pressure/TPMS malfunction telltale*

The vehicle meets the requirements of S4.4(a) when equipped with a combined Low Tire Pressure/TPMS malfunction telltale that:

(1) Meets the requirements of S4.2 and S4.3; and

(2) Flashes for one minute upon detection of any condition specified in S4.4(a) after the ignition locking system is turned to the "On" ("Run") position. After the first minute, the telltale must remain continuously illuminated as long as the malfunction exists and the ignition locking system is in the "On" ("Run") position. This flashing and illumination sequence must be repeated upon vehicle start-up until the situation causing the malfunction has been corrected. The TPMS malfunction telltale must extinguish after the malfunction has been corrected.

S4.5 *Written instructions.*

(a) The owner's manual in each vehicle certified as complying with S4 must provide an image of the Low Tire Pressure Telltale symbol (and an image of the TPMS Malfunction Telltale symbol, if a dedicated telltale is utilized for this function) with the following statement in English:

Each tire, including the spare (if provided), should be checked monthly when cold and inflated to the inflation pressure recommended by the vehicle manufacturer on the vehicle placard or tire inflation pressure label. (If your vehicle has tires of a different size than the size indicated on the vehicle placard or tire inflation pressure label, you should consult the appropriate section of this owner's manual to determine the proper tire inflation pressure.) When the low tire pressure telltale is illuminated, one or more of your tires is significantly under-inflated. You should stop and check your tires as soon as possible, and inflate them to the proper pressure. Driving on a significantly under-inflated tire causes the tire to overheat and can lead to tire failure. Under-inflation also reduces fuel efficiency and tire tread life, and may affect the vehicle's handling and stopping ability.

Your vehicle has also been equipped with a TPMS malfunction telltale to indicate when the system is not operating properly. When the malfunction telltale is illuminated, the system may not be able to detect or signal

low tire pressure as intended. TPMS malfunctions may occur for a variety of reasons, including the installation of incompatible replacement tires on the vehicle. Always check the TPMS malfunction telltale after replacing one or more tires on your vehicle to ensure that the replacement tires are compatible with the TPMS.

(b) The owner's manual may include additional information about the significance of the low tire pressure warning telltale illuminating, a description of corrective action to be undertaken, whether the tire pressure monitoring system functions with the vehicle's spare tire (if provided), and how to use a reset button, if one is provided.

(c) If a vehicle does not come with an owner's manual, the required information shall be provided in writing to the first purchaser of the vehicle.

S5 *Test conditions.*

S5.1 *Ambient temperature.* The ambient temperature is between 0 °C (32 °F) and 40 °C (104 °F).

S5.2 *Road test surface.*

Compliance testing is conducted on any portion of the Southern Loop of the Treadwear Test Course defined in Appendix A and Figure 2 of section 575.104 of this chapter. The road surface is dry during testing.

S5.3 *Vehicle conditions.*

S5.3.1 *Test weight.* The vehicle may be tested at any weight between its lightly loaded vehicle weight and its gross vehicle weight rating (GVWR) without exceeding any of its gross axle weight ratings.

S5.3.2 *Vehicle speed.* The vehicle's TPMS is calibrated and tested at speeds between 50 km/h (31.1 mph) and 100 km/h (62.2 mph).

S5.3.3 *Rim position.*

The vehicle rims may be positioned at any wheel position, consistent with any related instructions or limitations in the vehicle owner's manual.

S5.3.4 *Stationary location.*

The vehicle's tires are shaded from direct sun when the vehicle is parked.

S5.3.5 *Brake pedal application.* Driving time shall not accumulate during service brake application.

S5.3.6 *Range of conditions or test parameters.*

Whenever a range of conditions or test parameters is specified in this standard, the vehicle must meet applicable requirements when tested at any point within the range.

S6 *Test procedures.*

(a) Inflate the vehicle's tires to the cold tire inflation pressure(s) provided on the vehicle placard or the tire inflation pressure label.

(b) With the vehicle stationary and the ignition locking system in the "Lock" or "Off" position, turn the ignition locking system to the "On" ("Run") position or, where applicable, the appropriate position for the lamp check. The tire pressure monitoring system must perform a check of lamp function for the low tire pressure telltale as specified in paragraph S4.3.3 of this standard. If the vehicle is equipped with a separate TPMS malfunction telltale, the tire pressure monitoring system also must perform a check of lamp function as specified in paragraph S4.4(b)(4) of this standard.

(c) If applicable, reset the tire pressure monitoring system in accordance with the instructions in the vehicle owner's manual.

(d) *System calibration/learning phase.*

(1) Drive the vehicle along any portion of the test course for 10–15 minutes of cumulative time (not necessarily continuously).

(2) Drive the vehicle in the opposite direction along the test course for 5–15 minutes of cumulative time (not necessarily continuously).

(3) The sum of the total cumulative driving time under paragraphs S6(d)(1) and (2) shall not be less than 20 minutes.

(e) Stop the vehicle and keep the vehicle stationary for up to one hour with the engine off. Deflate any combination of one to four tires until the deflated tire(s) is (are) at 7 kPa (1 psi) below the inflation pressure at which the tire pressure monitoring system is required to illuminate the low tire pressure warning telltale.

(f) *System detection phase.*

(1) Drive the vehicle for up to 7 minutes of cumulative time (not necessarily continuously) along any portion of the test course, or until the low tire pressure telltale illuminates, whichever occurs first.

(2) If the telltale did not illuminate during the step in paragraph S6(f)(1), reverse direction on the course and drive the vehicle for an additional period of time up to a total cumulative time of 10 minutes (including the time in S6(f)(1), and not necessarily continuously), or until the low tire pressure telltale illuminates.

(3) If the low tire pressure telltale did not illuminate, discontinue the test.

(g) If the low tire pressure telltale illuminated during the procedure in paragraph S6(f), turn the ignition locking system to the "Off" or "Lock" position. After a 5-minute period, turn the vehicle's ignition locking system to the "On" ("Run") position. The telltale must illuminate and remain illuminated as long as the ignition locking system is in the "On" ("Run") position.

(h) Keep the vehicle stationary for a period of up to one hour with the engine off.

(i) If the vehicle's TPMS has a manual reset feature, attempt to reset the system in accordance with instructions specified in the vehicle owner's manual prior to re-inflating the vehicle's tires. If the low tire pressure telltale illuminates, discontinue the test.

(j) Inflate all of the vehicle's tires to the same inflation pressure used in paragraph S6(a). If the vehicle's tire pressure monitoring system has a manual reset feature, reset the system in accordance with the instructions specified in the vehicle owner's manual. Determine whether the telltale has extinguished. If necessary, drive the vehicle for a time period of up to 10 minutes.

(k) The test may be repeated, using the test procedures in paragraphs S6(a) through (j), with any one, two, three, or four of the tires on the vehicle under-inflated.

(l) *TPMS malfunction detection.*

(1) Simulate one or more TPMS malfunction(s) by disconnecting the power source to any TPMS component, disconnecting any electrical connection between TPMS components, by simulating a TPMS sensor malfunction, or by installing a tire on the vehicle that is incompatible with the TPMS.

(2) Turn the ignition locking system to the "On" ("Run") position or, where appropriate, the position for lamp check. The TMPS malfunction telltale must illuminate in accordance with paragraph S4.4.

(3) If the vehicle is equipped with a TPMS reset feature to extinguish the low tire pressure and/or malfunction telltale, reset the system according to the manufacturer's instructions. Verify that the TPMS continues to identify a system malfunction as specified in paragraph S4.4.

(4) Restore the TPMS to normal operation, reset if necessary, and verify that the malfunction telltale is extinguished.

S7 *Phase-in schedule.*

S7.1 *Vehicles manufactured on or after September 1, 2005, and before September 1, 2006.* For vehicles manufactured on or after September 1, 2005, and before September 1, 2006, the number of vehicles complying with this standard must not be less than 50 percent of:

(a) The manufacturer's average annual production of vehicles manufactured on or after September 1, 2002, and before September 1, 2005; or

(b) The manufacturer's production on or after September 1, 2005, and before September 1, 2006.

S7.2 *Vehicles manufactured on or after September 1, 2006, and before September 1, 2007.* For vehicles manufactured on or after September 1, 2006, and before September 1, 2007, the number of vehicles complying with this standard must not be less than 90 percent of:

(a) The manufacturer's average annual production of vehicles manufactured on or after September 1, 2003, and before September 1, 2006; or

(b) The manufacturer's production on or after September 1, 2006, and before September 1, 2007.

S7.3 *Vehicles manufactured on or after September 1, 2007.* All vehicles manufactured on or after September 1, 2007 must comply with this standard.

S7.4 *Calculation of complying vehicles.*

(a) For purposes of complying with S7.1, a manufacturer may count a vehicle if it is certified as complying with this standard and is manufactured on or after (date to be inserted that is 60 days after date of publication of the final rule), but before September 1, 2006.

(b) For purposes of complying with S7.2, a manufacturer may count a vehicle if it:

(1)(i) Is certified as complying with this standard and is manufactured on or after (date to be inserted that is 60 days after date of publication of the final rule), but before September 1, 2007; and

(ii) Is not counted toward compliance with S7.1; or

(2) Is manufactured on or after September 1, 2006, but before September 1, 2007.

S7.5 *Vehicles produced by more than one manufacturer.*

S7.5.1 For the purpose of calculating average annual production of vehicles for each manufacturer and the number of vehicles manufactured by each manufacturer under S7.1 through S7.3, a vehicle produced by more than one manufacturer must be attributed to a single manufacturer as follows, subject to S7.5.2:

(a) A vehicle that is imported must be attributed to the importer.

(b) A vehicle manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, must be attributed to the manufacturer that markets the vehicle.

S7.5.2 A vehicle produced by more than one manufacturer must be attributed to any one of the vehicle's manufacturers specified by an express written contract, reported to the National Highway Traffic Safety Administration under 49 CFR Part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under S7.5.1.

S7.6 *Small volume manufacturers.* Vehicles manufactured during any of the two years of the September 1, 2005 through August 31, 2007 phase-in by a manufacturer that produces fewer than 5,000 vehicles for sale in the United States during that year are not subject to the requirements of S7.1, S7.2, and S7.4.

S7.7 *Final-stage manufacturers and alterers.* Vehicles that are manufactured in two or more stages or that are altered (within the meaning of 49 CFR 567.7) after having previously been certified in accordance with Part 567 of this chapter are not subject to the requirements of S7.1 through S7.2 and S7.4.

Tables to § 571.138

Table 1 - Low Tire Pressure Warning Telltale - Minimum Activation Pressure

Tire Type	Maximum or Rated Inflation Pressure		Minimum Activation Pressure	
	(kPa)	(psi)	(kPa)	(psi)
P-metric -- Standard Load	240,	35,	140	20
	300, or	44, or	140	20
	350	51	140	20
P-metric - Extra Load	280 or	41 or	160	23
	340	49	160	23
Load Range C	350	51	200	29
Load Range D	450	65	260	38
Load Range E	550	80	320	46

PART 585—PHASE-IN REPORTING REQUIREMENTS

4. Proposed amendments to Part 585 were published on August 6, 2003, that would consolidate phase-in reporting requirements for various standards (68 FR 46546). Consistent with that proposal, Part 585 would be amended further, as follows:

1. The authority citation for Part 585 of Title 49 would be added to read as follows:

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

2. Subpart D would be revised to read as follows:

Subpart D—Tire Pressure Monitoring System Phase-in Reporting Requirements

Sec.

Subpart D—Tire Pressure Monitoring System Phase-in Reporting Requirements

§ 585.31 Scope.

This subpart establishes requirements for manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less, except those vehicles with dual wheels on an axle, to submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the requirements of Standard No. 138, *Tire pressure monitoring systems* (49 CFR 571.138).

§ 585.32 Purpose.

The purpose of these reporting requirements is to assist the National Highway Traffic Safety Administration in determining whether a manufacturer has complied with Standard No. 138.

§ 585.33 Applicability.

This subpart applies to manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less, except those vehicles with dual wheels on an axle. However, this subpart does not apply to manufacturers whose production consists exclusively of vehicles manufactured in two or more stages, and vehicles that are altered after previously having been certified in accordance with part 567 of the chapter. In addition, this subpart does not apply to manufacturers whose production of motor vehicles for the United States market is less than 5,000 vehicles in a production year.

§ 585.34 Definitions.

Production year means the 12-month period between September 1 of one year and August 31 of the following year, inclusive.

§ 585.35 Response to inquiries.

At any time prior to August 31, 2007, each manufacturer must, upon request from the Office of Vehicle Safety Compliance, provide information identifying the vehicles (by make, model, and vehicle identification number) that have been certified as complying with Standard No. 138. The manufacturer's designation of a vehicle as a certified vehicle is irrevocable.

§ 585.36 Reporting requirements.

(a) General reporting requirements. Within 60 days after the end of the production years ending August 31, 2006 and August 31, 2007, each manufacturer must submit a report to the National Highway Traffic Safety Administration concerning its compliance with Standard No. 138 (49 CFR 571.138) for its passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of less than 4,536 kilograms (10,000 pounds) produced in that year. Each report must—

(1) Identify the manufacturer;

(2) State the full name, title, and address of the official responsible for preparing the report;

(3) Identify the production year being reported on;

(4) Contain a statement regarding whether or not the manufacturer complied with the requirements of Standard No. 138 (49 CFR 571.138) for the period covered by the report and the basis for that statement;

(5) Provide the information specified in paragraph (b) of this section;

(6) Be written in the English language; and

(7) Be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

(b) *Report content.*

(1) *Basis for statement of compliance.* Each manufacturer must provide the number of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less, except those vehicles with dual wheels on an axle, manufactured for sale in the United States for each of the three previous production years, or, at the manufacturer's option, for the current production year. A new manufacturer that has not previously manufactured these vehicles for sale in the United States must report the number of such vehicles manufactured during the current production year.

(2) *Production.* Each manufacturer must report for the production year for which the report is filed: the number of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less that meet Standard No. 138 (49 CFR 571.138).

(3) *Vehicles produced by more than one manufacturer.* Each manufacturer whose reporting of information is affected by one or more of the express written contracts permitted by S7.5.2 of Standard No. 138 (49 CFR 571.138) must:

(i) Report the existence of each contract, including the names of all parties to the contract, and explain how the contract affects the report being submitted.

(ii) Report the actual number of vehicles covered by each contract.

§ 585.37 Records.

Each manufacturer must maintain records of the Vehicle Identification Number for each vehicle for which information is reported under § 590.6(b)(2) until December 31, 2009.

§ 585.38 Petition to extend period to file report.

A manufacturer may petition for extension of time to submit a report under this Part. A petition will be granted only if the petitioner shows good cause for the extension and if the extension is consistent with the public interest. The petition must be received not later than 15 days before expiration of the time stated in § 585.36(a). The filing of a petition does not automatically extend the time for filing a report. The petition must be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

Issued: September 10, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 04–20791 Filed 9–10–04; 3:25 pm]

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Federal Register

Thursday,
September 16, 2004

Part IV

Department of Labor

Office of the Secretary

Delegation of Authority and Assignment of Responsibilities to the Assistant Secretary of Labor for Veterans—Employment and Training; Notices

DEPARTMENT OF LABOR

Office of the Secretary

[Secretary's Order 3–2004]

Delegation of Authority and Assignment of Responsibilities to the Assistant Secretary of Labor for Veterans' Employment and Training

1. *Purpose.* To delegate authority and assign responsibility to the Assistant Secretary of Labor for Veterans' Employment and Training, and to consolidate those responsibilities regarding veterans into one Order.

2. *Authority and Directives Affected.* This Order is issued pursuant to 5 U.S.C. 301; 5 U.S.C. 5315; 29 U.S.C. 551, *et seq.*; additional authorities are listed in Paragraph 4.A.(1) and 4.A.(2) of this Order. This Order supersedes Secretary's Orders 1–83, 4–83, and 8–83. This Order does not affect Secretary's Order 4–2001 or Secretary's Order 4–75, both of which remain in effect.

3. *Background.* Several Secretary's Orders exist that delegate responsibilities to the Assistant Secretary of Labor for Veterans' Employment and Training. Congress established the position of an Assistant Secretary of Labor for Veterans' Employment in 1980. *See* Public Law 96–466, § 504, 94 Stat. 2171 (1980) (now 38 U.S.C. 4102A). Among other things, Secretary's Order 4–83 (March 24, 1983) redesignated the Office of the Assistant Secretary of Labor for Veterans' Employment as the Veterans' Employment and Training Service. In 1986, Congress formally redesignated the position to be the Assistant Secretary of Labor for Veterans' Employment and Training. Public Law 99–619, § 2(b)(3), 100 Stat. 3491 (1986).

Under the current statutory terms, the Assistant Secretary of Labor for Veterans' Employment and Training is appointed by the President with the advice and consent of the Senate and "shall formulate and implement all departmental policies and procedures to carry out (A) the purposes of this chapter [chapter 41], chapter 42, and chapter 43 of this title [title 38], and (B) all other Department of Labor employment, unemployment, and training programs to the extent they affect veterans." 38 U.S.C. 4102A(a). The Assistant Secretary of Labor for Veterans' Employment and Training is the principal advisor to the Secretary of Labor regarding veterans' issues. While the title, authorities, and responsibilities previously assigned and encompassed by statute will remain with the Assistant Secretary of Labor for Veterans' Employment and Training under this Secretary's Order, the Department and the public are better served by a single delegation encompassing all responsibilities.

4. *Delegation of Authority and Assignment of Responsibilities.* A. Except as hereinafter provided, the Assistant Secretary of Labor for Veterans' Employment and Training is delegated the authority (including the authority to re-delegate) and assigned the responsibilities of the Secretary of Labor:

(1) Under 38 U.S.C. 4102A, including any amendments.

(2) Under the following statutes, including any amendments:

(i) Administrative Redress for Preference Eligibles under Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a;

(ii) Transition Assistance Program (TAP), 10 U.S.C. 1144;

(iii) Veterans' Workforce Investment Programs (VWIP), Workforce Investment Act of 1998, 29 U.S.C. 2913;

(iv) Homeless Veterans Reintegration Program (HVRP), Homeless Veterans Comprehensive Assistance Act of 2001, 38 U.S.C. 2021;

(v) Incarcerated Veterans Transition Program, Homeless Veterans Comprehensive Assistance Act of 2001, 38 U.S.C. 2023;

(vi) President's National Hire Veterans Committee, 38 U.S.C. 4100 note;

(vii) State Directors for Veterans' Employment and Training (State DVETs), 38 U.S.C. 4103;

(viii) Disabled Veterans' Outreach Program (DVOP), 38 U.S.C. 4102A, 4103A;

(ix) Local Veterans' Employment Representatives (LVERs), 38 U.S.C. 4102A, 4104;

(x) Establishment of Administrative Controls and Application of Performance Standards, 38 U.S.C. 4107(a) and (b);

(xi) National Veterans' Employment and Training Services Institute, 38 U.S.C. 4109;

(xii) Advisory Committee on Veterans Employment and Training, 38 U.S.C. 4110(e)(4);

(xiii) Performance Incentive Awards for Quality Employment, Training and Placement Services, 38 U.S.C. 4112;

(xiv) Outstationing of Transition Assistance Program Personnel, 38 U.S.C. 4113;

(xv) Veterans' Employment Emphasis under Federal Contracts—Federal Contractor Veterans' Employment Report (VETS–100), 38 U.S.C. 4212(d) (2002 & Supp. 2004), and determination of compliance pursuant to 20 CFR 1001.130 regarding Federal contractor priority of employment referral and employment listings under 38 U.S.C. 4212(a)(2)(B) and (C) (2002 & Supp. 2004) (**Note:** Secretary's Order 4–2001 remains in effect, which, in part, delegates authority and assigns responsibility to the Assistant Secretary for Employment Standards for the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, including 38 U.S.C. 4212(a)(1), 4212(a)(2)(A), and 4212(b) (2004) and 38 U.S.C. 4212(a) and (b) (2002). Subject to the above delegation to VETS, Secretary's Order 4–75 also remains in effect, which, in part, delegates authority and assigns responsibility to the Assistant Secretary for Employment and Training for administration of Federal contractor priority of employment referral and employment listing services under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, now 38 U.S.C. 4212(a)(2)(B) and (C));

(xvi) Electronic Delivery of Services to Covered Persons, 38 U.S.C. 4215 note.

(xvii) Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. 103–353, 38 U.S.C. 4301–4333 (2000) and its predecessor, the Veterans' Reemployment Rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 4301–4307 (as set forth in the Codification Note preceding 38 U.S.C. 4301 (1994));

(xviii) Priority of Service for Veterans in DOL Job Training Programs, 38 U.S.C. 4215, with respect to job training programs that are administered by the ASVET. This delegation does not include authority for priority of service of veterans in job training programs that are administered by the Assistant Secretary for Employment and Training;

(xviv) As directed by the Secretary, such additional Federal acts similar to or related to those listed in paragraphs (i) through (xviii), above, that from time to time may assign additional authority or responsibilities to the Secretary.

(3) to invoke all appropriate governmental privileges, arising from the functions of the Veterans' Employment and Training Service, following his/her personal consideration of the matter and in accordance with the following guidelines:

(i) Generally Applicable Guidelines. The Assistant Secretary may not re-delegate the authority to invoke a privilege. The privilege may be asserted only with respect to specifically described information and only where the Assistant Secretary determines the privilege is applicable. In asserting a privilege, the Assistant Secretary shall

articulate in writing specific reasons for preserving the confidentiality of the information.

(ii) Informant's Privilege (to protect from disclosure the identity of any person who has provided information to the Veterans' Employment and Training Service in cases arising under the statutory provisions listed in paragraph 4.A.(1) and 4.A.(2) of this Order that are delegated or assigned to the Veterans' Employment and Training Service). To assert this privilege, the Assistant Secretary must first determine that disclosure of the privileged matter may: (A) Interfere with the Veterans' Employment and Training Service's investigation or enforcement of a particular statute for which it exercises investigative or enforcement authority; (B) adversely affect persons who have provided information to the Veterans' Employment and Training Service; or (C) deter other persons from reporting violations of the statute.

(iii) Deliberative Process Privilege (to withhold information which may disclose pre-decisional intra-agency or inter-agency deliberations, in cases arising under the statutory provisions listed in paragraph 4.A.(1) and 4.A.(2) of this Order including: the analysis and evaluation of facts; written summaries of factual evidence; and recommendations, opinions, or advice on legal or policy matters). To assert this privilege, the Assistant Secretary must first determine that: (A) The information is not purely factual and does not concern recommendations that the department expressly adopted or incorporated by reference in its ultimate decision; (B) the information was generated prior to and in contemplation of a decision by a part of the Department; and (C) disclosure of the information would have an inhibiting effect on the Department's decision-making processes.

(iv) Privilege for Investigative Files Compiled for Law Enforcement Purposes (to withhold information that may reveal the Veterans' Employment and Training Service's confidential investigative techniques and procedures). To assert this privilege, the Assistant Secretary must first determine that disclosure of the privileged matter may have an adverse impact upon the Veterans' Employment and Training Service's enforcement of the statutory provisions listed in paragraph 4.A.(1) and 4.A.(2) of this Order, by: (A) Disclosing investigative techniques and methodologies; (B) deterring persons from providing information to the Veterans' Employment and Training Service; (C) prematurely revealing the facts of the Department's case; or (D) disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

(v) Prior to filing a formal claim of privilege, the Assistant Secretary shall personally review the information sought to be withheld, including all the documents sought to be withheld (or, in cases where the volume of information is so large all of it cannot be personally reviewed in a reasonable time, an adequate and representative sample of such information) and a description or summary of the litigation in which the disclosure is sought.

(vi) The Assistant Secretary may comply with any additional requirements imposed by local court rules or precedent in asserting a governmental privilege.

(vii) In asserting a governmental privilege, the Assistant Secretary may ask the Solicitor of Labor or the Solicitor's representative to prepare and file any necessary legal papers or documents.

B. The Solicitor of Labor is delegated authority and assigned responsibility for providing legal advice and assistance to all officials of the Department relating to the authorities of this Order, for bringing appropriate legal actions on behalf of the Secretary, and representing the Secretary in all civil proceedings.

5. *Reservation of Authority.* A. The submission of reports and recommendations to the President and the Congress concerning the administration of statutory or administrative provisions is reserved to the Secretary.

B. This Secretary's Order does not affect the authorities and responsibilities of the Office of Inspector General under the Inspector General Act of 1978, as amended, or under Secretary's Order 2–90 (January 31, 1990).

6. *Effective Date.* This Order is effective immediately.

Dated: September 10, 2004.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 04–20843 Filed 9–15–04; 8:45 am]

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Federal Register

Thursday,
September 16, 2004

Part V

General Services Administration

48 CFR Parts 511 and 552
General Services Administration Acquisition Regulation; Defense Priorities and Allocations System; Final Rule

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 511 and 552

[GSAR Amendment 2004–02; GSAR Case 2003–G502; Change 10]

RIN 3090–AH88

General Services Administration Acquisition Regulation; Defense Priorities and Allocations System

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to implement the Defense Priorities and Allocations System (DPAS) within the GSA Federal Supply Service (FSS).

DATES: *Effective Date:* September 16, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Laurie Duarte, Regulatory Secretariat (V), Room 4035, GS Building, Washington, DC, 20405, (202) 501–4225, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite Amendment 2004–02, GSAR case 2003–G502.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation (FAR) Subpart 11.6 implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce (DOC) regulation in support of the national defense (see 15 CFR part 700). The DOC delegates authority to Delegate Agencies to place priority ratings on contracts and orders that support authorized programs. GSA is a Delegate Agency.

A proposed rule was published in the **Federal Register** at 68 FR 59510, October 15, 2003. No comments were received from the public. However, DOC submitted editorial changes that have been adopted in part.

FAR 11.603(f) instructs agencies to provide contracting officers with specific guidance on the issuance of rated orders. The GSA Federal Supply Service issues single award and multiple award Federal Supply Schedule contracts.These contracts are not rated orders as defined by DPAS.However, from time to time, an order placed against one of these schedule contracts may be a rated order. This rule would provide GSA contracting officers with the required specific guidance by adding a new subpart to the GSAR. The rule also requires the use of a clause that explains to schedule contractors their obligations under DPAS.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule primarily provides instructions for GSA contracting officers on including a contract clause in Federal Supply Schedules and information on placing DPAS rated orders. Contractors are already required to give priority to DPAS rated orders under Title I of the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061, *et seq.*). A Final Regulatory Flexibility Act Analysis was, therefore, not performed.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C.3501, *et seq.*

List of Subjects in 48 CFR Parts 511 and 552

Government procurement.

Dated: September 8, 2004.

David A. Drabkin,

Deputy Chief Acquisition Officer,Office of the Chief Acquisition Officer.

■ Therefore, GSA amends 48 CFR parts 511 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 511 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 511—DESCRIBING AGENCY NEEDS

■ 2. Add subpart 511.6, consisting of sections 511.600 through 511.604, to read as follows:

Subpart 511.6—Priorities and Allocations

Sec

511.600 Scope of subpart.

FAR Subpart 11.6 implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce (DOC) regulation (15 CFR part 700) to assure timely delivery of industrial resources (products, materials, and services) in support of approved national defense, energy, and civil emergency preparedness (Homeland Security) programs. Pursuant to DPAS Delegation 3, DOC delegated GSA the authority to use the DPAS in support of the GSA Federal Supply system. This subpart implements the DPAS within GSA.

511.601 Definitions.

As used in this subpart—

Approved program means a program determined as necessary or appropriate for priorities and allocations support to promote the national defense by the Secretary of Defense, the Secretary of Energy, or the Department of Homeland Security Under Secretary for Emergency Preparedness and Response under the authority of the Defense Production Act, the Stafford Act, and Executive Order 12919, or the Selective Service Act and related statutes, and Executive Order 12742. See Schedule 1 of 15 CFR part 700 for a list of Delegate Agencies, approved programs, and program identification symbols at *http://www.bis.doc.gov/DefenseIndustrialBasePrograms/OSIES/DPAS/Default.htm.*

Authorized person means a Delegate Agency, or other entity either permitted under 15 CFR part 700, or explicitly authorized by DOC to issue DPAS rated orders.

Defense Priorities and Allocations System (DPAS) means the regulation published at 15 CFR part 700 that requires preferential treatment for certain contracts and orders placed by a Delegate Agency in support of an approved program.

Delegate Agency means an agency of the U.S. Government authorized by delegation from DOC to place priority ratings on contracts or orders needed to support approved programs.

Rated order means a prime contract, a subcontract, a purchase order, or a delivery or task order in support of an approved program issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

511.602 General.

(a) The purpose of the DPAS is to assure the timely availability of industrial resources to meet current national defense, energy, and civil emergency preparedness program requirements and to provide an operating system to support rapid industrial response in a national emergency. The primary statutory authority for the DPAS is Title I of the Defense Production Act of 1950, as amended, with additional authority from the Selective Service Act of 1948, and the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Executive Orders 12919 and 12742 delegate this authority to the DOC to administer the DPAS.The DOC is further authorized to redelegate to heads of other departments and agencies (Delegate Agencies) authority under the DPAS for the priority rating of contracts and orders in support of approved programs. Within the DOC, the Office of Strategic Industries and Economic Security (SIES) is assigned the implementation, administration, and compliance responsibilities for the system.

(b) The DPAS is published in the Code of Federal Regulations at 15 CFR part 700. This regulation provides an overview, a detailed explanation of operations and procedures, and other implementing guidance, including information on special priorities assistance and compliance.

(c) Orders placed under DPAS are "rated orders." Rated orders must receive preferential treatment only as necessary to meet delivery requirements. Rated orders are identified by a rating symbol of either "DX" or "DO" followed by a program identification symbol. All "DO" rated orders have equal priority with each other and take preference over unrated orders. All "DX" rated orders have equal priority with each other and take preference over "DO" rated orders and unrated orders. A program identification symbol indicates which approved program is supported by the rated order.

(d) Only authorized persons may place an order containing a DPAS priority rating.

(e) Within GSA, the Federal Supply Service (FSS) has been delegated the authority to issue rated orders to meet approved national defense, energy, and civil emergency preparedness program requirements of the supply distribution program. The Commissioner, FSS, shall issue additional guidance, as may be necessary, to ensure effective implementation of its delegated DPAS authority, such as the exclusions listed in paragraph F(2) of the 1998 DOC DPAS Delegation 3.

(f) Executive Order 12919 defines the jurisdictional limitations as set forth in 15 CFR 700.18(b).

511.603 Procedures.

(a) A DPAS rating may be placed against an entire contract at time of award or an individual order issued under an existing, otherwise unrated, contract.

(b) When a DPAS rating is placed against an entire contract, the contracting officer must include the clause and provision prescribed at FAR 11.604, as well as the elements listed in paragraphs (c)(1) through (c)(3) of this section (see 15 CFR 700.12).

(c) When a DPAS rating is placed against an individual order issued under an existing, otherwise unrated, contract, the order must include the following elements (see 15 CFR 700.12):

(1) The appropriate priority rating symbol (*i.e.*, either "DO" or "DX") along with the program identification symbol. As required by the 1998 DOC DPAS Delegation 3 to GSA, when GSA contracting officers place DO rated orders, they will use program identification symbol K1. When placing a DX rated order for other agencies, GSA contracting officers will use the requesting agency program identification symbol. When a Delegate Agency places its own orders, it uses its own program identification symbol. (See Schedule 1 of 15 CFR part 700 for a listing of Delegate Agencies, approved programs, and program identification symbols.)

(2) A required delivery date. The words "as soon as possible" or "immediately" do not constitute a required delivery date. A specific date or a specified number of days ARO (after receipt of order) is acceptable.

(3) The written signature on a manually placed order, or the digital signature or name on an electronically placed order of an individual authorized to place rated orders.

(4) A statement that reads substantially as follows:

"This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR part 700)."

(d) Multiple and Single Award Schedule contracts are not rated at time of award. Individual DPAS rated orders must include the elements listed in paragraphs (c)(1) through (c)(4) of this section.

511.604 Solicitation provision and contract clause.

The contracting officer must insert in full text the clause at 552.211–15, Defense Priorities and Allocations System Requirements, in Single and Multiple Award Schedule solicitations and resultant contracts, except where the contract is wholly for products, materials, or services excluded from DPAS applicability (see 15 CFR 700.18).

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 552.211–15 to read as follows:

552.211–15 Defense Priorities and Allocations System Requirements.

As prescribed at 511.604, insert the following clause:

DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM REQUIREMENTS (SEPT. 2004)

(a) *Definitions.*

Approved program means a program determined to be necessary or appropriate for priorities and allocation support to promote the national defense by the Secretary of Defense, the Secretary of Energy, or the Department of Homeland Security Under Secretary for Emergency Preparedness and Response under the authority of the Defense Production Act, the Stafford Act, and Executive Order 12919, or the Selective Service Act and related statutes, and Executive Order 12742. See Schedule 1 of 15 CFR part 700 for a list of Delegate Agencies, approved programs, and program identification symbols at *http://www.bis.doc.gov/DefenseIndustrialBasePrograms/OSIES/DPAS/Default.htm).*

Defense Priorities and Allocations System (DPAS) means the regulation published at 15 CFR part 700 that requires preferential treatment for certain contracts and orders placed by a Delegate Agency in support of an approved program.

Delegate Agency means an agency of the U.S. Government authorized by delegation from the Department of Commerce (DOC) to place priority ratings on contracts or orders needed to support approved programs.

Rated order means, for the purpose of this contract, a delivery or task order issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

(b) *Rated Order Requirement.* From time to time, the Contractor may receive a rated order under this contract from a Delegate Agency. The Contractor must give preferential treatment to rated orders as required by the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700). The existence of previously accepted unrated or lower rated orders is not sufficient reason to reject a rated order. Rated orders take preference over all unrated orders as necessary to meet required delivery dates. There are two levels of ratings designated by the symbol of either "DO" or "DX." All "DO" rated orders have equal priority with each

other and take preference over unrated orders. All "DX" rated orders have equal priority with each other and take preference over "DO" rated orders and unrated orders. The rating designation is followed by a program identification symbol. Program identification symbols indicate which approved program is supported by the rated order (see Schedule 1 of 15 CFR part 700 for a list of Delegate Agencies, approved programs, and program identification symbols).

(c) *Additional information.* Additional information may be obtained at the DOC DPAS website *http://www.bis.doc.gov/DefenseIndustrialBasePrograms/OSIES/DPAS/Default.htm* or by contacting the designated Administrative Contracting Officer.

[FR Doc. 04–20848 Filed 9–15–04; 8:45 am]

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Federal Register

Thursday,
September 16, 2004

Part VI

General Services Administration

48 CFR Part 552
General Services Administration Acquisition Regulation; Acquisition of Leasehold Interests in Real Property; Historic Preference; Final Rule

GENERAL SERVICES ADMINISTRATION

48 CFR Part 552

[Amendment 2004–03; GSAR Case 2002–G504; Change 11]

RIN 3090–AH01

General Services Administration Acquisition Regulation; Acquisition of Leasehold Interests in Real Property; Historic Preference

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) by revising the provision on Historic Preference.

DATES: *Effective Date:* September 16, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Laurie Duarte, Regulatory Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4225, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208–1168. Please cite Amendment 2004–03; GSAR case 2002–G504.

SUPPLEMENTARY INFORMATION:

A. Background

GSA is amending the GSAR by revising the provision on Historic Preference. Executive Order (E.O.) 13006, dated May 21, 1996, requires that the Federal Government utilize and maintain, wherever operationally appropriate and economically prudent, historic properties and districts in order to help revitalize the nation's central cities. The E.O. requires that, subject to the requirements of the Rural Development Act and E.O. 12072, when locating Federal facilities, Federal agencies give first consideration to historic properties within historic districts. If no such property is suitable, then Federal agencies must consider other developed or undeveloped sites within historic districts. Federal agencies must then consider historic properties outside historic districts, if no suitable site within a district exists. Based on the requirements of E.O. 13006, the GSAR provision has been revised to establish a hierarchy of consideration that is facilitated by giving a price evaluation preference to offers of space falling within the hierarchy.

A proposed rule implementing a historic preference provision for leasehold interests in real property was published in the **Federal Register** for comments at 64 FR 35122, June 30, 1999. GSA received comments, and the proposed rule was revised. The comments received by GSA and the changes made to the historic preference provision are summarized as follows: The Advisory Council on Historic Preservation recommended that the definitions of historic property and historic district be made consistent with other existing regulations and statutory definitions and that the hierarchical preferences be stated more clearly. The proposed historic preference provision has been revised to incorporate appropriate definitions from the National Historic Preservation Act and implementing regulations in Title 36 of the Code of Federal Regulations, and to clarify how the historic preference will be applied. GSA also considered whether the price preference for non-historic developed and undeveloped sites within historic districts should be less than the price preference for historic properties within and outside of historic districts. GSA believed that this would more appropriately reflect the relatively higher cost of rehabilitating, altering, and maintaining existing historic buildings as opposed to constructing and maintaining new buildings or altering existing non-historic buildings within an historic district. Accordingly, the historic preference provision has been revised to provide that historic properties within and outside of historic districts may be eligible for a 10 percent price preference; non-historic developed and undeveloped sites within historic districts may be eligible for a 2.5 percent price preference. Finally, the provision has been revised to state that the Government will compute the price evaluation preferences by reducing the price(s) of the offerors qualifying for a price evaluation preference by the applicable percentage provided in the historic preference provision. Because numerous changes were made to the proposed historic preference provision, GSA published a second proposed rule in the **Federal Register** at 66 FR 53193, October 19, 2001. No further comments were received.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule implements an existing Executive order and does not impose any new requirements. This rule requires the Federal Government to utilize and maintain historic properties and districts, wherever possible, to aid in the revitalization of the nation's central cities and establishes a price evaluation preference and order preference for properties in these specific areas.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C.3501, *et seq.*

List of Subjects in 48 CFR Part 552

Government procurement.

Dated: September 8, 2004.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer.

■ Therefore, GSA amends 48 CFR part 552 as set forth below:

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

■ 2. Revise section 552.270–2 to read as follows:

552.270–2 Historic Preference.

As prescribed in 570.602, insert the following provision:

Historic Preference (SEPT. 2004)

(a) The Government will give preference to offers of space in historic properties following this hierarchy of consideration:

(1) Historic properties within historic districts.

(2) Non-historic developed and non-historic undeveloped sites within historic districts.

(3) Historic properties outside of historic districts.

(b) *Definitions.* (1) *Determination of eligibility* means a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation

although the property is not formally listed in the National Register (36 CFR 60.3(c)).

(2) *Historic district* means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history (36 CFR 60.3(d)). The historic district must be included in or be determined eligible for inclusion in the National Register of Historic Places.

(3) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in or been determined eligible for inclusion in the National Register of Historic Places maintained by the Secretary of the Interior (36 CFR 800.16(l)).

(4) *National Register of Historic Places* means the National Register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture that the Secretary of the Interior is authorized to expand and maintain under the National Historic Preservation Act (36 CFR 60.1).

(c) The offer of space must meet the terms and conditions of this solicitation. The Contracting Officer has discretion to accept alternatives to certain architectural characteristics and safety features defined elsewhere in this solicitation to maintain the historical integrity of an historic building, such as high ceilings and wooden floors, or to maintain the integrity of an historic district, such as setbacks, floor-to-ceiling heights, and location and appearance of parking.

(d) When award will be based on the lowest price technically acceptable source selection process, the Government will give a price evaluation preference, based on the total annual square foot (ANSI/BOMA Office Area) cost to the Government, to historic properties as follows:

(1) First to suitable historic properties within historic districts, a 10 percent price preference.

(2) If no suitable historic property within an historic district is offered, or the 10 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(3) If no suitable non-historic developed or undeveloped site within an historic district is offered, or the 2.5 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(4) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

(e) When award will be based on the best value tradeoff source selection process, which permits tradeoffs among price and non-price factors, the Government will give a price evaluation preference, based on the total annual square foot (ANSI/BOMA Office Area) cost to the Government, to historic properties as follows:

(1) First to suitable historic properties within historic districts, a 10 percent price preference.

(2) If no suitable historic property within a historic district is offered or remains in the competition, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(3) If no suitable non-historic developed or undeveloped site within an historic district is offered or remains in the competition, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(4) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

(f) The Government will compute price evaluation preferences by reducing the price(s) of the offerors qualifying for a price evaluation preference by the applicable percentage provided in this provision. The price evaluation preference will be used for price evaluation purposes only. The Government will award a contract in the amount of the actual price(s) proposed by the successful offeror and accepted by the Government.

(g) To qualify for a price evaluation preference, offerors must provide satisfactory documentation in their offer that their property qualifies as one of the following:

(1) An historic property within an historic district.

(2) A non-historic developed or undeveloped site within an historic district.

(3) An historic property outside of an historic district.

(End of provision)

[FR Doc. 04–20847 Filed 9–15–04; 8:45 am]

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AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Exportation and importation of animals and animal products:
Tuberculosis in cattle; import requirements; comments due by 9-20-04; published 7-20-04 [FR 04-16282]

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Conservation Security Program; comments due by 9-20-04; published 6-21-04 [FR 04-13745]

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Natural Resources Conservation Service
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H.R. 5005/P.L. 108–303
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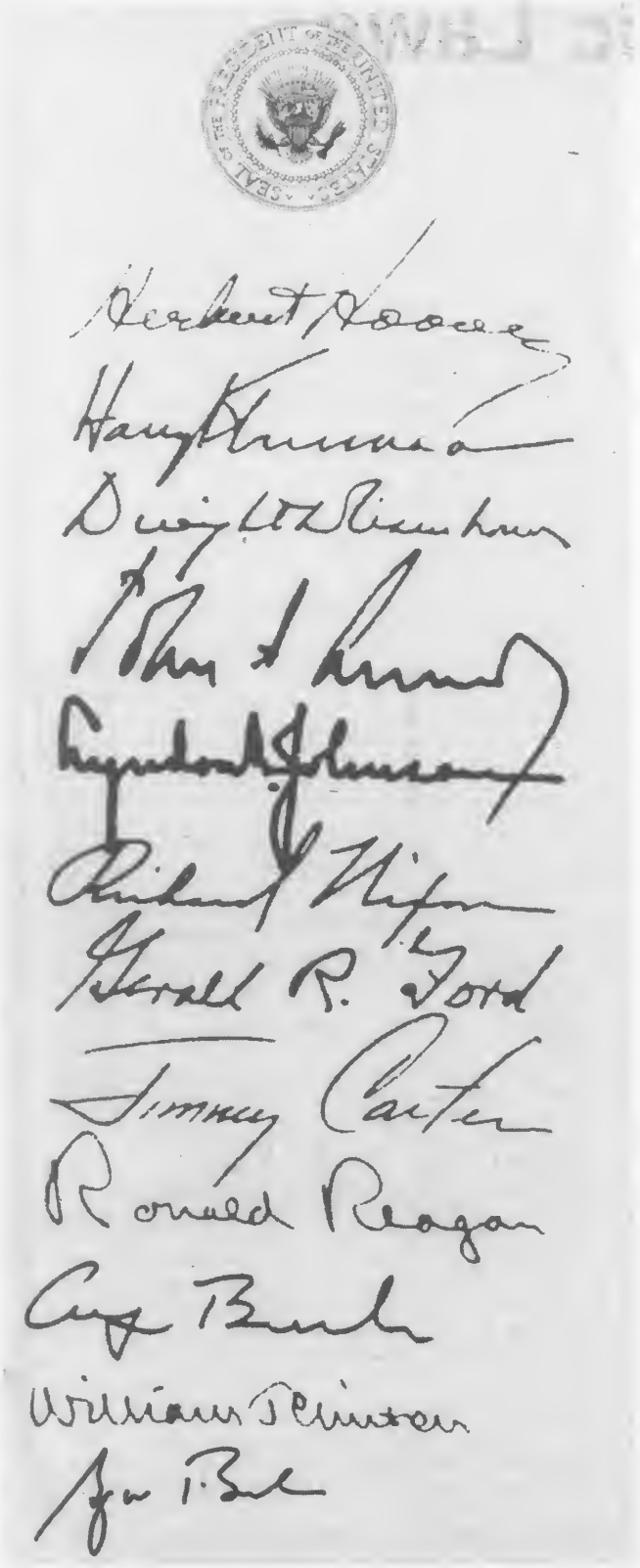

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