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5–16–03 Friday
Vol. 68 No. 95 May 16, 2003

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CFR PARTS AFFECTED IN THIS ISSUE

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

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Presidential Documents

Title 3—

The President

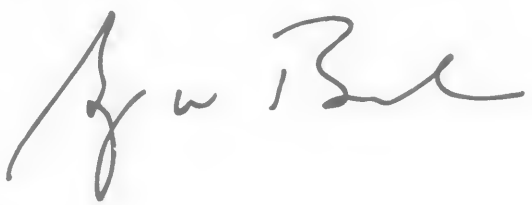
Memorandum of May 7, 2003

Report to the Congress on Tibet Negotiations

Memorandum for the Secretary of State

The provisions under the heading "Tibet Negotiations" in section 613(b) of the Tibetan Policy Act of 2002, as contained in the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107–228), state that a report must be prepared 180 days following enactment, and every 12 months thereafter, concerning the steps taken by the President and the Secretary to encourage the Government of the People's Republic of China to enter into dialogue with the Dalai Lama or his representatives leading to a negotiated agreement on Tibet. The report is also to address the status of any discussions between the People's Republic of China and the Dalai Lama or his representatives.

You are hereby authorized and directed to publish this memorandum in the **Federal Register** and to transmit the attached report to the appropriate committees of the Congress.



THE WHITE HOUSE,
Washington, May 7, 2003.

[FR Doc. 03–12486
Filed 5–15–03; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Presidential Determination No. 2003–23 of May 7, 2003

Suspending the Iraq Sanctions Act, Making Inapplicable Certain Statutory Provisions Related to Iraq, and Delegating Authorities, under the Emergency Wartime Supplemental Appropriations Act, 2003

Memorandum for the Secretary of State [and] the Secretary of Commerce

By virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 1503 and 1504 of the Emergency Wartime Supplemental Act, 2003, Public Law 108–11 (the "Act"), and section 301 of title 3, United States Code, I hereby:

(1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101–513, and

(2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87–195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

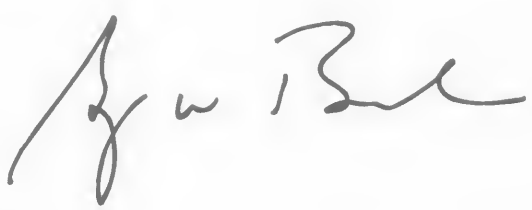
In addition, I delegate the functions and authorities conferred upon the President by:

(1) section 1503 of the Act to submit reports to the designated committees of the Congress to the Secretary of Commerce, or until such time as the principal licensing responsibility for the export to Iraq of items on the Commerce Control List has reverted to the Department of Commerce, to the Secretary of the Treasury; and,

(2) section 1504 of the Act to the Secretary of State.

The functions and authorities delegated herein may be further delegated and redelegated to the extent consistent with applicable law.

The Secretary of State is authorized and directed to publish this determination in the **Federal Register.**



THE WHITE HOUSE,
Washington, May 7, 2003.

[FR Doc. 03–12487
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Billing code 4710–10–P

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1491

RIN 0578–AA37

Farm and Ranch Lands Protection Program

AGENCY: Commodity Credit Corporation, Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This final rule sets forth the policies implementing the Farm and Ranch Lands Protection Program. The Farm Security and Rural Investment Act of 2002 repealed the Farmland Protection Program (FPP), established by the Federal Agriculture Improvement and Reform Act of 1996, and authorized a new farmland protection program. The new program will be called the Farm and Ranch Lands Protection Program (FRPP) to both distinguish it from the repealed program and to better describe the types of land the program seeks to protect. Under the FRPP, the Secretary of Agriculture, acting through the Natural Resources Conservation Service (NRCS), is authorized, on behalf of the Commodity Credit Corporation (CCC) and under its authorities, to purchase conservation easements or other interests in land for the purpose of protecting topsoil by limiting nonagricultural uses of the land. The final rule promulgates policy regarding the implementation of the FRPP, while the Request for Proposals (RFP), which will continue to be used, announces national fund availability and sets forth nationwide application procedures and ranking criteria. Conservation easements recorded on or following this date will be administered according to this final rule. Cooperative agreements signed on this date or following this date also will be administered according to this final rule.

DATES: This final rule is effective May 16, 2003.

ADDRESSES: This final rule can be accessed via the internet. Users can access the Natural Resources Conservation Service (NRCS) homepage at: *http://www.nrcs.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Denise Coleman, Farm and Ranch Lands Protection Program Manager, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890. Telephone: (202) 720–9476. Electronic mail *denise.coleman@usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, *etc.*) should contact the USDA Target Center at: (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this final rule is not a significant rulemaking action. Therefore, no benefit cost assessment of potential impacts is necessary.

Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, it has been determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, a regulatory flexibility analysis is not required for this final rule. This final rule implements the Farm and Ranch Lands Protection Program, which involves the voluntary acquisition of interests in property by NRCS in partnership with State, local, and Tribal governments and nonprofit entities.

Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in annual effect on the economy of $100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U. S.based companies to compete in domestic and export markets.

Environmental Analysis

An Environmental Assessment (EA) has been prepared to assist NRCS in determining whether this final rule would have a significant impact on the quality of the human environment such that an Environmental Impact Statement (EIS) should be prepared. Based on the results of the draft EA, NRCS has issued a Finding of No Significant Impact (FONSI). Copies of the EA and FONSI may be obtained from Denise Coleman, Farmland Protection and Community Planning Staff, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890. The FRPP EA and FONSI will also be available at the following Internet address: *http://www.nrcs.usda.gov/programs/Env_Assess/FPP/FPP.html.*

Paperwork Reduction Act

Section 2702 of the Farm Security and Rural Investment Act of 2002 provides that the promulgation of this final rule is carried out without regard to Chapter 35 of Title 44, United States Code (commonly known as the Paperwork Reduction Act).

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed in accordance with Executive Order 12988. NRCS has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such a conflict were to be identified, the final rule would preempt the State or local laws or regulations found to be in conflict. The provisions of this final rule are not retroactive. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR part 614 must be exhausted.

Executive Order 13132, Federalism

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined that the rule conforms to the Federalism principles set forth in the Executive Order; would not impose any compliance cost on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the

distribution of power and responsibilities on the various levels of government.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, NRCS has assessed the effects of this rulemaking action of State, local, and Tribal governments, and the public. This action does not compel the expenditure of $100,000,000 or more by any State, local, or Tribal government, or anyone in the private sector; therefore, a statement under section 202 of the Act is not required.

Background Related to the Farm and Ranch Lands Protection Program

Urban sprawl continues to threaten the Nation's farm and ranch land. Social and economic changes over the past three decades have influenced the rate at which land is converted to nonagricultural uses. Population growth, demographic changes, large lot development, expansion of transportation systems, and economic prosperity have contributed to increased agricultural land conversion rates. Increased population, growing affluence, and an expanded transportation infrastructure have accelerated the depopulation of the urban centers and have resulted in the conversion of farm and ranch land. Between 1960 and 1990, metropolitan area population grew by 50 percent, while the acreage of developed land increased 100 percent. About 45 percent of new construction between the years of 1994 and 1997 occurred in rural areas, with nearly 80 percent being land bordering urban areas. Overall, this translates to over 2.2 million acres being converted per year (USDA, *Maintaining Farm and Forestland In Rapidly Growing Areas*, 2000).

According to the USDA National Resources Inventory (NRI), urban and built-up areas increased from 65.3 million acres in 1992, to 79 million acres in 1997, equaling an area approximately the size of Ohio. Perhaps more important than the overall rate of land conversion is the location and type of land subject to this change in land use. On average, prime and important farmlands are being converted at a rate of two to four times that of other lands. Based on NRI urban and built-up data for the 1980s, 46 percent of the land converted to urban and built-up uses comes from cropland and pasture, while 38 and 14 percent comes from forest land and range land, respectively. Much of the land being lost is prime, unique, or important farmland located near cities. Moreover, an end to farm and forest land conversion is not in sight. The National Home Builders Association forecasts an expansion of 1.3 to 1.5 million new homes per year through 2010 (USDA, *Maintaining Farm and Forestland In Rapidly Growing Areas*, 2000).

As a result of these land use changes, there is growing national interest in protecting farm and ranch lands. Once developed, productive topsoil is effectively lost forever, placing the Nation's future food security at risk. Furthermore, land use devoted to agriculture provides other significant public benefits, including environmental quality, historic preservation, and scenic beauty.

Overview of the Farm and Ranch Lands Protection Program

The FRPP is a voluntary program that helps farmers and ranchers keep their land in agriculture. The program provides matching funds to State, Tribal, and local governments, and non-governmental organizations with existing farmland protection programs to purchase conservation easements. NRCS is authorized by statute to purchase conservation easements, or other interests in land. NRCS cannot use FRPP funds to restore historical or archaeological resources, nor share in the cost of installing conservation practices.

Under the FRPP, NRCS solicits proposals from Federally recognized Indian Tribes, States, units of local government, and non-governmental organizations to cooperate in the acquisition of conservation easements on farms and ranches for the purpose of protecting topsoil from conversion to nonagricultural uses. Although NRCS has authority to acquire other interests in land, the FRPP will seek to fund the acquisition of conservation easements.

Discussion of Comments and Changes

The Natural Resources Conservation Service (NRCS), on behalf of the Commodity Credit Corporation (CCC), published a proposed rule on October 29, 2002 at 7 CFR 1491. NRCS received 296 timely filed letters containing nearly 800 comments. Respondents included the following: 1 Congressional representative, 1 Federal agency, 5 State agencies, 5 local governments, 59 non-governmental organizations, and 225 from individuals. Comments were received from California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia. Some letters and e-mails did not indicate from which State they originated. Some comments pertained to a specific situation or locality and were not national in scope; therefore, these comments were not addressed in the final rule.

The discussion that follows is organized in the same sequence as the proposed rule.

Subpart A—General Provisions

Section 1491.1 Applicability

This section addresses the scope of the Farm and Ranch Lands Protection Program. The Farm and Ranch Lands Protection Program is available in all 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands. One respondent asked whether this final rule governs the policy for fiscal year 2002 applications. This final rule is effective upon publication. Conservation easements recorded on/or following this date will be administered according to this final rule. Cooperative agreements signed on this date or following this date also will be administered according to this final rule. One respondent asked that there be a discussion of how the final rule differs from the Request for Proposals, while one respondent requested that NRCS continue to use national Request for Proposal announcements, as it did under the Farmland Protection Program. The final rule promulgates policy regarding the implementation of the FRPP, while the Request for Proposals, which will continue to be used, announces national fund availability and sets forth nationwide application procedures and ranking criteria.

Three respondents indicated their overall support for the FRPP program and its proposed rule, while two respondents indicated that they did not support FRPP, contending that tax dollars should not be used on programs where the Federal government decides how private lands are to be used, and that a program such as FRPP invites more "boom and bust" land speculation. FRPP is a voluntary program that protects agricultural land from conversion to nonagricultural uses. FRPP, coupled with community planning and zoning, such as the use of agricultural districts, can help curb

"boom and bust" land speculation and ensure that farm and ranch lands remain viable in communities across the Nation.

Two respondents indicated their support for the program's name change from the Farmland Protection Program to the Farm and Ranch Lands Protection Program. Another respondent supported the name change as long as east coast farms remained competitive in acquiring FRPP funds. As it always has, FRPP will continue to protect both farm and ranch land from conversion to nonagricultural uses. The reason for the name change is not to shift the Program's purpose, but rather to distinguish it from the repealed program and to better describe the types of land the Program seeks to protect.

Another respondent raised the concern that farms and ranches located outside of priority areas be protected. FRPP promotes flexibility and local decision making as it relates to parcel protection. Priority area designation is at the discretion of the State Conservationist, with advice from the State Technical Committee.

Section 1491.2 Administration

In this section, the roles and responsibilities of NRCS were identified. Three respondents indicated that FRPP duplicates many processes already in use by various State and local governments and non-governmental organizations. One of these respondents further went on to state that the FRPP provisions "go way beyond the necessary criteria needed for Federal reimbursement of the easement purchase price and challenge the rights of the State, County, or non-governmental organization as Grantee." For this reason, the respondents requested that NRCS enter into Memoranda of Understandings with existing State and local farmland protection programs under which non-Federal review procedures and selection criteria would suffice for Federal purposes.

The Farm Security and Rural Investment Act of 2002 states:

> The Secretary, acting through the Natural Resources Conservation Service, shall establish and carry out a farmland protection program under which the Secretary shall purchase conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity for the purpose of protecting topsoil by limiting nonagricultural uses of the land.

In accordance with this statutory language, the Farm and Ranch Lands Protection Program is not a grant program, rather it is a land procurement program that acquires an actual Federal interest in the Property. In the case of FRPP, the interest acquired is a contingent right. In order to carry out the intent of the statute, NRCS has been active in conducting eligibility determinations, ranking parcels based on its own criteria, and reviewing and approving conservation easements.

Moreover, even if FRPP was a grant program, memoranda of understandings (MOUs) or memoranda of agreements (MOAs) are not legally binding instruments. Therefore, the Federal government does not utilize MOUs or MOAs to provide Federal funds to recipients. NRCS understands the fact that a number of State and local farmland protection programs have a longer history of acquiring parcels than FRPP. Many of these State and local governments have well established procedures to acquire parcels. For this reason, NRCS has and will continue to work with established farmland protection programs utilizing the State Technical Committee. In consultation with the State Technical Committee, NRCS:

- Issues Statewide application guidance;
- Develops ranking criteria that meets the objectives of FRPP and the State and local farmland protection programs; and
- Establishes NRCS State policy as it relates to FRPP easement acquisition.

Eighteen respondents asked that NRCS address FRPP's association with other conservation programs administered by the United States Department of Agriculture (USDA). NRCS encourages landowners to utilize other conservation programs to protect natural resources on FRPP land. Landowners who enroll in FRPP are eligible to participate in USDA's cost share programs, including the Agricultural Management Assistance Program (AMA), Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP), Wildlife Habitat Incentives Program (WHIP), and the long-term contract options under the Wetlands Reserve Program (WRP) and Conservation Reserve and Enhancement Program (CREP). One respondent suggested that permanently protected lands, such as FRPP, receive priority ranking in other USDA programs. Current policy allows the NRCS State Conservationist to establish ranking criteria at the State level for other conservation programs. The NRCS State Conservationist has the authority to rank FRPP parcels higher than other parcels, if the State Conservationist deems it to be appropriate.

Thirteen respondents asked NRCS to address, as it relates to FRPP implementation, the Partnership and Cooperation provision that was authorized in the 2002 Farm Bill. Partnerships and Cooperation, as authorized under the Farm Security and Rural Investment Act of 2002 (Title XII, Subtitle E, Section 1243 (f)), offers new opportunities to address pressing conservation and natural resource needs. The provision provides authority for the Secretary of Agriculture to use resources provided under other conservation programs to enter into stewardship agreements with State and local agencies, Indian tribes, and non-governmental organizations. Under this provision, the State Conservationist, with advice from the State Technical Committee, may designate special projects to enhance technical and financial assistance provided to owners, operators, and producers, and to address natural resource issues related to agricultural production. The U.S. Department of Agriculture is presently working to define the operational aspects of Partnerships and Cooperation. The provision is unique among the new Farm Bill authorities in that it builds from seven core programs, including the Farm and Ranch Lands Protection, Wetlands Reserve, Environmental Quality Incentives, Conservation Reserve, Wildlife Habitat Incentives, Grassland Reserve, and Conservation Security Programs. A number of these core programs required rule development or revision, many of which are in various stages of completion. The results of these activities will influence the overall design for Partnerships and Cooperation.

Section 1491.3 Definitions

This section provides and defines the common terms used throughout the FRPP proposed rule.

Agricultural Uses

Two comments were received concerning this definition. One comment suggests that the term "agricultural uses" should include "the construction of on-farm structures necessary for farm operations," while the other comment suggests that agricultural uses be defined by the State's Purchase of Development Rights (PDR) Program, or where no PDR program exists, agricultural uses should be defined by the State agricultural use assessment program. NRCS prefers to continue to utilize the flexibility afforded by the proposed rule's definition, which allows agricultural uses to be defined at the State level; however, NRCS supports the latter comment of making the definition consistent with the PDR or State

agricultural use assessment programs' definitions. For this reason, the definition of agricultural uses has been modified in the final rule. To ensure that broad State definitions of agricultural uses do not conflict with FRPP's mandate to protect soils, NRCS has chosen to continue to retain the language: "NRCS reserves the right to impose greater deed restrictions on the property than allowable under a State definition of agriculture in order to protect topsoil."

Conservation Easement

Comments were received from one respondent who requested that the term "agricultural conservation easement" should be used instead of the generic term "conservation easement." NRCS has chosen to continue using the term "conservation easement" because it provides a greater flexibility to work with cooperating entities which may use conservation easements that seek to protect not only farm and ranch lands, but also multiple, compatible conservation values, such as open space, scenic, and wildlife values.

Conservation Plan

Ten respondents requested clarification on the scope of a conservation plan. Several were confused because the preamble stated that "all lands enrolled in FRPP must have a conservation plan developed based on the NRCS Field Office Technical Guide specifications and highly erodible land and wetland conservation provisions in accordance with 7 CFR part 12," while the proposed rule defined a conservation plan as a plan that covered only highly erodible cropland. In accordance with the Food Security Act of 1985, as amended, the authorizing FRPP legislation, a conservation plan under the FRPP will cover only highly erodible cropland. Conservation planning on other lands or on other resources is at the discretion of the NRCS State Conservationist and the cooperating entity.

In addition to the comments requesting clarification of the scope of the conservation plan, nineteen respondents requested that all lands enrolled under FRPP have a conservation plan that addresses all natural resources, not only soil erosion. These resources include: water, wildlife, air, and plants. Three sources noted that a conservation plan should address all natural resources as a benefit to the United States taxpayer. Two respondents suggested that resource concerns be addressed within a specified time frame. In addition to the nineteen respondents, several respondents asked that specific resources or management activities be addressed in the conservation plan. One respondent requested that water quality should be specifically addressed in the conservation plan, while another requested water quality and wildlife habitat be addressed. Another respondent requested that the conservation plan address pest and weed control, while another requested that all forest land have a forest stewardship plan. Nine respondents requested that a conservation plan be required, but the respondents gave no indication as to what level or whether all the land should be covered by a conservation plan.

Two respondents requested that NRCS consider only those lands with highly erodible soils, and that landowners never be required to have a higher level of planning than those mandated at the time of easement signature. One respondent indicated that planning only for highly erodible land was inadequate for their program. Based on these comments, NRCS has chosen an option that one respondent suggested. The rule will be modified to state that any higher level of conservation planning and implementation be at the discretion of the cooperating entity and the NRCS State Conservationist. By doing this, for FRPP purposes, farmers and ranchers would never be held to a higher erosion standard than at the time of easement signature; the conservation plan would only be required on highly erodible soil as legislatively mandated; yet more land and more resources may be addressed under a conservation plan if the NRCS State Conservationist and cooperating entity deem it to be appropriate.

Other respondents requested modifications to the proposed rule's definition of a conservation plan to incorporate greater landowner involvement. Two respondents suggested modifying the definition to read as follows: "A conservation plan meeting the NRCS Field Office Technical Guide will be developed by the landowner with NRCS assistance," while another respondent suggested the definition include the following statement: "technically feasible, based on local resource conditions, cost effective; and not cause undue economic hardship on the landowner." These suggestions echo NRCS' current conservation planning policy, which takes into account the landowner's needs and economic situation, as well as local resource conditions. For this reason, as well as the intent to mirror FRPP's authorizing legislation's conservation plan definition, NRCS has chosen not to alter the proposed rule's conservation plan definition.

Eligible Land

One respondent requested that NRCS modify its definition of eligible land to include lands that protect drinking water sources, while another respondent requested that NRCS include in its definition the qualifier that "eligible lands must be under active management that fits the definition of agriculture used by the existing State Purchase of Development Rights (PDR) program, where no such program exists, the definition of agriculture used by the State agricultural use assessment program." Another respondent requested that NRCS specify to what degree non-traditional farm, ranch, and forest land are eligible. The purpose of FRPP is to protect agricultural lands from conversion to nonagricultural uses. NRCS believes that the definition of eligible lands, as currently defined in the statute and the final rule, is broad enough to allow the NRCS State Conservationist to protect any farm and ranch land in any geographic area or under any land use that the State Conservationist, with advice from the State Technical Committee, chooses to protect, as long as it meets the program's broad eligibility guidelines. For this reason, NRCS has chosen to retain the proposed rule's eligible land definition.

Fair Market Value

Three respondents suggested that the definition of fair market value be revised. They indicated that the proposed rule's definition only refers to the fee simple value of a property, not the "before" and "after" values needed to determine the value of a conservation easement. NRCS agrees with amending the definition to account for how conservation easement values are derived. For this reason, NRCS amends the definition as follows:

Fair market value is ascertained through standard real property appraisal methods. Fair market value is the amount in cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure of time on the competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. In valuing FRPP easements, the certified general appraiser estimates both the fair market value of the whole property before the easement acquisition and the fair market value of the remainder property after the easement has been imposed. The difference

between these two values is deemed the value of the conservation easement.

Farm Succession Plan

Thirteen respondents requested that Farm Succession Plan be added to the final rule's list of definitions. NRCS accepts this suggestion and adds the definition to read as follows:

Farm or ranch succession plan is a general plan to address the continuation of some type of agricultural business on the conserved land; the farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers and ranchers.

Historical and Archaeological Resources

Several respondents raised questions regarding the determination of what FRPP considers historical and archaeological resources. Most of the respondents recommended or provided comments on the second bullet in the proposed rule regarding which properties will be considered. One respondent suggested that the second bullet describing parcels eligible for the National Register is confusing, and suggested the following language: "Formally determined eligible for listing in the National Register of Historic Places by the Keeper of the National Register;" while another respondent suggested that the second bullet be worded as follows: "Be determined eligible for listing on the National Register of Historic Places through a written determination by a State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO)." Regarding the first recommendation, because only the Keeper of the National Register may make formal determinations of eligibility, NRCS does not believe that the rule needs to add this reference. Regarding the second recommendation, NRCS does not have the authority to establish a new National Register eligibility determination process for the FRPP program, such as using written determinations by SHPOs and THPOs, beyond that which is currently in effect for compliance with section 106 of the National Historic Preservation Act.

In relation to the FRPP historical and archaeological definition, two other respondents suggested that a broader definition of historical and archaeological resources exists. One respondent suggested that where there is no formal listing in the State, refer instead to other inventories and have the SHPO or THPO provide an additional certification of significance, while another suggested that a fourth bullet be added: "Identified in a congressionally authorized study of U.S. battlefield sites, including the July 1993 report on the Nation's Civil War battlefields prepared by the Civil War Sites Advisory Commission." Regarding the suggestion that NRCS establish a new certification of significance process, NRCS believes a separate and distinct evaluation process beyond the current National Register programs and State and tribal register programs would cause confusion. Additionally, NRCS believes that by keeping the focus on existing registers and inventories, NRCS is supporting and strengthening our partners' programs without adding to their current workload. As it relates to the use of the inventory in the Civil War Sites Advisory Commission's 1993 Report, NRCS acknowledges the importance of these properties, but also recognizes that the inventory was developed, in part, for use by a Department of Interior battlefield protection program, one that has a much narrower focus than that of the FRPP (protection of farm and ranch lands across the entire United States). If NRCS elected to use this one very specialized list, it would have to also consider using other specialized lists of cultural resources (*i.e.* bridges, lighthouses, dams, industrial resources) developed for other programs. Additionally, it is most likely that the properties in this battlefield inventory are already in State inventories and registers. Another respondent questions what it meant to be "determined formally eligible on the National Register." NRCS believes that this language is clear and need not be further explained. Finally, one commenter suggested that the FRPP rule is more restrictive regarding determinations of eligibility than current historic preservation compliance guidelines. NRCS does not agree and does not want to establish a separate determination and evaluation process. This would undermine existing historic preservation evaluation and designation programs and would also risk further confusion.

Land Evaluation and Site Assessment System (LESA)

NRCS did not receive any comments on this definition, but for clarification NRCS has defined what is meant by "Federal" for the purposes of FRPP. For this reason, NRCS amends the definition to read as follows: "Land Evaluation and Site Assessment System (LESA) is a land evaluation system approved by the NRCS State Conservationist used to rank land for farm and ranch land protection purposes, based on soil potential for agriculture, as well as social and economic factors, such as location, access to markets, and adjacent land use. (For additional information see the Farmland Protection Policy Act regulation, 7 CFR part 658.)"

Non-Governmental Organization

Four respondents suggested inserting the word "and" in the definition for eligible non-governmental organizations to clarify that non-governmental organizations must be a conservation organization and must be recognized by the Internal Revenue Service as tax exempt by virtue of being operated for religious, charitable, scientific or similar purposes. Despite these suggestions, NRCS has chosen to retain the original definition which reflects FRPP's authorizing legislation:

Non-governmental organization, is defined as any organization that:

- Is organized for, and at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue code of 1986;
- Is an organization that is described in section 501(c)(3)of that code that is exempt from taxation under 501(a) of that code;
- Is described in section 509(a)(2) of that code; or
- Is described in section 509(a)(3) of that code and is controlled by an organization described in section 509(a)(2) of that code.

Prime Farmland

One respondent requested that the term "prime farmland" be changed to "prime soils" since it is the soils that NRCS is describing in the definition. NRCS is choosing to retain the "prime farmland" definition to make it consistent with the definition from which it is derived in 7 CFR part 657. Two respondents asked whether land that grows Christmas trees, flowers, nursery stock and grapes for wine are considered prime since they are not producing food, feed, and forage. NRCS may consider these areas prime, unique, Statewide or locally important in accordance with 7 CFR part 657, since these areas have a special combination of soil quality, location, growing season, and moisture supply to produce these crops.

Ranch Land

Two respondents requested that the term "ranch land" be clarified so that it is more inclusive of many of the lands used in ranching across the country. Both respondents suggest that the following NRCS Pasture and Range Handbook definition be utilized,

Land on which the historic climax plant community is predominantly grasses, grasslike plants, forbs, or shrubs. Includes

lands revegetated naturally or artificially when routine management of that vegetation is accomplished mainly through manipulation of grazing. Rangelands include natural grasslands, savannas, shrublands, most deserts, tundra, alpine communities, coastal marshes, and wet meadows.

NRCS believes that the aforementioned ranch land definition is too broad and that a broad definition of ranch land could lead to the protection of ranch land that does not meet the statute's intent of protecting prime, unique, and important soils. Moreover, such a definition may limit NRCS' flexibility to protect lands not included in this definition. Another respondent generally stated that eligibility criteria for prime, unique farm and ranch land should be broadened. For the aforementioned reasons, NRCS has chosen not to limit the enrollment of farm and ranch land to one single definition, but instead chooses to determine eligible farm and ranch lands through already established procedures. In determining eligible farm and ranch lands, NRCS will continue to use the procedures that identify important farm and ranch lands outlined in 7 CFR part 657. Under this rule, farm and ranch lands not considered prime and unique may be considered Statewide or locally important, if a State agency or local planning body determines the land to be of importance. If determined to be prime, unique, or Statewide or locally important, these soils are then eligible for FRPP assistance. NRCS believes this process provides sufficient flexibility to protect farm and ranch lands that may not meet the prime and unique definition, but at the same time assures that the Congressional intent of protecting land that has "prime, unique, or other productive soil," is maintained. For this reason, NRCS chooses to retain the original eligibility definition and process determining prime, unique, and important soils.

Section 1491.4 Program Requirements

Three respondents directly or indirectly referred to FRPP as a grant program and that NRCS does not need to substitute its judgment for that of State and local farmland protection programs. As explained previously, the Farm and Ranch Lands Protection Program is not a grant program, rather it is a program where the Federal Government acquires an interest in the Property for the purpose of protecting the resource. For this reason, NRCS has been active and will continue to be active in conducting eligibility determinations, ranking parcels based on its own criteria, and reviewing and approving conservation easements in order to meet the statutory requirements of the Program.

One respondent questioned FRPP's emphasis on topsoil, stating that "Too much emphasis is placed on protecting topsoil and prime and unique farmland, more of an emphasis should be placed on protecting rangeland and watersheds," while two other respondents believed that requiring a pending offer is unrealistic, burdensome, and requires an expense on the part of the partner. As a result, land deals often fall through because a pending offer is required. In response to these comments, NRCS refers to the FRPP authorizing legislation which sets forth FRPP's purpose, "protecting topsoil by limiting nonagricultural uses of the land." The statute further defines eligible land as "farm and ranch land that has prime, unique or other productive soil; or contains historical or archaeological sources; and is subject to a pending offer for purchase from an eligible entity." In order to comply with its authorizing legislation, NRCS has placed a program emphasis on protecting prime, unique, and important farm and ranch land, as well as requiring a pending offer from an eligible entity. One respondent stated that historical and archeological resources and a pending offer should be factors to consider, not essential to eligibility. NRCS, once again refers to FRPP's authorizing legislation which states that "eligible land means land on a farm or ranch that has prime, unique, or other productive soil; or contains historical or archaeological resources; and is subject to a pending offer for purchase from an eligible entity." NRCS is bound by the statute. Consequently, NRCS has determined that land on a farm or ranch must contain historical or archaeological resources or prime, unique, or other productive soil to be eligible. In either case, the land must also have a pending offer to be eligible for FRPP. One respondent stated that the proposed rule adequately reflects the intent of the statute as it relates to historical and archaeological resources, while one respondent questioned whether parts of a farm can be enrolled. NRCS will enroll all or part of a farm or ranch, so long as 50 percent of the farm or ranch land enrolled consists of prime, unique, or important soils, or contains historical and archaeological resources and is subject to a pending offer.

One respondent stated that all FRPP easements should be perpetual. NRCS agrees with this comment; however, in some States, perpetual easements are prohibited. As a result, NRCS has required that "all easements will be in perpetuity unless prohibited by State law."

Two respondents indicated their support of NRCS' criteria used to evaluate interested entities that wish to receive FRPP funds in 1491.4(c)(1–4). NRCS will continue to use these criteria to evaluate eligible entities, and to ensure the entities have the capacity to hold, manage, and enforce conservation easements.

Several respondents questioned NRCS' policy on only acquiring conservation easements on privately owned land. One respondent thought that State-owned prison farm and ranch land should be eligible for FRPP, while another respondent questioned whether lands temporarily bought in fee simple by the State or local government can be acquired under FRPP. With a vast majority of the Nation's farm and ranch land being privately owned, the demand for the protection of prime, unique, or important farmland on privately owned land exceeds available funds. As a result, NRCS will continue to place emphasis on protecting privately owned farm and ranch land; however, NRCS will assist public entities with protecting lands if the acquisition of land is temporary and the land will later be sold to a private land owner in fee simple. NRCS will not disburse Federal payment to the public entity until the fee simple rights are transferred to a private landowner.

Six respondents raised concerns about the adjusted gross income land eligibility requirement. Two respondents argued that the adjusted gross income limitation should not apply to FRPP since NRCS is getting equal value in the land and oftentimes at a bargain sale; therefore, the FRPP payment should not be considered a benefit, but rather an equal exchange between the landowner and the United States Department of Agriculture. One respondent stated that the sale of land should not be considered in computing the adjusted gross income limitation, while two respondents stated that this will limit high value land often owned by developers or other landowners, who derive a majority of their income from non-farm or ranch enterprises. One respondent requested that the adjusted gross income limitation be subject to regional variation, while another requested that NRCS explain how this affects corporate owners. Another respondent requested that NRCS specify the adjusted gross income limitation requirements in the final rule, while another respondent indicated that this is just another burdensome step in the easement acquisition process. One respondent requested that the

cooperating entity not be held responsible for verification or auditing of the certification by the landowner.

In order to avoid a conflict with any policy contained within the Adjusted Gross Income Limitation final rule, NRCS directs respondents to the Adjusted Gross Income Limitation final rule, which is currently being promulgated. However, to clarify some matters raised during the FRPP proposed rule comment period, NRCS will briefly explain the adjusted gross income limitation and identify how this limitation relates to the FRPP. Section 1604 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 1–7–171) prohibits individuals and entities exceeding an average adjusted gross income limitation of $2.5 million from receiving USDA payments, unless 75 percent or more of their adjusted gross income is derived from farming, ranching or forestry production. Landowners receiving FRPP payments would be subject to this adjusted gross income limitation. The proposed Adjusted Gross Income Limitation rule, 7 CFR part 1400.6, clarifies this income limitation, and sets forth the criteria to be applied in determining whether certain income limits have been exceeded by an individual. Policy on corporate ownership and land sale revenues, as well as administrative procedures, such as income verification, are addressed in 7 CFR part 1400.6. In order to comply with Section 1604 of the Farm Security and Rural Investment Act of 2002, NRCS will comply with the statute and final rule governing the adjusted gross income limitation.

Twelve respondents raised concerns regarding NRCS' appraisal policy. One respondent requested that all appraisals be done in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) and that they be reviewed by a Federal appraiser. The same respondent stated UASFLA standards must be used, since the Uniform Standards of Professional Appraisal Practice (USPAP) does not address the "before" and "after" technique used to evaluate conservation easements. To provide cooperating entities maximum flexibility and reduce transaction costs, appraisals conducted for the FRPP shall conform to USPAP or USFLA standards. NRCS acknowledges that the "before" and "after" technique is an appropriate methodology to use in order to determine conservation easement value, and shall be adopted by FRPP. One respondent requested that NRCS address in the final rule how appraisal reports should be submitted and how these reports will be used. Another respondent requested that the reproduction of appraisal reports for NRCS use be minimized and that an annual meeting between NRCS and the cooperating entity would suffice, while another respondent suggested that providing a copy of the appraisal report is possible, but providing priority rating criteria is not. NRCS concurs with the need to streamline the appraisal submission process. However, due to the complexity of the appraisal review process and the fact that this type of administration issue is more appropriate for manual policy, NRCS has addressed specific appraisal review and process issues in its current policy manual, CPM part 519. CPM part 519 can be accessed via the Internet at: *http://policy.nrcs.usda.gov/scripts/lpsiis.dll/M/M_440_519.htm.*

Two local government respondents requested that NRCS adopt alternative real estate evaluation systems used by local governments, which reduce easement acquisition costs, rather than requiring that appraisals be conducted. Considering these comments, NRCS has determined that the adoption of alternative evaluation systems, which under certain circumstances were permitted in the Farmland Protection Program, conflicts with the terms of the FRPP authorizing legislation that states "the Federal share cannot exceed 50 percent of the appraised fair market value of the conservation easement." For this reason, NRCS has determined that only appraisals are appropriate to value FRPP parcels.

In addition, the FRPP is subject to the Department of Transportation regulations at 49 CFR part 24, which the USDA has adopted by reference in its own regulations at 7 CFR 21.1. 49 CFR part 24 implements the Uniform Relocation Assistance and Real Property Policies Act of 1970 (the 1970 Act) and applies to real property acquisition, including the acquisition of partial interests, such as conservation easements. One of the main purposes of the 1970 Act is to ensure that owners of real property to be acquired by the Federal Government or through Federally-assisted acquisitions are treated fairly. Because the FRPP is a voluntary program, the FRPP is exempt from the regulations that govern Federal acquisition. However, FRPP must comply with the terms of the exemption that is set forth at 49 CFR 24.101. Accordingly, cooperating entities receiving FRPP funds must comply with the requirements of 49 CFR 24.101(a)(2) which provides that: (1) Prior to making an offer for the property, the FRPP cooperating entity must advise the landowner that it is unable to acquire the property (*e.g.* by eminent domain) in the event negotiations fail to result in an amicable agreement; and (2) inform the owner of what the FRPP cooperating entity believes to be the fair market value of the property. In order to determine the fair market value of a property, an appraisal by a State-certified general or licensed appraiser must be done.

Three respondents requested that NRCS reimburse the entity for the cost of appraisals, while another respondent requested that appraisals older than one year may be acceptable if agreed to by NRCS and the cooperating entity in a Memorandum of Understanding. NRCS is required by law not to exceed "50 percent of the appraised fair market value of the conservation easement." As a result of this statutory requirement, NRCS requires an appraisal. The appraisal shall not be more than one year old prior to easement closure, in order to ensure that the Federal share does not exceed 50 percent of the appraised fair market value. One respondent asked that the appraiser certification be addressed, as well as stated that the Uniform Standard of Professional Appraisal Practice (USPAP) system does not utilize the "before" and "after" technique for partial acquisitions. NRCS believes that the "before" and "after" technique is the appropriate method in valuing conservation easements for the purpose of FRPP. The "before" and "after" technique does not conflict with other methodologies used by USPAP and is therefore adopted as a recommended way to determine FRPP easement values. NRCS has addressed appraisal review in CPM part 519 including administrative and technical reviews of appraisals by NRCS. CPM part 519 can be accessed via the Internet at: *http://policy.nrcs.usda.gov/scripts/lpsiis.dll/M/M_440_519.htm.*

The same respondent suggested that the final rule insert the word "general" in the appraiser description to read "State certified general appraiser," while another respondent has asked that the Section 1491.4(e) be reworded as follows: "Prior to FRPP fund disbursement, the value of the conservation easement must be appraised." NRCS acknowledges that "State certified general appraiser" is the correct terminology, it also agrees with the second suggestion which inserts the clarifying language that the value of the conservation easement must be appraised. As a result, NRCS has changed the rule accordingly.

Six respondents provided comments on 1491.4(f), which stated that at the discretion of the Chief, a standard easement will be required as a condition

for program participation. Four respondents objected to the Chief requiring a standard easement, while two respondents suggested that NRCS utilize a standard conservation easement deed, but provide for the local entity to supply other language as needed to comply with their specific requirements. One respondent objected to NRCS' use of a standard easement template, since NRCS was not a Grantee and the Federal Government's right of asserting the use of a standard easement was questionable. Three other respondents suggested that NRCS develop a standard easement template in each State. One respondent further clarified that the standard easement template should be a part of a Memorandum of Understanding that is signed by the cooperating entity and NRCS. NRCS chooses to retain the flexibility to develop conservation easement deed template by retaining the proposed rule language, if it determines it to be appropriate in order to protect the interests of the United States. However, NRCS finds the current process in which NRCS and the Office of General Counsel review and approve conservation easement templates provided by the cooperating entity to be sufficient at this time. As it has previously done, NRCS and the Office of General Counsel will continue to review conservation easement template deeds to ensure that the easement deeds protect the Federal interest and uphold FRPP's policies and objectives. Where an easement sufficiently deviates from the agreed-to template, NRCS and OGC may review the easement deed.

As it relates to specific language within the proposed rule, another respondent inserted that "at the discretion of the Chief, a standard easement, or equivalent legal form which meets the intent of the 2002 Act, will be required as a condition of program participation." Some entities that partner with NRCS use other forms of deeds to convey the acquisition of development rights. For this reason, NRCS has chosen to adopt this suggestion. Section 1491.4(f) has been changed accordingly.

There was one comment on the confidentiality of information related to the agricultural operation as set forth in 1491.4(g). The respondent requested that information related to the agricultural operation, as well as other incidental information be held in confidence by the State or local farmland protection program and NRCS. The respondent further stated that NRCS should require confidentiality from the non-governmental organization as a condition of partnership with NRCS. Section 1244 of the Food Security Act of 1985, as amended, states that information provided to the Secretary or a contractor of the Secretary for the purpose of providing technical or financial assistance to an owner, operator, or producer with respect to any natural resources conservation program administered by NRCS or FSA shall not be considered to be public information and shall not be released to any person or Federal, State, local agency or Indian tribe outside the Department of Agriculture. The issue of requiring confidentiality from non-governmental organizations and other cooperating entities will be addressed in a regulation pertaining specifically to confidentiality, which is being developed by NRCS in accordance with Section 1244 of the Food Security Act of 1985, as amended.

Another respondent asked about the timing of the development of the conservation plan. The conservation plan will be developed prior to the payment disbursement made by NRCS to the cooperating entity. One respondent requested that NRCS take the lead in monitoring conservation plans and make the initial determination that the landowner is not in compliance, after which the Grantee will be required to take necessary action. As it relates to monitoring the conservation plan on highly erodible land, the respondent's suggestion is current NRCS policy. If the landowner is found out of compliance with a conservation plan on highly erodible land or is violating wetland conservation provisions, NRCS will work with the landowner to assist the landowner in getting back into compliance. If the landowner refuses to comply with the terms of the conservation plan and has been afforded all the appeal and other administrative rights in accordance with 7 CFR part 12, NRCS will report the conservation plan violation to the cooperating entity. At such time, the cooperating entity will consider such noncompliance with the conservation plan to be an easement violation and the cooperating entity will proceed with their administrative or judicial procedures as it relates to easement violations.

Section 1491.5 Application Procedures

This section articulates how interested entities apply for FRPP assistance. One respondent requested that NRCS require from entities a plan showing how the entity plans to spend FRPP money. The respondent also suggested that NRCS review the entity's management strategies, as well as their ability to manage. NRCS believes that these concerns are addressed during the application review and the ranking and evaluation of parcels as set forth in Section 1491.6. One respondent requested that a consistent date for annual applications be established to allow for coordination between the Federal and State programs. Two factors make the establishment of a fixed application date problematic. Historically, USDA waits until Congress appropriates funds through an appropriation law. Second, because FRPP is funded annually through CCC, the Office of Management and Budget must apportion the funds to NRCS, before NRCS can obligate the funds to eligible entities.

Section 1491.6 Ranking Considerations and Proposal Selection

This section outlines how NRCS will rank and evaluate proposals from eligible entities. It also examines criteria that may be used by the NRCS State Conservationist to evaluate parcels. A number of respondents commented on this section, particularly the criteria that may be used by the NRCS State Conservationist.

As it relates to overall program administration, two respondents requested that memoranda of understandings be signed with State and local programs to determine a mutually acceptable way for non-federal entities to review and select parcels based on FRPP criteria. The memoranda of understandings, between the NRCS State Conservationist and the State or local programs, would outline mutually acceptable criteria to use in evaluating FRPP proposals. Decisions on which parcels to fund would be made by the cooperating State or local program, not NRCS. In the opinion of the two respondents, it would provide the needed flexibility at the State level, while at the same time reduce duplicative efforts in evaluating parcels. One respondent requested that NRCS purchase properties in a geographic area and match FRPP dollars with State program dollars, not choosing actual parcels which to fund, but rather selecting specific geographic areas. A majority of these concerns regarding review and selection of parcels have been addressed in Section 1491.2 Administration. However, NRCS wishes to further clarify that the FRPP authorizing legislation has a specific purpose of protecting prime, unique, and other productive soil from conversion to non-agricultural uses. This purpose is not always the primary purpose of cooperating entities' programs. For these reasons, as well as the practical reason that NRCS has

many parcels submitted by numerous cooperating entities, making execution of memoranda of understandings impractical. As a result, NRCS has chosen to retain the current procedures of selecting and evaluating parcels using uniform criteria at the State level.

Another respondent suggested that NRCS utilize a two-step process whereby eligible entities can be certified prior to the identification of eligible lands so that the cooperating entities might be poised to make an offer when eligible farmlands become available. This option is not possible under FRPP because the authorizing legislation requires that the entities have pending offers prior to NRCS awarding funds to eligible entities.

Four respondents requested clarification on how the National and State criteria are used in selecting parcels. The FRPP proposed rule set forth the national criteria used in determining State allocations. The national criteria are based on national agricultural land conversion rates as provided by the National Resources Inventory (NRI), as well as information gathered from interested entities through the FRPP State Plan process. This latter information includes but is not limited, to entity history, entity acquisition strategies, anticipated average FRPP cost per acre, and total acres needing to be protected in that fiscal year. The proposed rule also stated that national criteria, in addition to State criteria, will be used to evaluate parcels. Currently, FRPP policy states that parcels will be evaluated using State criteria and national criteria, with no less than 50 percent of the weight placed on national criteria. While criteria such as the NRI agricultural land conversion rates cannot be used beyond the State level, State conservationists have the flexibility to choose the national criteria which they deem appropriate. NRCS believes that the mix of national and State criteria allows national FRPP objectives to be met, while at the same time providing the NRCS State Conservationist the necessary flexibility needed to evaluate parcels at the State level. One respondent suggested that NRCS adopt a committee approach in developing ranking criteria, such as that used by USDA's Forest Legacy Program, while another respondent requests that NRCS develop a process for obtaining public input on ranking criteria. The final rule allows for the NRCS State Conservationist to develop ranking criteria with the advice from the State Technical Committee. In a majority of States, the NRCS State Conservationist currently develops ranking criteria based on the advice of the State Technical Committee. NRCS believes this committee approach allows for public input to be obtained.

Several respondents suggested on expanding FRPP ranking criteria. One respondent suggested that an emphasis be placed on watershed protection, while another suggested that agricultural economic viability of a farm or ranch be included as criteria. Another respondent suggested that FRPP criteria consider fish and wildlife habitat and water quality, as well as soils. One respondent questioned the applicability of the criteria, "proximity to other protected clusters" in areas where conservation easements are not utilized, while another respondent, in an area with increasing development pressures, suggested that NRCS consider the rate of land conversion relative to the remaining agriculture in the geographic area. This same respondent, as well as another respondent, suggested that NRCS evaluate parcels relative to specific geographic areas in which they were protecting. For example, the anticipated FRPP cost per acre or acreage to be protected should be considered in relation to the geographic area where the parcel is located. Another respondent suggested that LESA criteria should be modified so that sites near sewage lines, water lines, or other public utility lines should receive a higher ranking. NRCS has not changed the final rule as it relates to parcel ranking and evaluation because the agency believes that the State Technical Committee process, as well as the State Conservationist's ability to choose his or her own criteria to evaluate parcels, provide the NRCS State Conservationist the necessary flexibility to develop criteria and rank eligible parcels for funding.

Nineteen respondents requested that NRCS add the following to the list of possible State criteria: "History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession and transfer planning," while another stressed the importance of funding entities who place priority on protecting parcels in zoned agricultural areas. To encourage that these farms and ranches remain agriculturally viable in the future, NRCS has added these suggestions for the NRCS State Conservationists to use in State ranking criteria, if they deem appropriate. Two respondents questioned what is meant by "degree of leveraging guaranteed by eligible entities." One of these respondents suggested that NRCS rephrase this criterion to read as follows: "Amount of the Federal share to be contributed to the acquisition of the conservation easement relative to the fair market value of the conservation easement." NRCS partially accepts this suggestion and has rephrased the criteria accordingly.

Section 1491.7 Funding Priorities

Several respondents requested that NRCS place a priority on a variety of factors when evaluating parcels. One respondent requested that the highest priority should be given to parcels and areas that protect drinking water sources. Twelve respondents requested that NRCS place a priority on those farms and ranches that have a comprehensive resource management system where all the natural resources are addressed on the farm or ranch, seventeen respondents requested that NRCS place a higher priority on applications from landowners who have developed farm or ranch succession or transfer plans with a preference for plans that will benefit beginning farmers and ranchers. One respondent requested that NRCS place a higher priority on lands and locations where parcel size, soils, markets, local farm infrastructure, proximity of other agriculture, and other considerations make it more likely that the protected lands will constitute or contribute to an economically viable, independent farming operation.

NRCS has incorporated some of these comments in the final rule; however, as indicated previously, the State Conservationist, with advice from the State Technical Committee, develops criteria used to select parcels in accordance with the statutory objectives of FRPP. In addition, the selection of one set of criteria over another is at the discretion of the State Conservationist. For this reason, NRCS has chosen to include these suggested priorities, but continues to encourage and permit the NRCS State Conservationist with advice from the State Technical Committee, to determine the ranking criteria preference based on State natural resource conditions, anticipated funding, geographic priority areas, and other factors deemed to be important in each State.

NRCS also received comments requesting clarification of the meaning of Section 1491.7. For example, one respondent requested clarification of what is meant by on-site and off-site conditions. Examples of what is meant by on-site or off-site conditions are respectively a farm that contains a hazardous waste site, or a ranch that neighbors a commercially zoned area. Where on-site or off-site conditions exist, NRCS may choose not to fund a

parcel because of the implications surrounding that acquisition. One respondent requested that NRCS clarify what is meant by multi-functional benefits, while another respondent requested that historical and archaeological protection be added to the lists of lands that provide multifunctional benefits where NRCS may place a higher priority. NRCS concurs with the second respondent and will add historical and archaeological protection to the list of multi-functional benefits. In response to the initial comment, NRCS believes that multi-functional benefits vary across the nation; therefore, these multi-functional benefits are best determined by the State Conservationist, with advice from the State Technical Committee. Another respondent asked how certain geographical areas will receive high priority. As it relates to multi-functional benefits in a general sense, NRCS believes that multi-functional benefits and geographic priority areas can best be determined at the State level, where local input is provided through the State Technical Committee on State ranking criteria.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

Section 1491.20 Cooperative Agreements

The section outlines the process of how NRCS enters into cooperative agreements with eligible entities and what constitutes a cooperative agreement. One respondent indicated that NRCS must provide oversight of non-governmental organizations participating in FRPP to assure FRPP obligations are met. NRCS believes that the cooperative agreement, the contractual document between NRCS and the cooperating entity, binds the entity to perform duties and tasks in accordance with program policy and standards. NRCS oversight of these cooperative agreements ensures that NRCS program policy and objectives are met. Other comments received on topics contained within this section were addressed in other sections of the rule.

Section 1491.21 Funding

The Farm Security and Rural Investment Act of 2002 (2002 Act), provided policy direction for cost sharing in three areas:

- First, it specified that the Federal share could not exceed 50 percent of the appraised fair market value of the conservation easement.
- Second, it made it possible for landowner donations to be included as part of the entity's share.
- Third, it limited the amount of the donation that could be used as part of the entity's share to not more than 25 percent of the conservation easement's appraised fair market value.

The 2002 Act did not provide guidance on the minimum cash contribution by the entity. As a result, the proposed rule attempted to set forth cash requirements by the cooperating entity. Based on these three premises, the agency stated in the proposed rule that an entity may:

(1) Provide in cash, at least 25 percent of the appraised fair market value of the conservation easement, when accompanied by a landowner donation; or

(2) Provide in cash, at least 50 percent of the conservation easement purchase price. In this situation, the NRCS share cannot exceed the entity's contribution.

This proposal was met with a great deal of opposition primarily from the land trust community. Of the total 296 letters received, 214 objected to NRCS requiring cooperating entities to provide a minimum cash contribution. They maintain that by proposing a minimum cash contribution by the entity, NRCS is discouraging bargain sales by the landowner. While four respondents argued that if a land owner donated 50 percent of the easement's value and the Natural Resources Conservation Service (NRCS) paid 50 percent, the letter of the law could be met without any cash commitment from the land trust, fifty-five other respondents suggested a contribution provided by the entity but in a lesser degree to what NRCS proposed, stating that the requirement of a cash match will significantly restrict the number of properties that can be protected under FRPP. Forty-one respondents specifically stated that a landowner should be able to donate more than 25 percent of the appraised fair market value, and that the 25 percent contribution of the appraised fair market value limits the contribution by the landowner, while 175 respondents asked that the rules be rewritten to "base the required match for an easement on the price paid for the property not the price it would be on the open market." In response to all of the above comments, NRCS did not intend to mislead readers that a landowner donation be limited to 25 percent. On the contrary, land donations by the landowner are readily accepted, since the easement acquisition cost is less for both NRCS and the cooperating entity. To take advantage of sizeable landowner donations, NRCS clarified the final rule language by inserting the "50 percent of the purchase price" option.

In response to NRCS' proposed rule options, many within the land trust community countered NRCS' proposal by suggesting the elimination of any mention of the 25 percent of the appraised fair market value requirement and several respondents suggested the following or similar language:

"The entity must provide, in cash, an amount at least half of that provided by the NRCS."

The following table summarizes the FRPP and cooperating entity shares given the proposed rule's language and the above-mentioned language suggested by the land trust community. The analysis assumes that the appraised fair market value of the conservation easement is $100,000.

COMPARISON OF COST SHARING CRITERIA
PROPOSED FRPP RULE AND THE LAND TRUST SUGGESTION
[Dollars]

Land owner donation	Proposed rule		Land trust suggestion	
	Entity cash share	FRPP share	Entity cash share	FRPP share
Zero	$50,000	$50,000	$50,000	$50,000
10,000	40,000	50,000	40,000	50,000
25,000	25,000	50,000	25,000	50,000
40,000	25,000	35,000	20,000	40,000
55,000	22,500	22,500	15,000	30,000
70,000	15,000	15,000	10,000	20,000

Note that the cash shares for the cooperating entity and FRPP are identical from zero donation to a $25,000 (25 percent) donation level. At donation levels greater than $25,000 the cooperating entity contributions are greater with the proposed rule. In this example, if the landowner makes a $40,000 donation then the cash requirement is $5,000 greater in the proposed rule scenario as compared to the suggested change by the land trust community.

After considering these comments, NRCS has decided to retain the same funding options albeit with some clarification. NRCS believes that the final rule's language supports large bargain sales by the landowner and requires only that in these cases, the entity match NRCS' contribution dollar-for-dollar. Assuming a $100,000 easement, if the landowner chooses to donate 70 percent of the appraised fair market value, the actual easement purchase price would be $30,000. In this case, NRCS and the cooperating entity both contribute $15,000. By providing the option for the entity to choose either 25 percent of the appraised fair market value or 50 percent of the purchase price, NRCS is accommodating the cooperating entities desire to take advantage of bargain sales and at the same time, ensuring that the Federal investment is secured with some contribution by the cooperating entity. Consequently, the final rule adopts the language of the proposed rule.

Several respondents suggested that NRCS take into account donations of other lands by an entity, as a matching offer. NRCS interprets the statute to mean that an entity's contribution pertains specifically to the parcel of land, which is subject to a pending offer in which the Secretary is purchasing an interest. Using land as match for the purchase of such land is not within the statutory authority of the program.

Five respondents recommended that to the extent that they are ordinary, necessary and reasonable, administrative costs associated with NRCS requirements be reimbursable with FRPP funds, or at the very least count towards the entity's share. In accordance with the statute that authorizes NRCS to cost share only the purchase of a property interest, NRCS does not reimburse a cooperating entity's easement costs associated with easement acquisitions, nor do these easement acquisition costs count towards an entity's share of the contribution. One respondent requested that NRCS insert in the final rule that easement administrative and transaction costs will not be paid for using FRPP funds. NRCS agrees with this recommendation and has inserted this policy into the final rule.

One respondent requested that NRCS provide the option to the entity to issue landowner payments in installments. NRCS concurs with this recommendation. However, due to the complexity of the payment process, will address this issue in its policy manual, CPM part 519.

Section 1491.22 Conservation Easement Deeds

One respondent requested a clear articulation of FRPP's goals and objectives in Section 1491.22(a). NRCS agrees with the respondent and has inserted clauses under Section 1491.22(a) to more fully describe the goals and objectives of FRPP. As set forth in FRPP's authorizing legislation, the purpose of FRPP is to purchase conservation easements for the purpose of protecting topsoil by limiting nonagricultural uses of the land. With this in mind, NRCS has inserted the following goals into section 1491.22: (i) To protect the topsoil from conversion to nonagricultural uses; and (ii) to ensure that the agricultural capacity of the soils remains viable for future generations.

Several other respondents requested specifics on what is or should be allowed in FRPP. Two respondents stated that easements associated with FRPP should clearly provide for continued, active management of the farm, ranch and associated forest land. One respondent stated every conservation easement deed should require a farm succession plan. While NRCS encourages that these farms be actively farmed for perpetuity, the agency also recognizes that FRPP's authority is limited to protecting the soils, not ensuring that the farm or ranch be actively farmed for perpetuity, nor does the agency believe it is practicable to do so.

One of these respondents also asked that NRCS consider forestry as an agricultural use, making it clear that the conversion of farm to forest does not constitute a conversion to non-agricultural use. NRCS agrees with this response; however, NRCS believes that the majority of farms and ranches accepted into the program will not be converted into forestland because the quality of farm and ranch land that are accepted into the program would make conversion to forest land economically infeasible. Moreover, NRCS believes that the FRPP ranking criteria favor parcels that will remain agriculturally viable in the future. NRCS acknowledges that some parcels enrolled under FRPP may be converted to forest land in the future. Although the agency has attempted to structure the program so that the primary focus of the program is to protect high quality farmland that will be actively cropped or grazed, NRCS believes that it lacks the authority to mandate that farms and ranches remain actively farmed in perpetuity. NRCS believes that its authority extends only to ensure that the topsoil protected under FRPP easements is not converted to nonagricultural uses and that the agricultural capacity of the soils remains viable for future generations. Under this rationale, NRCS believes that the conversion of farm and ranch land to forest land retains the agricultural viability of the soils and that if future generations deemed it appropriate, the forest acreage could be harvested and the land could be tilled or grazed.

One respondent requested that NRCS clarify its association with other conservation programs. As previously discussed, NRCS encourages landowners to utilize other conservation programs to protect natural resources on FRPP land. Landowners who enroll in FRPP are eligible to participate in USDA's cost share programs, including the Agricultural Management Assistance Program (AMA), Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP), Wildlife Habitat Incentives Program (WHIP), and the long-term contract options under the Wetlands Reserve Program (WRP) and Conservation Reserve and Enhancement Program (CREP). However, NRCS believes that WRP 30-year and permanent easements, as well as CREP permanent easements which restore wetlands and limit agricultural uses, may undermine FRPP goals and objectives to protect the agricultural viability of topsoil for future generations. For this reason as well as the desire to maximize Federal dollars, NRCS has chosen to exclude WRP and CREP acreage from FRPP easements. For example, a landowner who wishes to enroll in both programs can continue to do so; however, the land under WRP easement must border the FRPP easement—the same acreage cannot be enrolled under both easements.

One respondent questioned the language in 1491.22(c) that required a review of the conservation easement by NRCS and the Office of General Counsel. The respondent argued that there is "no legal standing by the Federal government as Grantee." NRCS and the Office of General Counsel (OGC) refer once again to the statute that instructs the Secretary, acting through

NRCS, to purchase conservation easements. In interpreting the statute, NRCS has acquired an interest in the Property in the form of a contingent right. A contingent right in the conservation easement deed provides that all rights conveyed by the landowner under the easement deed shall become vested in the United States should the grantee abandon or attempt to terminate or extinguish the conservation easement. To ensure that the United States property interest is upheld and to ensure that the American taxpayer is acquiring legally sound conservation easement deeds, NRCS and OGC must review all conservation easement templates used by the cooperating entity. In the interest of time, NRCS and OGC try to negotiate standard deed templates with the cooperating entity. Once these standard easement templates meet OGC approval, the cooperating entity may use that template on all easement deeds acquired with FRPP funds.

Several respondents raised issues concerning the contingent right paragraph that is incorporated into every conservation easement deed acquired with FRPP funds. Three respondents requested that NRCS allow for a right of appeal to be granted to eligible entities regarding a determination by the Secretary that the entity has failed to enforce the easement. NRCS' authority is to purchase an interest in land. With this authority, NRCS purchases a contingent right in the land. This contingent right is activated only in cases, where the cooperating entity terminates, extinguishes or fails to uphold the conservation easement. NRCS has determined that it needs to have this absolute right in order to protect the Federal Government's property interest should the Federal Government determine that the Grantee has attempted to terminate, extinguish or fail to uphold the conservation easement. Another respondent objected to the Secretary having sole discretion in the contingent right paragraph and suggested that the contingent right paragraph be relaxed where conservation easements are co-held with State or local funds within the DelMarVa Conservation Corridor. For the reasons mentioned above, NRCS believes that it is in the interest of the Federal government to retain in the final rule, the contingent right that was set forth in the proposed rule. One respondent indicated that a Federal contingent right interest would not be acceptable to many landowners. The Federal contingent right interest may discourage some landowners from participating in FRPP. However, FRPP is a voluntary program, and landowners are not forced to participate if they find the contingent right paragraph, or other conservation easement provisions unacceptable. One respondent recommended that should the cooperating entity transfer the conservation easement, the landowner should have the right of first refusal for reacquiring the easement interest. The United States' contingent right to hold the conservation easement negates a landowner's right of first refusal. In addition, the right of first refusal by a landowner undermines the purpose of placing a conservation easement on the land.

Currently, NRCS signs the conservation easement deed, accepting NRCS' property interest in the deed of easement. One respondent requested that the requirement that NRCS sign the conservation easement deed be included in the rule, while another respondent recommended that NRCS require that easements be recorded and that the entity provide proof of recordation. NRCS concurs with these recommendations and has included these provisions in the final rule.

One respondent recommended that if NRCS requires implementation of the conservation plan, NRCS should also provide cost-share assistance to the landowner. A majority of farmers and ranchers are already subject to highly erodible land and wetland conservation requirements through participation in other USDA programs. Where financial assistance is needed to help a producer reduce soil erosion on highly erodible lands, cost-share assistance through programs, such as EQIP, is available. Another respondent suggested that a landowner be notified in writing about and consulted regarding conservation measures required on the Property. As indicated previously, this suggestion replicates NRCS" current conservation planning policy which takes into account a landowner's needs and economic situation, as well as local resource conditions.

One respondent raised a concern about the enforcement issues surrounding the conservation plan and the conservation easement, stating "the important matter is a commitment to conservation planning, not to a particular static conservation plan. Enforcement should be about ensuring maintenance of an evolving plan." NRCS believes that the conservation planning process is an evolving and interactive process; however, NRCS has decided that a landowner should not be required to maintain a higher standard of erosion reduction than the landowner originally agreed to at the time of easement signature. This does not mean however that the landowner is prohibited from achieving a higher standard of resource protection, if the landowner or cooperating entity deem appropriate. Another respondent recommended that if NRCS require an entity to enforce a conservation plan, the entity be required to be involved in conservation planning. NRCS has the responsibility to enforce the conservation plan as it relates to highly erodible land and wetland conservation provisions. If the landowner refuses to comply with these requirements and all the appeal rights and other waivers afforded the landowner in accordance with 7 CFR part 17 and 7 CFR part 614 have been exhausted, NRCS will report to the cooperating entity that the landowner is in violation of the easement. At this time, it becomes the responsibility of the cooperating entity to enforce the terms of the conservation easement.

Section 1491.23 Easement Modifications

Several respondents objected to or requested clarification on this section, which required that easement deed amendments be approved by NRCS. Three respondents requested that the final rule clarify who, within NRCS, is able to approve conservation easement modifications. NRCS has clarified this in the final rule by stating that the State Conservationist, with concurrence from the Office of General Counsel, shall approve or disapprove conservation easement modifications, in the form of deed amendments. One respondent supported NRCS approving easement modifications. They also suggested that NRCS establish a criterion that no amendment will be allowed if it would lower the net benefit of the easement for conservation. NRCS believes that a single criterion, such as lowering the net benefit of the conservation, is difficult to establish on a nationwide basis; therefore, NRCS has chosen to approve amendments on a case-by-case basis. One respondent asserted that the easement modification provisions are inconsistent and incompatible with their program and question NRCS and the Office of General Counsel's authority to accept or reject such modifications. It is not NRCS' intention to supersede the cooperating entity's decision to prohibit an easement amendment. However, where easement amendments are allowed, NRCS' response regarding easement modifications or amendments mirrors its response on easement review—

because the United States is buying an interest in the property, any modification or amendment shall be approved by NRCS and the Office of General Counsel. One respondent requested that NRCS interpret Section 1491.23 to give a cooperating entity the discretion to distinguish between a major and minor amendment. If appropriate, NRCS, with advice from the Office of General Counsel, will review and delegate authority for amendment review on a case-by-case basis as it relates to minor amendments.

Subpart C—General Administration

Section 1491.30 Violations and Remedies

Fifty-five respondents commented on this portion of the proposed rule. Fifty-two respondents recommended that section 1491.30(c) be reworded to allow for landowner notification prior to NRCS' entry on the property as it relates to conservation plan violations, while one respondent questioned the need to include this provision in the rule, but rather state it in the conservation easement deed. NRCS accepts the first set of recommendations and has modified the final rule provision to allow for landowner notification prior to NRCS entry. NRCS also addresses and inserts right of access provisions in all FRPP conservation easement deeds.

One respondent suggested that NRCS should contact the landowner, but it should not be prevented from exercising its imminent violation rights by rules outside of the easement or in the case of an emergency; therefore, they suggest that the wording be changed to NRCS notifies or reasonably attempts to notify. As a condition of program eligibility, landowners agree to allow NRCS to enter the land when they sign the AD–1026, Highly Erodible Land Conservation and Wetland Conservation Certification form; however, NRCS' policy is to make all reasonable advance notification to the landowner prior to any visit on the property.

One respondent has objected to NRCS accessing the easement area stating that it conflicts with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements, neither NRCS nor CCC have responsibilities under law to monitor, enforce or prosecute violators of FRPP easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already governed by State legislation. NRCS's monitoring responsibility relates only to the conservation plan, which is required by FRPP's authorizing legislation. Violations related to the conservation plan and any other such violations that NRCS may encounter while on the farm or ranch will be reported to the cooperating entity. NRCS does not assume the role of any monitoring beyond the conservation plan compliance provision of the Food Security Act of 1985, as amended.

One respondent requested that if enforcement language is required in the deed, the rule should contain such language. The final rule contains the general guidelines related to conservation plan compliance, while the cooperative agreement between NRCS and the cooperating entity will articulate any specific enforcement language as it relates to the conservation plan. One respondent asked whether lands that do not contain highly erodible soils or wetland resources need to be monitored by NRCS. Lands that do not contain highly erodible soils or wetland resources do not need to be monitored by NRCS, unless the State Conservationist and cooperating entity have entered into a cooperative agreement whereby they have agreed to assist the cooperating entity monitor non-highly erodible lands enrolled under FRPP. One respondent requested that NRCS articulate whether all easements prior to the publication of the final rule will be monitored. NRCS will monitor easements that were recorded prior to the publication of this final rule in accordance with the terms and conditions set forth in individual conservation easement deeds.

One respondent requested that the NRCS clarify that the landowner be liable for any costs incurred by the United States as it relates specifically to the conservation plan.

NRCS agrees with this respondents request for clarification and has reworded the last sentence of 1491.30(c) to read as follows: "The landowner shall be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with the easement requirements as it relates to conservation plan violations."

Two respondents requested that NRCS clarify section 1491.30(d) by adding "related to the FRPP easement." NRCS agrees with this recommendation and has redrafted this section to read as follows: "The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action related to the FRPP easement."

Two respondents requested that NRCS soften the indemnification language. One entity requested that the section be amended for cross indemnification, while another entity requested that the indemnification language read as follows: "(e) The conservation easement shall include an indemnification clause requiring landowners to indemnify, defend, and hold harmless the United States from any liability resulting from the negligent acts of the landowner." NRCS has chosen to retain the proposed rule's language as it relates to indemnification, which is similar to the second respondent's suggestion. In response to the first respondent's request for cross indemnification, NRCS does not have the authority to waive the Federal government's sovereign immunity.

Section 1491.31 Appeals

One respondent has objected to NRCS affording appeals to landowners and cooperating entities, asserting that it conflicts with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements with individual landowners, NRCS has no responsibilities under law to monitor, enforce or prosecute violators of easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already legislated by State legislation under which they are governed.

The Department of Agriculture Reform Act (Pub. L. 103–354; 7 U.S.C. 6991 et seq.), requires that USDA agencies covered by this Act develop and implement an informal and formal appeals policy. The USDA has developed regulations articulating how the appeal process works when making decisions over a disputed agency decision or determination. Accordingly, NRCS provides an appeal and mediation process to agency program participants where decisions and determinations made by the agency are disputed by the program participant. Under these provisions, program participant can mean the cooperating entity or the landowner, depending on the circumstance. Appealable items include, but are not limited to:

- The determination that the land is eligible;
- The determination that the conservation plan submitted by the landowner to the entity and further submitted to NRCS is not sufficient; and
- The determination by NRCS that the person farming the land under FRPP easement has violated the HELC or WC provisions.

Section 1491.32 Scheme and Device

One respondent has objected to the NRCS scheme and device provisions,

asserting that they conflict with the rights of the Grantee. The respondent notes that since neither NRCS nor CCC are Grantees of the recorded conservation easements with individual landowners, NRCS has no responsibilities under law to monitor, enforce or prosecute violators of easements. Therefore, NRCS should not impose rules and regulations covering these enforcement authorities already legislated by a State legislation under which they are governed. To clarify any confusion regarding the applicability of scheme and device provisions and to address the respondent's concerns, NRCS has removed the term "landowner" from the scheme and device paragraphs. However, NRCS has retained these paragraphs as drafted in the proposed rule in the event a cooperating entity with whom NRCS directly enters into a cooperative agreement commits waste, fraud, or abuse. These paragraphs have been edited to reflect this change in policy.

List of Subjects in 7 CFR Part 1491

Administrative practice and procedure, Agriculture, Soil conservation.

■ For the reasons stated in the preamble, the Commodity Credit Corporation amends chapter XIV by adding a new part 1491 as set forth below:

PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM

Subpart A—General Provisions

Sec.

Subpart B—Cooperative Agreements and Conservation Easement Deeds ec.

Subpart C—General Administration

Authority: 16 U.S.C. 3838h–3838i.

Subpart A—General Provisions

§ 1491.1 Applicability.

(a) The regulations in this part set forth policies, procedures, and requirements for program implementation of the Farm and Ranch Lands Protection Program as administered by the Natural Resources Conservation Service (NRCS). FRPP cooperative agreements and easements signed on or after May 16, 2003, will be administered according to 7 CFR part 1491.

(b) The NRCS Chief may implement FRPP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

§ 1491.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the NRCS Chief.

(b) NRCS shall— (1) Provide overall program management and implementation leadership for FRPP;

(2) Develop, maintain, and ensure that policies, guidelines, and procedures are carried out to meet program goals and objectives;

(3) Ensure that the FRPP share of the cost of an easement or other deed restrictions in eligible land shall not exceed 50 percent of the appraised fair market value of the conservation easement;

(4) Determine land and entity eligibility;

(5) Ensure a conservation plan is developed in accordance with 7 CFR part 12;

(6) Make funding decisions and determine allocations of program funds;

(7) Coordinate with the Office of the General Counsel (OGC) to ensure the legal sufficiency of the cooperative agreement and the easement deed or other legal instrument;

(8) Sign and monitor cooperative agreements for the CCC with the selected entity;

(9) Monitor and ensure conservation plan compliance with highly erodible land and wetland provisions in accordance with 7 CFR part 12; and

(10) Provide leadership for establishing, implementing, and overseeing administrative processes for easements, easement payments, and administrative and financial performance reporting.

(c) NRCS may enter into cooperative agreements with eligible entities to assist NRCS with implementation of this part.

§ 1491.3 Definitions.

The following definitions may be applicable to this part:

Agricultural uses are defined by the State's Purchase of Development Rights (PDR) program, or where no PDR program exists, agricultural uses should be defined by the State agricultural use assessment program. (If the Agency finds that a State definition of agriculture is so broad that an included use could lead to the degradation of soils, NRCS reserves the right to impose greater deed restrictions on the property than allowable under that State definition of agriculture in order to protect topsoil.)

Chief means the Chief of NRCS, USDA.

Commodity Credit Corporation (CCC) is a Government-owned and operated entity that was created to stabilize, support, and protect farm income and prices. CCC is managed by a Board of Directors, subject to the general supervision and direction of the Secretary of Agriculture, who is an ex-officio director and chairperson of the Board. CCC provides the funding for FRPP, and NRCS administers FRPP on its behalf.

Conservation Easement means a voluntary, legally recorded restriction, in the form of a deed, on the use of property, in order to protect resources such as agricultural lands, historic structures, open space, and wildlife habitat.

Conservation Plan is the document that—

(1) Applies to highly erodible cropland;

(2) Describes the conservation system applicable to the highly erodible cropland and describes the decisions of the person with respect to location, land use, tillage systems, and conservation treatment measures and schedules;

(3) Is approved by the local soil conservation district in consultation with the local committees established under Section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 5909h(b)(5)) and the Secretary, or by the Secretary.

Contingent right is an interest in land held by the United States, which the United States may exercise under specific circumstances in order to enforce the terms of the conservation easement or hold title to the easement.

Eligible entities means Federally recognized Indian Tribes, States, units of local government, and certain non-governmental organizations, which have a farmland protection program that purchases agricultural conservation easements for the purpose of protecting topsoil by limiting conversion to non-agricultural uses of the land.

Additionally, to be eligible for FRPP, the entity must have pending offers, for acquiring conservation easements for the purpose of protecting agricultural land from conversion to non-agricultural uses.

Eligible land is privately owned land on a farm or ranch that has prime, unique, Statewide, or locally important soil, or contains historical or archaeological resources, and is subject to a pending offer by an eligible entity. Eligible land includes cropland, rangeland, grassland, and pasture land, as well as forest land that is an incidental part of an agricultural operation. Other incidental land that would not otherwise be eligible, but when considered as part of a pending offer, may be considered eligible, if inclusion of such land would significantly augment protection of the associated farm or ranch land.

Fair market value is ascertained through standard real property appraisal methods. Fair market value is the amount in cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure of time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer. Neither the seller nor the buyer act under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. In valuing conservation easements, the appraiser estimates both the fair market value of the whole property before the easement acquisition and the fair market value of the remainder property after the conservation easement has been imposed. The difference between these two values is deemed the value of the conservation easement.

Farm or Ranch Succession Plan is a general plan to address the continuation of some type of agricultural business on the conserved land; the farm or ranch succession plan may include specific intra-family succession agreements or strategies to address business asset transfer planning to create opportunities for beginning farmers and ranchers.

Field Office Technical Guide (FOTG) is the official document for NRCS guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. The FOTG contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

Historical and archaeological resources must be:

(1) Listed in the National Register of Historic Places (established under the National Historic Preservation Act (NHPA), 16 U.S.C. 470, *et seq.*), or

(2) Formally determined eligible for listing in the National Register of Historic Places (by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and the Keeper of the National Register in accordance with section 106 of the NHPA), or

(3) Formally listed in the State or Tribal Register of Historic Places of the SHPO (designated under section 101 (b)(1)(B) of the NHPA) or the THPO (designated under section 101(d)(1)(C) of the NHPA).

Land Evaluation and Site Assessment System (LESA) is the land evaluation system approved by the NRCS State Conservationist used to rank land for farm and ranch land protection purposes, based on soil potential for agriculture, as well as social and economic factors, such as location, access to markets, and adjacent land use. (For additional information see the Farmland Protection Policy Act rule at 7 CFR part 658.)

Landowner means a person, persons, estate, corporation, or other business or nonprofit entity having fee title ownership of farm or ranch land.

Natural Resources Conservation Service is an agency of the U.S. Department of Agriculture.

Non-governmental organization is defined as any organization that:

(1) Is organized for, and at all times since the formation of the organization, has been operated principally for one or more of the conservation purposes specified in clause (i), (ii), (iii), or (iv) of section 170(h)(4)(A) of the Internal Revenue Code of 1986;

(2) Is an organization described in section 501(c)(3) of that Code that is exempt from taxation under 501(a) of that Code;

(3) Is described in section 509(a)(2) of that Code; or

(4) Is described in section 509(a)(3) of that Code and is controlled by an organization described in section 509(a)(2) of that Code.

Other interests in land include any right in real property recognized by State law, including fee title. FRPP funds will only be used to purchase other interests in land with prior approval from the Chief.

Other productive soils are soils that are contained on farm or ranch land that is identified as farmland of Statewide or local importance and is used for the production of food, feed, fiber, forage, or oilseed crops. The appropriate State or local government agency determines Statewide or locally important farmland with concurrence from the State Conservationist. Generally, these farmlands produce high yields of crops when treated and managed according to acceptable farming methods. In some States and localities, farmlands of Statewide and local importance may include tracts of land that have been designated for agriculture by State law or local ordinance. 7 CFR part 657 sets forth the process for designating soils as Statewide or locally important.

Pending offer is a written bid, contract, or option extended to a landowner by an eligible entity to acquire a conservation easement before the legal title to these rights has been conveyed for the purpose of limiting non-agricultural uses of the land.

Prime and unique farmland are defined separately, as follows:

(1) Prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, without intolerable soil erosion, as determined by the Secretary.

(2) Unique farmland is land other than prime farmland that is used for the production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables. Additional information on the definition of prime, unique, or other productive soil can be found in 7 CFR part 657 and 7 CFR part 658.

Secretary is the Secretary of the U.S. Department of Agriculture.

State Technical Committee means a committee established by the Secretary of the U.S. Department of Agriculture in a State pursuant to 16 U.S.C. 3861 and 7 CFR part 610, subpart C.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area (Puerto Rico and the Virgin Islands), or the Pacific Basin Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

§ 1491.4 Program requirements.

(a) Under the FRPP, the Secretary, on behalf of CCC, shall purchase conservation easements, in partnership with eligible entities, from landowners who voluntarily wish to protect their farm and ranch lands from conversion to nonagricultural uses. Eligible entities submit applications to NRCS State Offices to partner with NRCS to acquire conservation easements on farm and ranch land. NRCS enters into

cooperative agreements with selected entities and provides funds for up to 50 percent of the appraised market value for the easement purchase. In return, the entity agrees to acquire, hold, manage, and enforce the easement. A Federal contingent right interest in the property must be included in each easement deed for the protection of the Federal investment.

(b) The term of all easements will be in perpetuity unless prohibited by State law.

(c) To be eligible to receive FRPP funding, an entity must meet the definition of "eligible entity" as listed in § 1491.3. In addition, eligible entities wishing to receive FRPP funds must also demonstrate:

(1) A commitment to long-term conservation of agricultural lands;

(2) A capability to acquire, manage, and enforce easements;

(3) Sufficient number of staff dedicated to monitoring and easement stewardship; and

(4) The availability of funds.

(d) Eligible land must meet the definition of "eligible land" as provided in § 1491.3. In addition:

(1) Entire farms or ranches may be enrolled in FRPP.

(2) Farms must contain at least 50 percent of prime, unique, Statewide, or locally important soil, unless otherwise determined by the State Conservationist, or contain historical or archaeological resources.

(3) Eligible lands are farm and ranch lands subject to a pending offer, as defined in § 1491.3, for purchase of a conservation easement.

(4) Eligible land must be privately owned. NRCS will not enroll land in FRPP that is owned in fee title by an agency of the United States or State or local government, or land that is already subject to an easement or deed restriction that limits the conversion of the land to nonagricultural use, unless otherwise determined by the Secretary.

(5) Eligible land must be owned by landowners who certify that they do not exceed the adjusted gross income limitation eligibility requirements set forth in Section 1604 of the Farm Security and Rural Investment Act of 2002.

(e) Prior to FRPP fund disbursement, the value of the conservation easement must be appraised. Appraisals shall be completed and signed by a State-certified or licensed general appraiser and shall contain a disclosure statement by the appraiser. The appraisal shall conform to either the Uniform Standards of Professional Appraisal Practices or the Uniform Appraisal Standards for Federal Land Acquisitions.

(f) At the discretion of the Chief, a standard easement or equivalent legal form, which meets the intent of the 2002 Act, will be required as a condition for program participation.

(g) The landowner shall be responsible for complying with the Highly Erodible Land and Wetland Conservation provisions of the Food Security Act of 1985, as amended, and 7 CFR part 12.

§ 1491.5 Application procedures.

(a) When funds are available, NRCS publishes a Request for Proposals in the **Federal Register** or, at the discretion of the Chief, uses another process to solicit applications from eligible entities to cooperate in the acquisition of conservation easements on farms and ranches. Information required in the application will be set forth in the Request for Proposals.

(b) To participate, an eligible entity submits a proposal to NRCS for the acquisition of conservation easements on eligible farm or ranch land, on which the entity already has pending offers. An entity's application contains a request to fund one or more parcels. All applications must be submitted to the appropriate NRCS State Conservationist by the specified date, as indicated in the Request for Proposals.

§ 1491.6 Ranking considerations and proposal selection.

(a) Once the NRCS State Conservationist has assessed entity eligibility and land eligibility, the State Conservationist shall use National and State criteria to evaluate the land and rank parcels. Entities and parcels will be selected for participation based on the entities' responses to the Request for Proposals. Selection will be based on national ranking criteria set forth by the Chief in the Request for Proposals and State criteria as determined by the State Conservationist, with advice from the State Technical Committee.

(1) Examples of national criteria may include:

(i) Acreage of prime, unique, and important farm and ranch land to be protected;

(ii) Total acres of land to be protected with the requested award;

(iii) Acreage of prime, unique, and important farm and ranch land identified in the National Resources Inventory as converted to nonagricultural uses;

(iv) Total acres needing protection;

(v) Number or acreage of historical and archaeological resources to be protected on farm or ranch lands;

(vi) Anticipated average FRPP cost per acre;

(vii) Rate of land conversion (*e.g.*, local land use conversion rates);

(viii) Amount of the Federal share to be contributed to the acquisition of the conservation easement, as guaranteed by the eligible entity;

(ix) History of eligible entity's commitment to conservation planning and conservation practice implementation;

(x) History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession transfer;

(xi) Eligible entity's history of acquiring, managing, holding, and enforcing conservation easements. This could include annual farmland protection expenditures, monetary donations received, accomplishments, and staffing levels;

(xii) A description of the eligible entity's farmland protection strategy and how the FRPP application submitted by the entity corresponds to the entity's strategic plan; and

(xiii) Eligible entity's estimated acres of unfunded proposed conservation easements on prime, unique, and important farm and ranch land.

(2) Examples of State or local criteria, as determined by the State Conservationist may include:

(i) Proximity of parcel to other protected clusters;

(ii) Proximity of parcel to other agricultural operations and infrastructure;

(iii) Parcel size;

(iv) Type of land use;

(v) Maximum FRPP cost expended per acre;

(vi) Amount of the Federal share to be contributed to the acquisition of the conservation easement, as guaranteed by the eligible entity;

(vii) History of an eligible entity's commitment to assisting beginning farmers and ranchers, to promoting opportunities in farming and ranching, and to farm and ranch succession transfer;

(viii) Existence of a parcel in an agriculturally zoned area.

(b) State ranking criteria will be developed on a State-by-State basis. Prior to proposal submission, interested entities should contact the State Conservationist located in their State for a full listing of applicable National and State ranking criteria.

(c) The NRCS State Conservationist may seek advice from the State Technical Committee (established pursuant to 16 U.S.C. 3861) in

evaluating the merits of the applications.

§ 1491.7 Funding priorities.

(a) NRCS will only consider funding the acquisition of eligible land in the Program if the agricultural viability of the land can be demonstrated. For example, the land must be of sufficient size and have boundaries that allow for efficient management of the area. The land must also have access to markets for its products and a support infrastructure appropriate for agricultural production.

(b) NRCS may not fund the acquisition of eligible lands if NRCS determines that the protection provided by the FRPP would not be effective because of on-site or off-site conditions.

(c) NRCS will place a higher priority on easements acquired by entities that have extensive experience in managing and enforcing easements.

(d) During the application period, pending offers having appraisals completed and signed by State-certified general appraisers within the preceding one year shall receive higher funding priority by the NRCS State Conservationist. Before funding is released for easement acquisition, the cooperating entity must provide NRCS with a copy of the certified appraisal.

(e) NRCS may place a higher priority on lands and locations that help create a large tract of protected area for viable agricultural production and that are under increasing urban development pressure(s).

(f) NRCS may place a higher priority on lands and locations that link to other Federal, Tribal, or State governments or non-governmental organization efforts with complementary farmland protection objectives (*e.g.* open space, watershed and wildlife habitat protection).

(g) NRCS may place a higher priority on lands that provide multifunctional benefits including social, economic, historical and archaeological, and environmental benefits.

(h) NRCS may place a higher priority on certain geographic regions where the enrollment of particular lands may help achieve National, State, and regional goals and objectives, or enhance existing government or private conservation projects.

(i) NRCS may place a higher priority on farms or ranches that have or will have a greater variety of natural resources protected.

(j) NRCS may place a higher priority on farms or ranches that have a farm succession plan or similar plan established to encourage farm viability for future generations.

(k) NRCS may place a higher priority on the national ranking criteria listed in § 1491.6(a)(1) than State criteria, if the NRCS Chief deems appropriate.

Subpart B—Cooperative Agreements and Conservation Easement Deeds

§ 1491.20 Cooperative agreements.

(a) NRCS, on behalf of CCC, enters into a cooperative agreement with those entities selected for funding awards. Once a proposal is selected by the State Conservationist, the entity must work with the appropriate State Conservationist to finalize and sign the cooperative agreement incorporating all necessary FRPP requirements. The cooperative agreement addresses:

(1) The interests in land to be acquired, including the form of the easements to be used and terms and conditions;

(2) The management and enforcement of the rights acquired;

(3) The role of NRCS;

(4) The responsibilities of the easement manager on lands acquired with the assistance of FRPP; and

(5) Other requirements deemed necessary by NRCS to protect the interests of the United States.

(b) The cooperative agreement will also include an attachment listing the parcels accepted by the State Conservationist, landowners' names, addresses, location map(s), and other relevant information. An example of a cooperative agreement may be obtained from the State Conservationist.

§ 1491.21 Funding.

(a) The State Conservationist, in coordination with the cooperating entity, shall determine the NRCS share of the cost of purchasing a conservation easement.

(b) Under the FRPP, NRCS may provide up to 50 percent of the appraised fair market value of the conservation easement. Entities are required to supplement the NRCS share of the cost of the conservation easement.

(c) Landowner donations up to 25 percent of the appraised fair market value of the conservation easement may be considered part of the entity's matching offer.

(d) For the entity, two cost-share options are available when providing its matching offer.

(1) The entity may provide in cash at least 25 percent of the appraised fair market value of the conservation easement, or

(2) The entity may provide at least 50 percent of the purchase price in cash, of the conservation easement. This second option may be preferable to an entity in the case of a large bargain sale by the landowner. If this option is selected, the NRCS share cannot exceed the entity's contribution.

(e) FRPP funds may not be used for expenditures such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other related administrative and transaction costs incurred by the entity.

(f) If the State Conservationist determines that the purchase of two or more conservation easements are comparable in achieving FRPP goals, the State Conservationist shall not assign a higher priority to any one of these conservation easements based on lesser cost to FRPP.

§ 1491.22 Conservation easement deeds.

(a) Under FRPP, a landowner grants an easement to an eligible entity with which NRCS has entered into an FRPP cooperative agreement. The easement shall require that the easement area be maintained in accordance with FRPP goals and objectives for the term of the easement.

(b) Pending offers by an eligible entity must be for acquiring an easement in perpetuity, except where State law prohibits a permanent easement.

(c) The conveyance document or conservation easement deed used by the eligible entity may be reviewed and approved by the NRCS National Office and Office of the General Counsel (OGC) before being recorded.

(d) Since title to the easement is held by an entity other than the United States, the conveyance document must contain a "contingent right" clause that provides that all rights conveyed by the landowner under the document will become vested in the United States should the eligible entity (*i.e.*, the grantee[s]) abandon or attempt to terminate the conservation easement. In addition, the contingent right also provides, in part, that the Secretary takes title to the easement, if the eligible entity fails to uphold the easement or attempts to transfer the easement without first securing the consent of the Secretary.

(e) As a condition for participation, a conservation plan will be developed by NRCS in consultation with the landowner and implemented according to the NRCS Field Office Technical Guide and approved by the local conservation district. The conservation plan will be developed and managed in accordance with the Food Security Act of 1985, as amended, 7 CFR part 12 or subsequent regulations, and other requirements as determined by the State Conservationist. To ensure compliance with this conservation plan, the

easement will grant to the United States, through NRCS, its successors or assigns, a right of access to the easement area.

(f) The cooperating entity shall acquire, hold, manage and enforce the easement. The cooperating entity may have the option to enter into an agreement with governmental or private organizations to carry out easement stewardship responsibilities if approved by NRCS.

(g) Prior to fund disbursement, NRCS must sign the conservation easement, concurring with the terms of the conservation easement and accepting its interest in the conservation easement deed.

(h) All conservation easement deeds acquired with FRPP funds must be recorded. Proof of recordation shall be provided to NRCS by the cooperating entity.

§ 1491.23 Easement modifications.

(a) After an easement has been recorded, no amendments to the easement will be made without prior approval by NRCS State Conservationist and the USDA Office of General Counsel.

(b) Easement modifications will be approved only when easement is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation, and when the amendment is consistent with the purposes of the conservation easement.

Subpart C—General Administration

§ 1491.30 Violations and remedies.

(a) In the event of a violation of the terms of the easement, the cooperating entity shall notify the landowner. The landowner may be given reasonable notice and, where appropriate, an opportunity to voluntarily correct the violation in accordance with the terms of the conservation easement.

(b) In the event that the cooperating entity fails to enforce any of the terms of the easement as determined in the sole discretion of the Secretary, the Secretary and his or her successors and assigns shall have the right to enforce the terms of the easement through any and all authorities available under Federal or State law. In the event that the cooperating entity attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests of the easement or extinguish the easement or without the prior consent of the Secretary and payment of consideration to the United States, then, at the option of the Secretary, all right, title, and interest in the conservation easement shall become vested in the United States of America.

(c) Notwithstanding paragraph (a) of this section, NRCS, upon notification to the landowner, reserves the right to enter upon the easement area at any time to monitor conservation plan implementation or remedy deficiencies or easement violations, as it relates to the conservation plan. The entry may be made at the discretion of NRCS when the actions are deemed necessary to protect highly erodible soils and wetland resources. The landowner will be liable for any costs incurred by the United States as a result of the landowner's negligence or failure to comply with the easement requirements as it relates to conservation plan violations.

(d) The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action as it relates to the enforcement of the FRPP easement.

(e) The conservation easement shall include an indemnification clause requiring landowners to indemnify, defend, and hold harmless the United States from any liability resulting from the negligent acts of the landowner.

(f) In instances where an easement is terminated or extinguished, NRCS will collect CCC's share of the conservation easement based on the appraised fair market value of the conservation easement at the time the easement is extinguished or terminated. CCC's share shall be in proportion to its percentage of original investment.

§ 1491.31 Appeals.

(a) A person or cooperating entity which has submitted an FRPP proposal and is therefore participating in FRPP may obtain a review of any administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

(b) Before a person may seek judicial review of any action taken under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for the purposes of judicial review, no decision shall be a final agency action except a decision of the U. S. Department of Agriculture under these provisions.

§ 1491.32 Scheme or device.

(a) If it is determined by the Secretary that a cooperating entity has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such a cooperating entity during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person or entity of payments for easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

Signed in Washington, DC, on May 8, 2003.

Bruce I. Knight,

Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.

[FR Doc. 03–12064 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–16–AD; Amendment 39–13145; AD 2003–08–52]

RIN 2120–AA64

Airworthiness Directives; GE Aircraft Engines CT7–9B Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 2003–08–52 that was sent previously to all known U.S. owners and operators of GE Aircraft Engines (GEAE) CT7–9B turboprop engines. This AD requires rigging the compressor variable geometry (VG) to VG schedule N. This AD is prompted by reports of 12 compressor stall events that occurred over a six-month period. The actions specified in this AD are intended to prevent a dual-engine in-flight shutdown or power loss due to a compressor stall during deceleration from takeoff power to climb power.

DATES: Effective June 2, 2003, to all persons except those persons to whom it was made immediately effective by emergency AD 2003–08–52, issued on April 15, 2003, which contained the requirements of this amendment. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of June 2, 2003.

We must receive any comments on this AD by July 15, 2003.

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

- By mail: The Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–NE–16–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9-ane-adcomment@faa.gov.*

You may get the service information referenced in this AD from GE Aircraft Engines Customer Support Center, M/D 285, 1 Neumann Way, Evendale, OH 45215, telephone (513) 552–3272, fax (513) 552–3329, e-mail *GEAE.csc@ae.ge.com.*

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Anthony W. Cerra Jr., Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299, telephone (781) 238–7128; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: On April 15, 2003, we issued emergency AD 2003–08–52, that is applicable to GEAE CT7–9B turbofan engines. That emergency AD requires rigging the compressor VG to VG schedule N. That action was prompted by reports of 12 compressor stall events that occurred over a six-month period. This is in contrast to recent historical experience of four to six stall events per year. The stall events have occurred on deceleration when transitioning from takeoff power to climb power. Of the 10 events under investigation, nine had the compressor VG rigged to the VG schedule N1. The manufacturer's maintenance manuals and related service bulletins permit the compressor VG to be rigged to either the VG. schedule N or the VG schedule N1. The VG schedule N provides a higher stall margin at the expense of a small reduction of engine performance margin as compared to the VG schedule N1. Since 1992, the manufacturer has recommended that overhaul shops use the VG schedule N only. VG schedule N provides more stall margin on used engines, which inherently have a lower stall margin due to wear or deterioration. Other factors that contribute to lower stall margins include dirty compressors and the increased compressor clearances that occur during the first takeoff of the day. This condition, if not corrected, could result in a dual-engine in-flight shutdown or power loss due to a compressor stall during deceleration from takeoff power to climb power.

Relevant Service Information

We have reviewed and approved the technical contents of GEAE Alert Service Bulletin (ASB) No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003. That ASB describes procedures for rigging the compressor VG to the VG schedule N.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other GEAE CT7–9B turboprop engines of the same type design. Therefore, we are issuing this AD to prevent a dual-engine in-flight shutdown or power loss due to a compressor stall during deceleration from takeoff power to climb power. This AD requires:

- If both engines on the airplane are rigged to VG schedule N1, rigging the compressor VG on one engine to VG schedule N within 30 flight hours (FH) or 3 days after the effective date of this AD, whichever occurs later and,
- Rigging the remaining engine compressor VG to VG schedule N within 100 FH or 10 days after the effective date of this AD, whichever occurs earlier.
- If only one engine is rigged to VG schedule N1, rigging the compressor VG to VG schedule N within 100 FH or 10 days after the effective date of this AD, whichever occurs earlier.

You must do the actions per GEAE ASB No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003, described previously.

FAA's Determination of the Effective Date

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment were impracticable and contrary to the public interest and that good cause existed to make the AD effective immediately on April 15, 2003, to all known U.S. owners and operators of GEAE CT7–9B turboprop engines. These conditions still exist, and we are publishing the AD in the **Federal Register** as an amendment to section 39.13 of part 39 of the Federal Aviation Regulations (14 CFR part 39) to make it effective to all persons.

Changes to 14 CFR Part 39—Effect on the AD

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

Interim Action

The investigation to determine the root causes of the decel stall events is ongoing. We may take further rulemaking action when we have identified the root causes.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2003–NE–16–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it. If a person contacts us through a nonwritten communication, and that contact relates to a substantive part of this AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications with you. You may get more information about plain language at *http://www.plainlanguage.gov.*

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on

the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2003–NE–16–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2003–08–52 GE Aircraft Engines: Amendment 39–13145. Docket No. 2003–NE–16–AD.

Effective Date

(a) This amendment becomes effective June 2, 2003, to all persons except those persons to whom it was made immediately effective by emergency AD 2003–08–52, issued April 15, 2003.

Affected ADs

(b) None.

Applicability

(c) This AD applies to GEAE CT7–9B turboprop engines. These engines are installed on, but not limited to Saab Aircraft AB 340B airplanes.

Unsafe Condition

(d) This AD was prompted by reports of 12 compressor stall events that occurred over a six month period. The actions specified in this AD are intended to prevent a dual-engine in-flight shutdown or power loss due to a compressor stall during deceleration from takeoff power to climb power.

Compliance

(e) Compliance with the requirements of this AD is required as indicated unless already done.

Determining Compressor VG Rigging Schedule

(f) Determine which schedule was used to rig the compressor VG. The serial numbers (SNs) contained in Table 1 of this AD are known to have been rigged to VG schedule N1. Engines with SNs that are not listed in Table 1 might be rigged to VG schedule N1. You must review the engine records to determine if the engines are rigged to VG schedule N1 using GEAE Service Bulletin (SB) No. CT7–TP S/B 72–0241, dated April 6, 1990. Table 1 follows:

TABLE 1.—SNs OF ENGINES KNOWN TO HAVE BEEN RIGGED TO VG SCHEDULE N1

785102	785104	785106	785107	785109	785111
785112	785113	785117	785118	785125	785128
785129	785131	785133	785136	785138	785148
785150	785151	785152	785154	785160	785185
785188	785211	785231	785232	785234	785235
785237	785239	785241	785257	785259	785265
785266	785275	785322	785325	785326	785334
785375	785391	785400	785459	785460	785462
785465	785474	785476	785477	785480	785481
785487	785499	785506	785534	785538	785554
785569	785591	785592	785598	785603	785700
785759					

Rigging the Compressor VG to Schedule N

(g) If the compressor VGs of both engines on the airplane are rigged to VG schedule N using GEAE SB CT7–TP S/B 72–0328 dated June 9, 1992 or GEAE Alert Service Bulletin (ASB) CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003 no further action is required.

(h) If the compressor VGs on both engines on the airplane are rigged to VG schedule N1, do the following:

(1) Within 30 flight hours (FH) or 3 days after the effective date of this AD, whichever occurs later, rig the compressor VG on one engine to VG schedule N in accordance with 3.A.(1) through 3.A.(12) of the Accomplishment Instructions of GEAE ASB No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003.

(2) Within 100 FH or 10 days after the effective date of this AD, whichever occurs earlier, rig the compressor VG on the remaining engine to VG schedule N in accordance with 3.A.(1) through 3.A.(12) of the Accomplishment Instructions of GEAE ASB No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003.

(i) If the compressor VG on one engine on the airplane is rigged to VG schedule N1, within 100 FH or 10 days after the effective date of this AD, whichever occurs earlier, rig the compressor VG to VG schedule N in accordance with 3.A.(1) through 3.A.(12) of the Accomplishment Instructions of GEAE ASB No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003.

Installation of Engines With VG Schedule N1

(j) After the effective date of this AD, do not install any CT7–9B turboprop engine that is rigged to VG schedule N1 on to any Saab Aircraft AB 340B airplane.

Alternative Methods of Compliance

(k) Alternative methods of compliance must be requested in accordance with 14 CFR part 39.19, and must be approved by the Manager, Engine Certification Office, Federal Aviation Administration (FAA).

Material Incorporated by Reference

(l) The rigging of the compressor VG must be done in accordance with GE Aircraft Engines Alert Service Bulletin (ASB) No. CT7–TP S/B 72–A0328, Revision 1, dated April 8, 2003. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may get a copy from GE Aircraft Engines Customer Support Center, M/D 285, 1 Neumann Way, Evendale, OH 45215, telephone (513) 552–3272, fax (513) 552–3329, email *GEAE.csc@ae.ge.com.* You may review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Related Information

(m) Additional information to help minimize the occurrence of multiple-engine in-flight shutdowns or power loss may be

found in GEAE All Operator's Wire CT7–03–02, dated April 3, 2003.

Issued in Burlington, MA on May 7, 2003.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–11972 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–12–AD; Amendment 39–13148; AD 2003–10–03]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Model RB211 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to Rolls-Royce plc (RR) model RB211–535E4–37, RB211–535E4–B–37, and RB211–535E4–B–75 turbofan engines. This amendment requires removal from service of certain high pressure (HP) turbine discs before they reach newly established life limits. This amendment is prompted by the manufacturer's inspections and analysis of HP turbine discs that have accumulated high cycles. The actions specified by this AD are intended to prevent machining-induced cracking of the HP turbine disc which could cause an uncontained HP turbine disc failure and damage to the airplane.

DATES: Effective June 20, 2003.

ADDRESSES: Information regarding this action may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299, telephone (781) 238–7178; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to RR model RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines was published in the **Federal Register** on November 6, 2002 (67 FR 69160). That action proposed to require removal from service of certain HP turbine discs before they reach newly established life limits.

Comments

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

Change Explanation for Cracking

One commenter states that the explanation for cracking in the HP disc rim cooling hole area is machining damage from new manufacture, and has nothing to do with the discs being sensitive to corrosion-induced cracking, as stated in the proposal. The commenter also states that RR had previously indicated that the proposed life reduction was due to the condition described in RR Mandatory Service Bulletin (MSB) No. 72–C817. This MSB states that HP turbine discs part numbers (P/Ns) UL10323, UL27680, and UL27681 are sensitive to cracking in the disc rim cooling hole area due to machining damage from new manufacture.

The FAA agrees. The cracking has been identified as occurring at the disc rim cooling hole area on the disc rear face. Although problems have been reported during overhaul, presumably due to rework or repair associated with, in part, corrosion, the primary explanation for this AD is machining damage. Therefore, in the final rule the explanation for cracking is changed to machining damage.

Clarification of Part Numbers

One commenter requests that HP turbine discs P/Ns UL39766 and UL39767 be removed from the applicability and disc P/N UL10323 be added. The commenter states that disc P/N UL39766 is not listed in the RR Engine Illustrated Parts Catalogue or the Time Limits Manual. The commenter states that disc P/N UL39767 was introduced by RR Service Bulletin (SB) No. 72–C817 and is not subject to damage by machining. The commenter also states that disc P/N UL10323 is listed in the Time Limits Manual with a life limit of 14,800 cycles-since-new (CSN). Service Bulletin No. 72–C817 lists disc P/N UL10323, indicating that it is sensitive to cracking due to machining damage from manufacture.

The FAA agrees. We determined that HP turbine disc P/N UL39766 was never produced by RR and is, therefore, removed from the final rule. Also, disc P/N UL39767 was introduced as a new part to replace disc P/N UL27681, and has, therefore, been removed from the final rule. Disc P/N UL10323 is affected by machining damage and is added to the final rule applicability with a life limit of 14,800 CSN.

Add Engine Model to Applicability

One commenter asks if the RB211–535E4–37 engine should be included in the applicability.

The FAA agrees that this AD should be applicable to engine model RB211–535E4–37. Therefore, this model is now listed in the final rule.

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

Economic Analysis

There are approximately 400 RR model RB211–535E4–37, RB211–535E4–B–37, and RB211–535E4–B–75 turbofan engines in the worldwide fleet containing the affected HP turbine discs, P/Ns UL10323, UL27680, and UL27681. The FAA estimates that 346 engines installed on airplanes of U.S. registry will be affected by this AD, that it will take approximately 112 work hours per engine to replace an affected disc, and that the average labor rate is $60 per work hour. The FAA estimates that the prorated cost of the life reduction per engine would be approximately $64,000. Based on these figures, the total cost of the AD to remove HP turbine discs P/Ns UL27680 and UL27681 from service before accumulating 15,000 cycles-since-new (CSN) and HP turbine discs P/N UL10323 from service before accumulating 14,800 CSN, rather than the former life limit of 20,000 CSN, is estimated to be $24,469,120.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2003–10–03 Rolls-Royce plc: Amendment 39–13148. Docket No. 2002–NE–12–AD.

Applicability: This airworthiness directive (AD) is applicable to model RB211–535E4–37, RB211–535E4–B–37 and RB211–535E4–B–75 turbofan engines with high pressure (HP) turbine disc, P/N UL10323, UL27680, and UL27681, installed. These engines are installed on, but not limited to Boeing 757 and Tupolev Tu204 airplanes.

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

Compliance: Compliance with this AD is required as indicated, unless already done.

To prevent machining-induced cracking of the HP turbine disc, which could cause an uncontained HP turbine disc failure and damage to the airplane, do the following:

(a) Remove HP turbine discs P/Ns UL27680 and UL27681 from service before accumulating 15,000 cycles-since-new (CSN).

(b) Remove HP turbine discs P/N UL10323 from service before accumulating 14,800 CSN.

(c) After the effective date of this AD, do not install any HP turbine disc P/N UL27680 or UL27681 that exceeds 15,000 CSN, or any HP turbine disc P/N UL10323 that exceeds 14,800 CSN.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office (ECO). Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ECO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

Special Flight Permits

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

Effective Date

(f) This amendment becomes effective on June 20, 2003.

Issued in Burlington, Massachusetts, on May 9, 2003.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–12109 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–CE–17–AD; Amendment 39–13150; AD 2003–10–05]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company Model 390 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Raytheon Aircraft Company (Raytheon) Model 390 airplanes. This AD requires you to incorporate information into the FAA-approved Airplane Flight Manual (AFM) that would add requirements for "Landing Performance for Operation of the Airplane with Lift Dump Inoperative." This AD is the result of two accidents on the affected airplanes where a contributing factor was the lift dump spoilers failing to deploy when commanded after the initial landing. The FAA previously issued AD 2003–07–09 affecting certain Model 390 airplanes. However, the airplane serial numbers included in this AD were inadvertently omitted from AD 2003–07–09. The actions specified by this AD are intended to require the use of necessary flight information to prevent runway overruns based on insufficient wheel braking if the lift dump spoilers do not operate after landing touchdown. This could result in reduced or loss of control of the airplane.

DATES: This AD becomes effective on May 30, 2003.

The Director of the Federal Register previously approved the incorporation by reference of certain publications listed in the regulation as of April 7, 2003 (68 FR 16205, April 3, 2003).

The Federal Aviation Administration (FAA) must receive any comments on this rule on or before July 2, 2003.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–17–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. You may view any comments at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. You may also send comments electronically to the following address: *9–ACE–7–Docket@faa.gov*. Comments sent electronically must contain "Docket No. 2003–CE–17–AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII text.

You may get the service information referenced in this AD from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140. You may view this information at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–17–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Derek Morgan, Flight Test Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4172; facsimile: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

What Events Have Caused This AD?

The FAA has received information of an unsafe condition on Raytheon Model 390 airplanes. The current procedure for an annunciated lift dump failure is to increase landing distance by a factor of 1.53. In two recent accidents of these airplanes, the lift dump spoilers failed to deploy when commanded after touchdown.

Whether loss of lift dump is annunciated or unannunciated after touchdown, the pilot (in most instances) does not have enough time to take effective corrective action.

The FAA issued AD 2003–07–09 (68 FR 16203) on March 27, 2003, affecting certain Model 390 airplanes. However, airplane serial numbers RB–18 through RB–24 included in this AD were inadvertently omitted from AD 2003–07–09.

What Are the Consequences if the Condition Is Not Corrected?

Without requiring the use of necessary flight information, runway overruns based on insufficient wheel braking could occur if the lift dump spoilers do not operate after landing touchdown. This could result in reduced or loss of control of the airplane.

Is There Service Information That Applies to This Subject?

Raytheon has issued Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003BTC5A1, revised March 24, 2003. This document:

—Replaces the existing landing distance and brake energy charts with ones that reflect landing performance without the effects of lift dump spoilers; and

—Modifies all operating limitations to specify the use of these landing charts in determining the maximum landing weight.

Raytheon is working toward a design that would eliminate the need for this Temporary AFM Change.

The FAA's Determination and an Explanation of the Provisions of This AD

What Has FAA Decided?

The FAA has reviewed all available information, including the service information referenced above; and determined that:

—The unsafe condition referenced in this document exists or could develop on other Raytheon Model 390 airplanes of the same type design;

—The information specified in the previously-referenced service information should be incorporated into the FAA-approved AFM; and

—AD action should be taken in order to correct this unsafe condition.

What Does This AD Require?

This AD requires you to incorporate the previously-referenced service information into the FAA-approved AFM, which would add requirements for "Landing Performance for Operation of the Airplane with Lift Dump Inoperative."

As specified previously, Raytheon is working toward a design that would eliminate the need for these requirements. If completed, FAA will evaluate and determine whether additional regulatory action is necessary.

In preparation of this rule, we contacted type clubs and aircraft operators to obtain technical information and information on operational and economic impacts. We did not receive any information through these contacts. If received, we would have included, in the rulemaking docket, a discussion of any information that may have influenced this action.

How Does the Revision to 14 CFR Part 39 Affect This AD?

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

Will I Have the Opportunity To Comment Prior to the Issuance of the Rule?

Because the unsafe condition described in this document could result in reduced or loss of control of the airplane during landing operations, we find that notice and opportunity for public prior comment are impracticable. Therefore, good cause exists for making this amendment effective in less than 30 days.

Comments Invited

How Do I Comment on This AD?

Although this action is in the form of a final rule and was not preceded by notice and opportunity for public comment, FAA invites your comments on the rule. You may submit whatever written data, views, or arguments you choose. You need to include the rule's docket number and submit your comments to the address specified under the caption **ADDRESSES.** We will consider all comments received on or before the closing date specified above. We may amend this rule in light of comments received. Factual information that supports your ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether we need to take additional rulemaking action.

Are There Any Specific Portions of the AD I Should Pay Attention to?

We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. You may view all comments we receive before and after the closing date of the rule in the Rules Docket. We will file a report in the Rules Docket that summarizes each FAA contact with the public that concerns the substantive parts of this AD.

How Can I Be Sure FAA Receives My Comment?

If you want us to acknowledge the receipt of your comments, you must include a self-addressed, stamped postcard. On the postcard, write "Comments to Docket No. 2003-CE–17-AD." We will date stamp and mail the postcard back to you.

Regulatory Impact

Does This AD Impact Various Entities?

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

Does This AD Involve a Significant Rule or Regulatory Action?

We have determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a significant regulatory action under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared

and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. FAA amends § 39.13 by adding a new airworthiness directive (AD) to read as follows:

2003–10–05 Raytheon Aircraft Company: Amendment 39–13150; Docket No. 2003–CE–17–AD.

(a) *What airplanes are affected by this AD?* This AD applies to Model 390 airplanes, serial numbers RB–18 through RB–24, that are certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the airplanes identified in paragraph (a) of this AD must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to require the use of necessary flight information to prevent runway overruns based on insufficient wheel braking if the lift dump spoilers do not operate after landing touchdown. This could result in reduced or loss of control of the airplane.

(d) *What must I do to address this problem?* To address this problem, you must accomplish the following actions:

Actions	Compliance
(1) Incorporate information into the FAA-approved Airplane Flight Manual (AFM) that would add requirements for "Landing Performance for Operation of the Airplane with Lift Dump Inoperative." Accomplish this action by inserting Raytheon Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003BTC5A1, revised March 24, 2003.	Within the next 5 hours time-in-service (TIS) after May 30, 2003 (the effective date of this AD).
(2) The owner/operator holding at least a pnvate pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may incorporate into the AFM the information specified in paragraph (d)(1) of this AD. Make an entry into the aircraft records showing compliance with this portion of the AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).	Within the next 5 hours TIS after May 30, 2003 (the effective date of this AD).

(e) *Are special flight permits authorized for this AD?* Special flight permits are not authorized for this AD. On July 10, 2002, FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs FAA's AD system. Part of this amendment to 14 CFR part 39 authorized special flight permits for all ADs, unless specified otherwise. Because the owner/operator holding an appropriate pilot's license may accomplish the action of this AD and the compliance time is 5 hours TIS after the AD effective date, FAA has determined that special flight permits are not necessary for this AD.

(f) *Can I comply with this AD in any other way?* To use an alternative method of compliance or adjust the compliance time, follow the procedures in 14 CFR 39.19. Send these requests to the Manager, Wichita Aircraft Certification Office (ACO). For information on any already approved alternative methods of compliance, contact Derek Morgan, Flight Test Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4172; facsimile: (316) 946–4107.

(g) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with Raytheon Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003BTC5A1, revised March 24, 2003. The Director of the Federal Register previously approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51 as of April 7, 2003 (68 FR 16205, April 3, 2003). You can get copies from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140. You may view this information at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) *When does this amendment become effective?* This amendment becomes effective on May 30, 2003.

Issued in Kansas City, Missouri, on May 12, 2003.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–12240 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30368; Amdt. No. 3058]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These change are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective May 16, 2003. the compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 16, 2003.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

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

For Purchase—Individial SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 965–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation's Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained in the content of the following FDC/P NOTAMs for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. When conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been canceled.

The FDC/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs by FED/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPs. Because of the close and immediate relationship between these SIAPs and safety in air commerce. I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, and Navigation (air).

Issued in Washington, DC on May 9, 2003.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35.

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	Subject
04/21/03	LA	MONROE	MONROE REGIONAL	3/3081	VOR/DME RWY 4, AMDT 1
04/21/03	LA	MONROE	MONROE REGIONAL	3/3082	VOR RWY 4, AMDT 17A
04/21/03	TX	WICHITA FALLS	SHEPPARD AFB/WICHITA FALLS MUNI.	3/3091	RNAV (GPS) RWY 33L, ORIG
04/25/03	AZ	SAFFORD	SAFFORD REGIONAL	3/3202	GPS RWY 12, ORIG
04/25/03	AZ	SAFFORD	SAFFORD REGIONAL	3/3203	GPS RWY 30, ORIG

FDC date	State	City	Airport	FDC No.	Subject
04/29/03	AR	MOUNTAIN VIEW	MOUNTAIN VIEW WILCOX MEMORIAL FIELD.	3/3278	NDB–A, AMDT 2A
04/30/03	KY	LONDON	LONDON-CORBIN ARPT-MAGEE FIELD.	3/3120	GPS RWY 5, ORIG–A
04/30/03	KY	LONDON	LONDON-CORBIN ARPT-MAGEE FIELD.	3/3121	GPS RWY 23, ORIG–A
04/30/03	KY	LONDON	LONDON-CORBIN ARPT-MAGEE FIELD.	3/3122	VOR RWY 5, AMDT 12C
04/30/03	KY	LONDON	LONDON-CORBIN ARPT-MAGEE FIELD.	3/3123	VOR/DME RNAV RWY 5, AMDT 3C
04/30/03	AZ	PHOENIX	PHOENIX SKY HARBOR INTL	3/3313	RNAV (GPS) RWY 25R, ORIG
04/30/03	AZ	PHOENIX	PHOENIX SKY HARBOR INTL	3/3314	RNAV (GPS) RWY 25L, ORIG
04/30/03	AZ	PHOENIX	PHOENIX SKY HARBOR INTL	3/3315	ILS RWY 25L, AMDT 1A
05/06/03	NY	ALBANY	ALBANY INTL	3/3407	ILS RWY 19, AMDT 21B
05/06/03	TX	CLEVELAND	CLEVELAND MUNI	3/3448	VOR–A, AMDT 4A

[FR Doc. 03–12174 Filed 5–15–03; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30367; Amdt. No. 3057]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective May 16, 2003. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 16, 2003.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The Flight Inspection Area Office which originated the SIAP; or,

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

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unneccesary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between

these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, and Navigation (air).

Issued in Washington, DC on May 9, 2003.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 92.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35.

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

** * * Effective July 10, 2003*

Carlsbad, CA, McClellan-Palomar, RNAV (GPS) RWY 24, Orig-A
Daggett, CA, Barstow-Daggett, RNAV (GPS) RWY 26, Orig-A
Los Angeles, CA, Los Angeles Intl, RNAV (GPS) RWY 7R, Orig-A
Los Angeles, CA, Los Angeles Intl, RNAV (GPS) RWY 7L, Orig-A
Oakland, CA, Metropolitan Oakland Intl, RNAV (GPS) RWY 29, Orig-A
Oakland, CA, Metropolitan Oakland Intl, RNAV (GPS) RWY 11, Orig-A
Ontario, CA, Ontario Intl, RNAV (GPS) RWY 8R, Orig-B
Ontario, CA, Ontario Intl, RNAV (GPS) RWY 8L, Orig-B
Ontario, CA, Ontario Intl, RNAV (GPS) RWY 26R, Orig-B
Ontario, CA, Ontario Intl, RNAV (GPS) RWY 26L, Orig-A
Palmdale, CA, Palmdale Production Flt/Test Instln AF Plant 42, RNAV (GPS) RWY 25, Orig-A
Ramona, CA, Ramona, RNAV (GPS) RWY 9, Orig
Ramona, CA, Ramona, (GPS) RWY 9, Orig-A, CANCELLED
San Francisco, CA, San Francisco Intl, RNAV (GPS) Z RWY 19R, Orig-A
San Francisco, CA, San Francisco Intl, RNAV (GPS) Z RWY 19L, Orig-A
San Francisco, CA, San Francisco Intl, RNAV (GPS) Z RWY 10R, Orig-A
San Francisco, CA, San Francisco Intl, RNAV (GPS) RWY 28R, Amdt 1A
San Francisco, CA, San Francisco Intl, RNAV (GPS) RWY 28L, Orig-A
San Jose, CA, Norman Y. Mineta-San Jose International, RNAV (GPS) RWY 11, Orig-A
San Jose, CA, Norman Y. Mineta-San Jose International, RNAV (GPS) RWY 29, Orig-A
San Jose, CA, Norman Y. Mineta-San Jose International, RNAV (GPS) RWY 30R, Orig-A
Fort Lauderdale, FL, Fort Lauderdale-Hollywood Intl, RNAV (GPS) RWY 9L, Orig-A
Fort Lauderdale, FL, Fort Lauderdale-Hollywood Intl, RNAV (GPS) RWY 9R, Orig-A
Fort Lauderdale, FL, Fort Lauderdale-Hollywood Intl, RNAV (GPS) RWY 13, Orig-A
Fort Lauderdale, FL, Fort Lauderdale-Hollywood Intl, RNAV (GPS) RWY 27R, Orig-A
Miami, FL, Miami Intl, RNAV (GPS) RWY 9L, Orig-B
Miami, FL, Miami Intl, RNAV (GPS) RWY 9R, Orig-B
Miami, FL, Miami Intl, RNAV (GPS) RWY 12, Orig-C
Miami, FL, Miami Intl, RNAV (GPS) RWY 27L, Orig-B
Miami, FL, Miami Intl, RNAV (GPS) RWY 27R, Orig-B
Miami, FL, Miami Intl, RNAV (GPS) RWY 30, Orig-C
Naples, FL, Naples Muni, RNAV (GPS) RWY 5, Amdt 1A
Naples, FL, Naples Muni, RNAV (GPS) RWY 23, Orig-A
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, VOR RWY 14, Amdt 16C
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, VOR RWY 22, Amdt 10D
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, VOR RWY 32, Amdt 8D
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 32, Orig
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 22, Orig
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 14, Orig
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 4, Orig
Baxley, GA, Baxley Muni, NDB RWY 8, Amdt 1
Baxley, GA, Baxley Muni, GPS RWY 8, Orig, CANCELLED
Baxley, GA, Baxley Muni, RNAV (GPS) RWY 8, Orig
Montezuma, GA, Dr. C.P. Savage Sr., NDB RWY 18, Amdt 2
Montezuma, GA, Dr. C.P. Savage Sr., RNAV (GPS) RWY 36, Orig
Montezuma, GA, Dr. C.P. Savage Sr., RNAV (GPS) RWY 18, Orig
Hilo, HI, Hilo Intl, RNAV (GPS) RWY 26, Orig-A
Kailua-Kona, HI, Kona Intl at Keahole, RNAV (GPS) RWY 17, Orig-A
Kailua-Kona, HI, Kona Intl at Keahole, RNAV (GPS) Y RWY 35, Orig-A
Kailua-Kona, HI, Kona Intl at Keahole, RNAV (GPS) Z RWY 35, Orig-A
Hazard, KY, Wendell H. Ford, VOR/DME RWY 14, Amdt 1
Hazard, KY, Wendell H. Ford, GPS RWY 14, Orig, CANCELLED
Hazard, KY, Wendell H. Ford, RNAV (GPS) RWY 14, Orig
Jackson, KY, Julian Carroll, RNAV (GPS) RWY 1, Orig
Jackson, KY, Julian Carroll, VOR/DME RWY 1, Amdt 2
Homer, LA, Homer Municipal, NDB RWY 12, Amdt 2
Homer, LA, Homer Municipal, RNAV (GPS) RWY 12, Orig
Homer, LA, Homer Municipal, RNAV (GPS) RWY 30, Orig
Homer, LA, Homer Municipal, GPS RWY 30, Orig-B, CANCELLED
Portland, ME, Portland Intl Jetport, RNAV (GPS) RWY 36, Orig-A
Presque Isle, ME, Northern Maine Regional Airport at Presque Isle, RNAV (GPS) Z RWY 1, Orig-A
Boston, MA, General Edward Lawrence Logan Intl, RNAV (GPS) RWY 4R, Orig-D
Boston, MA, General Edward Lawrence Logan Intl, RNAV (GPS) RWY 15R Orig-B
Boston, MA, General Edward Lawrence Logan Intl, RNAV (GPS) RWY 27, Orig-A
Boston, MA, General Edward Lawrence Logan Intl, RNAV (GPS) RWY 33L, Orig-A
Provincetown, MA, Provincetown Muni, RNAV (GPS) RWY 7, Orig-A
Sault Ste Marie, MI, Chippewa County Intl, RNAV (GPS) RWY 16, Orig-A
Sault Ste Marie, MI, Chippewa County Intl, RNAV (GPS) RWY 34, Orig-A
Sidney, NE, Sidney Muni, VOR/DME OR TACAN RWY 12, Amdt 4B
Sidney, NE, Sidney Muni, RNAV (GPS) RWY 12, Orig
Sidney, NE, Sidney Muni, RNAV (GPS) RWY 30, Orig
Sidney, NE, Sidney Muni, GPS RWY 30, Orig-B CANCELLED

Ely, NV, Ely Airport-Yelland Field, VOR-A, Amdt 7
Ely, NV, Ely Airport-Yelland Field, VOR/DME–C, Amdt 2
Ely, NV, Ely Airport-Yelland Field, RNAV (GPS) RWY 18, Orig
Ely, NV, Ely Airport-Yelland Field, GPS RWY 18, Orig-A, CANCELLED
Henryetta, OK, Henryetta Muni, NDB RWY 36, Amdt 3
Henryetta, OK, Henryetta Muni, RNAV (GPS) RWY 36, Orig
Henryetta, OK, Henryetta Muni, GPS RWY 36, Orig-B, CANCELLED
Oklahoma City, OK, Will Rogers World, RNAV (GPS) RWY 13, Amdt 1
Hermiston, OR, Hermiston Muni, VOR/DME–A, Amdt 3
Hermiston, OR, Hermiston Muni, RNAV (GPS)–B, Orig
San Juan, PR, Luis Munoz Marin Intl, RNAV (GPS) RWY 8, Orig-A
San Juan, PR, Luis Munoz Marin Intl, RNAV (GPS) RWY 10, Orig-B
San Juan, PR, Luis Munoz Marin Intl, RNAV (GPS) RWY 26, Orig-A
Angleton/Lake Jackson, TX, Brazoria County, RNAV (GPS) RWY 17, Amdt 1A
Angleton/Lake Jackson, TX, Brazoria County, RNAV (GPS) RWY 35, Amdt 1A
Del Rio, TX, Del Rio Intl, RNAV (GPS) RWY 13, Orig-B
Harlingen, TX, Valley Intl, RNAV (GPS) RWY 13, Orig-B
Harlingen, TX, Valley Intl, RNAV (GPS) RWY 17L, Orig-B
Harlingen, TX, Valley Intl, RNAV (GPS) RWY 1R, Orig-B
Harlingen, TX, Valley Intl, RNAV (GPS) RWY 31, Orig-A
Harlingen, TX, Valley Intl, RNAV (GPS) RWY 35L, Orig-A
San Angelo, TX, San Angelo Regional/Mathis Field, VOR RWY 21, Amdt 17
San Angelo, TX, San Angelo Regional/Mathis Field, RNAV (GPS) RWY 21, Orig
San Angelo, TX, San Angelo Regional/Mathis Field, RNAV (GPS) RWY 21, Orig, CANCELLED
San Antonio, TX, San Antonio Intl, RNAV (GPS) RWY 3, Orig-A
San Antonio, TX, San Antonio Intl, RNAV (GPS) RWY 12R, Orig-A
San Antonio, TX, San Antonio Intl, RNAV (GPS) RWY 21, Orig-A
San Antonio, TX, San Antonio Intl, RNAV (GPS) RWY 30L, Orig-A
Burlington, VT, Burlington Intl, RNAV (GPS) Z RWY 15, Orig-A
Christiansted, VI, Henry E. Rohlsen, RNAV (GPS) RWY 10, Orig-B
Moses Lake, WA, Grant County Intl, RNAV (GPS) RWY 32R, Orig-A
Spokane, WA, Spokane Intl, RNAV (GPS) RWY 3, Orig-D
Spokane, WA, Spokane Intl, RNAV (GPS) RWY 21, Orig-C

** * * Effective 15 May 2003*

Somerset, KY, Somerset-Pulaski County J.T. Wilson Field, RNAV (GPS) RWY 22, Orig

[FR Doc. 03–12175 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF STATE

22 CFR Part 32

[Public Notice 4365]

Stolen Property Under Treaty With Mexico

AGENCY: Department of State.

ACTION: Direct final rule.

SUMMARY: This final rule removes regulations which describe the documents required when making a request for a stolen vehicle under the Convention of October 6, 1936, between the United States and Mexico for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes, or Component Parts of Any of Them. This treaty is no longer in force; and therefore, the regulations implementing this treaty are obsolete.

DATES: This rule is effective July 15, 2003, without further action, unless adverse comment is received by June 16, 2003. If adverse comment is received, the Department of State will publish a timely withdrawal of the final rule in the **Federal Register**.

ADDRESSES: Send comments to Mike Meszaros, Overseas Citizen Services, A/OCS, Department of State, Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Mike Meszaros, Overseas Citizen Services, Department of State, 202–312–9750.

SUPPLEMENTARY INFORMATION: This rule removes part 32 of title 22 of the Code of Federal Regulations. Part 32 describes the documents required when making a request for the return of stolen vehicles under the Convention of October 6, 1936, between the United States and Mexico for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes, or Component Parts of Any of Them. The 1936 treaty did not describe what documents should accompany a request for a stolen vehicle. Instead the two governments agreed to similar regulations describing what documents would accompany a request for return of a stolen vehicle (*see* **Federal Register** Doc. 38–2527, filed August 29, 1938). The Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft, signed at Washington on January 15, 1981, and entered into force on June 28, 1983, replaced the 1936 treaty. The 1981 treaty specifically describes the documents that are required in connection with a request for the return of a stolen vehicle (*see* Article III), and no other regulations are needed to implement the 1981 treaty. Therefore, the regulations set forth in part 32 of title 22 of the Code of Federal Regulations are obsolete and their removal is appropriate.

Regulatory Analysis and Notices

This amendment involves a foreign affairs function of the United States and, therefore, is not subject to the procedures required by 5 U.S.C. 553 and 554. It is exempt from review under Executive Order 12866 but has been reviewed internally by the Department to ensure consistency with the purposes thereof. This rule does not require analysis under the Regulatory Flexibility Act or the Unfunded Mandates Reform Act. It has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996. It will not have substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this rule does not have sufficient federalism implications to warrant application of the consultation provisions of Executive Orders 12372 and 13132. This rule does not impose any new reporting or recordkeeping information collection requirements under the Paperwork Reduction Act, 44 U.S.C. chapter 35.

List of Subjects in 22 CFR Part 32

Alien property, Mexico, Stolen property, Treaties, Vehicles.

■ Accordingly, pursuant to the President's authority under the United States Constitution to conduct the foreign relations of the United States (Article II, section 2) as exercised by the Secretary of State on a day-to-day basis under 22 U.S.C. 2656 and pursuant to the authority of 22 U.S.C. 2651a, 22 CFR chapter I, subchapter D is amended by removing part 32 as follows:

PART 32—[REMOVED]

■ Part 32 is removed.

Dated: May 7, 2003.

Grant S. Green, Jr.,

Under Secretary for Management, Department of State.

[FR Doc. 03–12294 Filed 5–15–03; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA45

Financial Crimes Enforcement Network; Delegation of Enforcement Authority Regarding the Foreign Bank Account Report Requirements

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN is amending the regulations implementing the Bank Secrecy Act to reflect that enforcement authority with respect to the foreign bank account report requirements of 31 CFR part 103 has been delegated from FinCEN to the Commissioner of the Internal Revenue Service (IRS).

DATES: This final rule is effective May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Office of Chief Counsel, FinCEN, (703) 905–3590 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Bank Secrecy Act (BSA), Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311 *et seq.*, authorizes the Secretary of the Treasury, *inter alia*, to issue regulations requiring financial institutions and other persons to keep records and file reports that have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counterintelligence activitites, to protect against international terrorism, and to enforce any reporting or recordkeeping requirement through various means, including the assessment and collection of civil penalties. Regulations implementing the authority of the BSA appear at 31 CFR part 103. FinCEN, a bureau within the U.S. Department of the Treasury, administers and enforces the BSA and its implementing provisions pursuant to a delegation by the Secretary of the Treasury.

FinCEN recently delegated to the IRS the authority to enforce the FBAR requirements of 31 CFR part 103. Enforcement authority was delegated by means of a Memorandum of Agreement between FinCEN and the IRS, and includes the authority to assess and collect civil penalties for noncompliance with FBAR requirements. The reasons for delegating enforcement authority were laid out in Treasury/FinCEN's April 2002 report to Congress on the FBAR requirements, which was required to be submitted by § 361(b) of the USA PATRIOT Act of 2001, Pub. L. 107–56. Among the reasons cited for the possible delegation of enforcement authority were the nature of the FBAR requirements (*i.e.*, unlike with other BSA reports, the overwhelming majority of FBARs are filed by individual taxpayers, rather than financial institutions) and the greater resources available to the IRS to devote to FBAR compliance. IRS previously had been delegated the authority to investigate possible violations of 31 CFR 103.24. FinCEN is issuing this final rule to amend the relevant BSA regulations to reflect the delegation of FBAR enforcement authority.

II. Administrative Procedure Act

This final rule is being issued without notice and an opportunity for comment because it is a procedural rule, rather than a substantive rule. The delegation of enforcement authority described in this document has no substantive impact on those persons subject to the FBAR reporting and recordkeeping requirements. Rules of agency organization, procedure, or practice are not subject to notice and comment under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). *See* 5 U.S.C. 553(b)(3)(A).

III. Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply to this final rule because the rule is not subject to the notice and comment requirements of the Administrative Procedure Act.

IV. Paperwork Reduction Act

This final rule contains no collection of information for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

V. Executive Order 12866

It has been determined that this final rule is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks and banking, Currency, Investigations, Law Enforcement, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5332; title III, secs. 312, 314, 352, Pub. L. 107–56, 115 Stat. 307.

■ 2. Section 103.56 is amended by adding new paragragh (g) to read as follows:

§ 103.56 Enforcement.

* * * * *

(g) The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 103.24 and 103.32 of this part has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and §§ 103.24 and 103.32 of this part, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 103.57; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2)) of this section); employ the summons power of subpart F of part 103; issue administrative rulings under subpart G of part 103; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

3. Section 103.72 is amended by revising paragraph (b) to read as follows:

(b) *Internal Revenue Service.* Except with respect to § 103.23 of this part, the Commissioner, the Deputy Commissioner, or a delegate of either official, and, for the purposes of perfecting seizures and forfeitures related to civil enforcement of this part, the Chief (Criminal Investigation) or a delegate.

Dated: May 8, 2003.

James F. Sloan,

Director, Financial Crimes Enforcement Network.

[FR Doc. 03–12211 Filed 5–15–03; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Prince William Sound 03–001]

RIN 2115–97

Security Zone: Port Valdez and Valdez Narrows, Valdez, AK

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule; request for comments.

SUMMARY: The Coast Guard is establishing a temporary security zone encompassing the Trans-Alaska Pipeline (TAPS) Valdez Terminal Complex, Valdez, Alaska and TAPS Tank Vessels and a security zone in the Valdez Narrows, Port Valdez, Alaska. The security zones are necessary to protect the Alyeska Marine Terminal and Vessels from damage or injury from sabotage, destruction or other subversive acts. Entry of vessels into these security zones is prohibited unless specifically authorized by the Captain of the Port, Prince William Sound, Alaska.

DATES: This rule is effective from January 1, 2003 until June 30, 2003. Comments and related material must reach the Coast Guard by June 15, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket are part of docket COTP Prince William Sound 03–001 and are available for inspection or copying at U.S. Coast Guard Marine Safety Office, PO Box 486, Valdez, Alaska 99686, between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lt. Chris Beadle, U.S. Coast Guard Marine Safety Office Valdez, Alaska, (907) 835–7222.

SUPPLEMENTARY INFORMATION:

Regulatory History

A notice of proposed rulemaking (NPRM) was not published for this regulation. In accordance with 5 U.S.C. 553(b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. The Coast Guard is taking this action for the immediate protection of the national security interests in light or terrorist acts perpetrated on September 11, 2001. Also, in accordance with 5 U.S.C. 553(d)(3), the Coast Guard finds good cause to exist for making this regulation effective less than 30 days after publication in the **Federal Register**. Publication of a notice of proposed rulemaking and delay of effective date would be contrary to the public interest because immediate action is necessary to provide for the safety of the TAPS terminal and TAPS tank vessels. On November 7, 2001, we published three temporary final rules in the **Federal Register** (66 FR 56208, 56210, 56212) that created security zones effective through June 1, 2002. The section numbers and titles for these zones are—

§ 165.T17–003—Security zone; Trans-Alaska Pipeline Valdez Terminal Complex, Valdez, Alaska,

§ 165.T17–004—Security zones; Captain of the Port Zone, Prince William Sound, Alaska.

Then on June 4, 2002, we published a temporary final rule (67 FR 38389) that established security zones to replace these security zones that expired June 1, 2002. That rule issued in June, which expired July 30, 2002, created temporary § 165.T17–009, entitled "Port Valdez and Valdex Narrows, Valdez, Alaska".

Then on July 30, 2002 we published a temporary final rule rule (67 FR 19359) that established security zones to extend the temporary security zones that would have expired July 30, 2002. This extension was to allow for a Notice of Proposed Rulemaking process to be completed for permanent security zones to replace the temporary zones. Then on October 22, 2002, we published the Notice of Proposed Rulemaking that sought public comment on establishing the temporary security zones as permanent security zones. The comment period for this NPRM ended December 23, 2002. Although no comments were received that would result in changes to the proposed rule, an administrative omission was found that resulted in the need to issue a Supplemental Notice of Proposed Rulemaking (SNPRM) to address the "Collection of Information" section of the NPRM. This temporary final rule extends the temporary security zones to allow for the SNPRM process to be completed.

Discussion of the Rule

This temporary final rule establishes three security zones. The Trans-Alaska Pipeline (TAPS) Valdez Marine Terminal Security zone encompasses the waters of Port Valdez between Allison Creek to the east and Sawmill Spit to the west and offshore to marker buoys A and B (approximately 1.5 nautical miles offshore from the TAPS Terminal). The Tanker Moving Security Zone encompasses the waters within 200 yards of a TAPS Tanker within the Captain of the Port, Prince William Sound Zone. The Valdez Narrows Security Zone encompasses the waters 200 yards either side of the Tanker Optimum Trackline through Valdez Narrows between Entrance Island and Tongue Point. This zone is enforced only when a TAPS Tanker is in the zone. This temporary final rule reflects the changes to 33 CFR part 1701 submitted for regulatory review and publication as a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**. The Coast Guard has worked closely with local and regional users of Port Valdez and Valdez Narrows waterways to develop these security zones and the NPRM in order to mitigate the impact on commercial and recreational users. This temporary final rule establishes a uniform transition from the temporary operating zones while the NPRM and SNPRM process is completed.

Request for Comments

Although the Coast Guard has good cause in implementing this regulation without a notice of proposed rulemaking, we want to afford the maritime community the opportunity to participate in this rulemaking by submitting comments and related material regarding the size and boundaries of these security zones in order to minimize unnecessary burdens. If you do so, please include your name and address, identify the docket number for this rulemaking, COTP Prince William Sound 03–001, indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 81.2 by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this temporary final rule in view of them.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies

and procedures of DOT is unnecessary. Economic impact is expected to be minimal because of the short duration of this rule and the season in which it is in effect.

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. The number of small entities impacted by this rule is expected to be minimal because of the short duration of the rule. Since the time frame this rule is in effect may cover commercial harvests of fish in the area, the entities most likely affected are commercial and native subsistence fishermen. The Captain of the Port will consider applications for entry into the security zone on a case-by-case basis; therefore, it is likely that very few, if any, small entities will be impacted by this rule. Those interested may apply for a permit to enter the zone by contacting Marine Safety Office, Valdez at the above contact number.

Assistant for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in 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 contains no new information collection requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 13132 and has determined that this temporary final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Unfunded Mandates Reform Act

The Unfunded Mandate 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 this 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(b0(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 create an environmental risk to health or risk to safety that may 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. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211

Environment

The Coast Guard considered the environmental impact of this rule and concluded that under Figures 2–1 paragraph 34(g) of Commandant Instruction M16745.1D, this rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Safety measures, Vessels, Waterways.

■ For the reasons set forth in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

■ 2. A new temporary § 165.T17–014 is added to read as follows:

§ 165.T17–016 Port Valdez and Valdez Narrows, Valdez, Alaska-security zones.

(a) The following areas are security zones—

(1) Trans-Alaska Pipeline (TAPS) Valdez Terminal complex (Terminal), Valdez, Alaska and TAPS Tank Vessels. All enclosed waters enclosed within a line beginning on the southern shoreline of Port Valdez at 61°042573 N, 146°262203 W; thence northerly to 61°062303 N, 146°262203 W; thence east to 61°062303 N, 146°212153 W, south to 61°02073 N, 146°212153 W; thence west along the shoreline and including the area 2000 yards inland along the shoreline to the beginning point. This security zone encompasses all waters approximately 1 mile north, east and west of the TAPS Terminal between Allison Creek (61°052073 N, 146°212153 W) and Sawmill Spit (61°042573 N, 146°262203 W).

(2) Tank Vessel Moving Security Zone. All waters within 200 yards of

any TAPS tank vessel maneuvering to approach, moor, unmoor or depart the TAPS Terminal or is transiting, maneuvering, laying to or anchored within the boundaries of the Captain of the Port, Prince William Sound Zone described in 33 CFR 3.85(b).

(3) Valdez Narrows, Port Valdez, Valdez, Alaska. All waters within 200 yards of the Valdez Narrows Tanker Optimum Track line bounded by a line beginning at 61°05216.03 N, 146°37220.03 W; thence south west to 61°04200.03 N, 146°39252.03 W; thence southerly to 61°02233.53 N, 146°41228.03 W; thence north west to 61°02240.53 N, 146°41247.53 W; thence north east to 61°04206.03 N, 146°40214.53 W; thence north east to 61°05223.03 N, 146°37240.03 W; thence south east back to the starting point at 61°05216.03 N, 146°37220.03.

(i) The Valdez Narrows Tanker Optimum Track line is a line commencing at 61°05223.03 N, 146°37222.53 W; thence south westerly to 61°04203.23 N, 146°40203.23 W; thence southerly to 61°032003 N, 146°412123W.

(ii) This security zone encompasses all waters approximately 200 yards either side of the Valdez Narrows Optimum Track line.

(b) Effective dates. This section is effective from January 1, 2003 until June 30, 2003.

(c) Authority. In addition to 33 U.S.C. 1281 and 49 CFR 1.46, the authority for this section includes 33 U.S.C. 1226.

(d) Regulations. (1) The general regulations governing security zones contained in 33 CFR 165.33 apply.

(2) Tank vessels transiting directly to the TAPS terminal complex, engaged in the movement of oil from the terminal or fuel to the terminal, and vessels used to provide assistance or support to the tank vessels directly transiting to the terminal, or to the terminal itself, and that have reported their movements to the Vessel Traffic Service may operate as necessary to ensure safe passage of tank vessels to and from the terminal.

(3) All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port and the designated on-scene patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a vessel displaying a U.S. Coast Guard ensign by siren, radio, flashing light, or other means, the operator of the vessel shall proceed as directed. Coast Guard Auxiliary and local or state agencies may be present to inform vessel operators of the requirements of this section and other applicable laws.

Dated: December 30, 2002.

M.A. Swanson,

Commander, United States Coast Guard, Captain of the Port, Prince William Sound, Alaska.

[FR Doc. 03–12183 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–248–2003217(a); FRL–7498–6]

Approval and Promulgation of Implementation Plans: Revisions to Tennessee State Implementation Plan: Transportation Conformity Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a revision to the Tennessee State Implementation Plan (SIP) submitted on March 19, 2002, with the exception of one state regulation pertaining to triggers. The revision contains the transportation conformity rule pursuant to the Clean Air Act as amended in 1990 (Act), including detailed consultation procedures for implementing the transportation conformity rule. The transportation conformity rule assures that projected emissions from transportation plans, improvement programs and projects in air quality nonattainment or maintenance areas stay within the motor vehicle emissions ceiling contained in the SIP. The transportation conformity SIP revision enables the State to implement and enforce the Federal transportation conformity requirement at the state level. This action streamlines the conformity process to allow direct consultation among agencies at the local level. This final approval action is limited to requirements for transportation conformity.

DATES: This direct final rule is effective July 15, 2003 without further notice, unless EPA receives adverse comment by June 16, 2003. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: All comments should be addressed to: Kelly Sheckler at the EPA, Region 4 Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

Copies of documents relative to this action are available at the following address for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Kelly Sheckler, (404) 562–9042.

Tennessee Department of Environment and Conservation, Air Pollution Control, 9th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243–1531.

FOR FURTHER INFORMATION CONTACT: Kelly Sheckler at (404) 562–9042, e-mail: *Sheckler.Kelly@epa.gov*

SUPPLEMENTARY INFORMATION: On March 19, 2002, Tennessee submitted a revision to the SIP, with the exception of one state regulation pertaining to triggers. The revision contains the transportation conformity rule pursuant to the Clean Air Act as amended in 1990 (Act), including detailed consultation procedures for implementing the transportation conformity rule. The information on this action is organized as follows:

I. Background

A. What Is a SIP?

The states, under section 110 of the Act, must develop air pollution regulations and control strategies to ensure that state air quality meets National Ambient Air Quality Standards (NAAQS) established by EPA. The Act, under section 109, established these NAAQS which currently address six criteria pollutants. These pollutants are: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each state must send these regulations and control strategies to EPA for approval and incorporation into the Federally enforceable SIP, which protects air quality and contains emission control plans for NAAQS nonattainment areas. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as

emission inventories, monitoring networks, and modeling demonstrations.

B. What Is the Federal Approval Process for a SIP?

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

Once a state rule, regulation, or control strategy is adopted, the state will send these provisions to EPA for inclusion in the Federally enforceable SIP. EPA must then determine the appropriate Federal action, provide public notice, and request additional public comment on the action. The possible Federal actions include approval, disapproval, conditional approval and limited approval/disapproval. If adverse comments are received, EPA must consider and address the comments before taking final action.

EPA incorporates state regulations and supporting information (sent under section 110 of the Act) into the Federally approved SIP through the approval action. EPA maintains records of all such SIP actions in the CFR at title 40, part 52, entitled "Approval and Promulgation of Implementation Plans." The EPA does not reproduce the text of the Federally approved state regulations in the CFR. They are "incorporated by reference," which means that the specific state regulation is cited in the CFR and is considered a part of the CFR the same as if the text were fully printed in the CFR.

C. What Is Transportation Conformity?

Conformity first appeared as a requirement in the Act's 1977 amendments (Pub. L. 95–95). Although the Act did not define conformity, it stated that no Federal department could engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which did not conform to a SIP which has been approved or promulgated.

The 1990 Amendments to the Act expanded the scope and content of the conformity concept by defining conformity to a SIP. Section 176(c) of the Act defines conformity as conformity to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards. Also, the Act states "that no Federal activity will: (1) Cause or contribute to any new violation of any standard in any area, (2) increase the frequency or severity of any existing violation of any standard in any area, or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." The requirements of section 176(c) of the Clean Air Act apply to all departments, agencies and instrumentalities of the Federal government. Transportation conformity refers only to the conformity of transportation plans, programs and projects that are funded or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. Chapter 53).

D. Why Must the State Submit a Transportation Conformity SIP?

A transportation conformity SIP is a plan which contains criteria and procedures for the State Department of Transportation (DOT), Metropolitan Planning Organizations (MPOs), and other state or local agencies to assess the conformity of transportation plans, programs and projects to ensure that they do not cause or contribute to new violations of a NAAQS in the area substantially affected by the project, increase the frequency or severity of existing violations of a standard in such area or delay timely attainment. 40 CFR part 51.390, subpart T requires states to submit a SIP that establishes criteria for conformity to EPA. 40 CFR part 93, subpart A, provides the criteria the SIP must meet to satisfy 40 CFR part 51.390.

EPA was required to issue criteria and procedures for determining conformity of transportation plans, programs, and projects to a SIP by section 176(c) of the Act. The Act also required the procedure to include a requirement that each state submit a revision to its SIP including conformity criteria and procedures. EPA published the first transportation conformity rule in the November 24, 1993, **Federal Register** (FR), and it was codified at 40 CFR part 51, subpart T and 40 CFR part 93, subpart A. The transportation conformity rule required the states to adopt and submit a transportation conformity SIP revision to the appropriate EPA Regional Office by November 25, 1994. The State of Tennessee submitted a transportation conformity SIP to the EPA Region 4 on November 15, 1994. EPA did not take action on this SIP because the Agency was in the process of revising the transportation conformity requirements. EPA revised the transportation conformity rule on August 7, 1995 (60 FR 40098), November 14, 1995 (60 FR 57179), and August 15, 1997 (62 FR 43780), and codified the revisions under 40 CFR part 51, subpart T and 40 CFR part 93, subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. of the Federal Transit Laws (62 FR 43780). EPA's action of August 15, 1997, required the states to change their rules and submit a SIP revision to EPA by August 15, 1998.

States may choose to develop in place of regulations, a memorandum of agreement (MOA) which establishes the roles and procedures for transportation conformity. The MOA includes the detailed consultation procedures developed for that particular area. The MOAs are enforceable through the signature of all the transportation and air quality agencies, including the Federal Highway Administration, Federal Transit Administration and the Environmental Protection Agency.

E. How Does Transportation Conformity Work?

The Federal or state transportation conformity rule applies to all NAAQS nonattainment and maintenance areas in the state. The MPO, the DOT (in absence of a MPO), State and local Air Quality Agencies , U.S. Environmental Protection Agency and U.S. Department of Transportation (USDOT) are involved in the process of making conformity determinations. Conformity determinations are made on programs and plans such as transportation improvement programs (TIP), transportation plans, and projects. The MPOs calculate the projected emissions that will result from implementation of the transportation plans and programs and compare those calculated emissions to the motor vehicle emissions budget established in the SIP. The calculated emissions must be equal to or smaller than the Federally approved motor vehicle emissions budget in order for USDOT to make a positive conformity determination with respect to the SIP.

II. Approval of the State Transportation Conformity Rule

A. What Did the State Submit?

The State of Tennessee chose to address the transportation conformity SIP requirements using state rules that incorporate by reference portions of the federal conformity rule and specific rules that provide the procedures for interagency consultation. The Transportation conformity rule, part 93.105, requires the state to develop specific procedures for consultation, resolution of conflict and public consultation. On March 19, 2002, the

State of Tennessee, through the Department of Environment and Conservation (DEC), submitted the rules for transportation conformity. DEC gave notice of rule-making proceedings to the public on April 6, 1998, held a public hearing on May 18, 1998 and the rules were approved by the Tennessee Air Pollution Control Board on September 13, 2000. These amendments to Department of Environment and Conservation Rule Chapter 1200–3–34, filed on August 31, 2001, became effective November 14, 2001.

B. What Is EPA Approving Today and Why?

EPA is approving the Tennessee transportation conformity rule submitted to the EPA Region 4 office on March 19, 2002, by the Technical Secretary of the Tennessee Air Pollution Control Board. One exception is the approval of one provision in 1200–3–34–.01 (2), where subpart A of the conformity rule 40 CFR part 93 is adopted by reference. 40 CFR part 93.104(e), was amended after the state went through its public adoption process. EPA amended 93.104(e) in August 2002, changing the starting point for eighteen month clocks from the date of SIP submittal to the date of adequacy determination of the motor vehicle emissions budgets. Refer to the August 6, 2002, final rule (67 FR 50808) for more details. Therefore, the Tennessee rule incorporating by reference the 40 CFR part 93, subpart A, will not include section 93.104(e).

Furthermore, Tennessee's incorporation by reference of the conformity rule did not include portions of the regulations affected by the federal court decision in *Environmental Defense Fund* v. *Environmental Protection Agency,* 167 F.3d 641 (D.C. Cir. 1999) and *Sierra Club* v. *EPA, et. al.,* 129 F. 3d 137 (D.C. Cir. 1997). These include the following sections: 93.102(c)(1), 93.102(d), 93.118(e)(1), 93.120(a)(2), 93.121(a)(1) and 93.124(b). For all those portions not incorporated by reference, the Federal transportation conformity rule will take precedence.

EPA has evaluated this SIP revision and determined that the SIP requirements of the Federal transportation conformity rule, as described in 40 CFR part 51, subpart T and 40 CFR part 93, subpart A, have been met. Therefore, EPA is approving this revision to the Tennessee SIP.

C. How Did the State Satisfy the Interagency Consultation Process (40 CFR 93.105)?

EPA's rule requires the states to develop their own processes and procedures for interagency consultation among Federal, state, and local agencies and resolution of conflicts meeting the criteria of 40 CFR 93.105. The SIP revision must include the process and procedures to be followed by the MPOs, DOT, Federal Highway Administration (FHWA), Federal Transit Administration (FTA), local transit operators, the state and local air quality agencies and EPA before making conformity determinations. The transportation conformity SIP revision must also include processes and procedures for the state and local air quality agencies and EPA to coordinate the development of applicable SIPs with MPOs, state DOTs, FHWA and FTA.

The State of Tennessee developed its statewide consultation rule based on the elements contained in state rule 1200–3–34 (3). The consultation process developed by the Tennessee Air Pollution Control Division (TAPCD) is unique to the state of Tennessee and is enforceable, effective November 14, 2001, signed by the City of Nashville Secretary of State on January 29, 2002.

III. Final Action

EPA is approving the aforementioned changes to the Tennessee SIP, with the exception of the incorporation of reference to 40 CFR part 93.104(e) in 1200–3–34–.01(3) which requires the state to comply with outdated conformity rule trigger provisions, because the state adopted this regulation prior to EPA's rulemaking amendment on August 6, 2002.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective July 15, 2003 without further notice unless the Agency receives adverse comments by June 16, 2003.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on July 15, 2003 and no further action will be taken on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. 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 July 15, 2003. 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).)

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 July 15, 2003. 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, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 29, 2003.

Stanley L. Meiburg,

Acting Regional Administrator, Region 4.

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

PART 52—[AMENDED]

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

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

Subpart RR—Tennessee

■ 2. Section 52.2220(c) is amended by adding in numerical order a new chapter heading No. "1200–3–34 Conformity", and an entry for "1200–3–34–.01" to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED TENNESSEE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
		Chapter 1200–3–34 Conformity		
Section 1200–3–34–.01.	Conformity of Transportation Plans, Programs, and Projects.	November 14, 2001.	May 16, 2003. [Insert citation of publication].	Except for the incorporation by reference of 40 CFR 93.104(e) of the Transportation Confirmity Rule.

* * * * *

[FR Doc. 03–12178 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[DC052–7007, MD143–3102, VA129–5065; FRL–7499–9]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; Post 1996 Rate-of-Progress Plans and One-Hour Ozone Attainment Demonstrations; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: This document corrects an error and clarifies the preamble language of EPA's conditional approval of the severe ozone nonattainment area State Implementation Plan (SIP) revisions for the Metropolitan Washington severe ozone nonattainment area. This document also corrects several typographical errors in the preamble language of this conditional approval.

EFFECTIVE DATE: May 19, 2003.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at *cripps.christopher.@epa.gov.*

SUPPLEMENTARY INFORMATION:
Throughout this document wherever "we," or "our" are used we mean EPA.

Date Conditional Approval Might Convert to Disapproval

On April 17, 2003, (68 FR 19106), we published a final rulemaking action announcing our conditional approval of severe ozone nonattainment area State Implementation Plan (SIP) revision for the Metropolitan Washington severe ozone nonattainment area. In the final rule language which is found on page 19131 of the April 17, 2003, final rule, EPA conditionally approved each Washington area jurisdiction's severe area SIP revisions contingent on that jurisdiction submitting SIP revisions by April 17, 2004 that satisfy certain conditions enumerated in the final rule text. In the second sentence of the Final Action section of the preamble on page 19130 in the first column of this April 17, 2003, final rule, EPA inadvertently stated that "[s]hould the Washington area jurisdictions fail to fulfill these conditions by May 19, 2003, this conditional approval will convert to a disapproval pursuant to Clean Air Act (CAA) section 110(k)." EPA intended that if a Washington area jurisdiction should fail to meet any condition for approval within one-year from the publication date of the final rule, *i.e.*, by April 17, 2004, the conditional approval would convert to a disapproval pursuant to CAA section 110(k). EPA did not intend that the date triggering disapproval pursuant to 110(k) of the CAA would be the May 19, 2003, effective date of the April 17, 2003 final action, which is nearly eleven months before the due date set forth in the text of the April 17, 2003, final rule. As stated above, EPA intended that should the Washington area jurisdictions fail to fulfill these conditions by April 17, 2004, the conditional approval will convert to a disapproval pursuant to CAA section 110(k).

In the preamble to the final rule published on April 17, 2003, on page 19130, in the first column, the second sentence of the Final Action section is corrected to read: "Should the Washington area jurisdictions fail to fulfill these conditions by April 17, 2004, this conditional approval will convert to a disapproval pursuant to CAA section 110(k)."

Typographical Errors

In the preamble to the final rule published in the **Federal Register** on April 17, 2003, on page 19120 in the second column, and on page 19122 in the first column, EPA incorrectly cited as 68 FR 3210 the volume and page numbers for the January 24, 2003, final action that reclassified the Washington area to severe nonattainment. The correct citation is 68 FR 3410, January 24, 2003.

In the preamble to the final rule published in the **Federal Register** on April 17, 2003, on page 19109 in the first column, and on page 19129 in the third column, EPA incorrectly stated the proposed rule for the April 17, 2003, final rule was published on February 4, 2003. The correct date is February 3, 2003 (68 FR 5246).

In the preamble to the final rule published in the **Federal Register** on April 17, 2003, on page 19126 in the third column, EPA incorrectly stated the publication date for 67 FR 21867 as May 1, 2000. The correct date is May 1, 2002 (67 FR 21867).

In the preamble to the final rule published in the **Federal Register** on April 17, 2003, on page 19117 in the first column, we presented a summary of air quality data to date. On page 19117 in the first column, EPA stated that "[a]nother one of these seven has data for the last 123 days of the ozone season (July 1, 2003, through October 31, 2003 inclusive)". EPA was referring to monitoring data for July 1, 2002 through October 31, 2002 not for July 1, 2003, through October 31, 2003.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(B).

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore 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)). Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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 governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; 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. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1998) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA had made such a good cause finding, including the reasons therefore, and established an effective date of May 19, 2003. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This correction to the April 17, 2003, final rule (68 FR 19106) for the District of Columbia, Maryland, and Virginia is not a "major rule" as defined by 5 U.S.C. 804(2).

Dated: May 9, 2003.

Donald S. Welsh,

Regional, Administrator, Region III.

[FR Doc. 03–12473 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–1482, MB Docket No. 02–116, RM–10233]

Digital Television Broadcast Service; Billings, MT

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of KTVQ Communications, Inc., substitutes DTV channel 10 for DTV channel 17 at Billings, Montana. *See* 67 FR 38056, May 13, 2002. DTV channel 10 can be allotted to Billings, Montana, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 45–46–00 N. and 108–27–27 W. with a power of 160, HAAT of 165 meters and with a DTV service population of 139 thousand. Since the community of Billings is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective June 23, 2003.

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. 02–116, adopted April 30, 2003, and released May 9, 2003. 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, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

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 Montana, is amended by removing DTV channel 17 and adding DTV channel 10 at Billings.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–12202 Filed 5–15–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–1440, MB Docket No. 02–82, RM–10408]

Digital Television Broadcast Service; Burlington, VT

AGENCY: Federal Communications Commission (FCC).

ACTION: Final rule.

SUMMARY: The Commission, at the request of C–22 FCC Licensee Subsidiary, LLC, substitutes DTV channel 13 for DTV channel 16 at Burlington, Vermont. *See* 67 FR 20940, April 29, 2002. DTV channel13 can be allotted to Burlington in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 44–31–40 N. and 72–48–58 W. with a power of 4.5, HAAT of 835 meters and with a DTV service population of 514 thousand. Since the community of Burlington is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective June 23, 2003.

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. 02–82, adopted April 28, 2003, and released May 8, 2003. 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, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com*.

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 16 and adding DTV channel 13 at Burlington.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–12203 Filed 5–15–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI60

Endangered and Threatened Wildlife and Plants; Establishment of Nonessential Experimental Population Status and Reintroduction of Black-Footed Ferrets in South-Central South Dakota

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in cooperation with the Rosebud Sioux Tribe (Tribe), the U.S. Forest Service, and the U.S. Bureau of Indian Affairs, will reintroduce endangered black-footed ferrets (*Mustela nigripes*) into south-central South Dakota on the Rosebud Sioux Reservation. The purposes of the reintroduction are to implement actions required for recovery of the species and to evaluate and improve reintroduction techniques and management applications. We may release surplus captive-raised or wild-born black-footed ferrets annually for several years until a self-sustaining population is established. If this reintroduction program is successful, a wild population could be established in 5 years or less. The Rosebud Sioux Reservation black-footed ferret population will be established as a nonessential experimental population in accordance with section 10(j) of the Endangered Species Act of 1973, as amended (Act). We will manage this population under provisions of this special rule. An environmental assessment and finding of no significant impact have been prepared on this action.

DATES: The effective date of this rule is May 16, 2003.

ADDRESSES: You may inspect the complete file for this rule during normal business hours at the Ecological Services Office, 420 South Garfield Avenue, Suite 400, Pierre, South Dakota 57501, or telephone (605) 224–8693. You must make an appointment in advance if you wish to inspect the file.

FOR FURTHER INFORMATION CONTACT: Scott Larson or Pete Gober at the above address, telephone (605) 224–8963, extensions 27 and 24, respectively.

SUPPLEMENTARY INFORMATION:

Background

1. *Legislative:* Congress made significant changes to the Act in 1982 with the addition of section 10(j), which provides for the designation of specific reintroduced populations of listed species as "experimental populations." Previously, we had authority to reintroduce populations into unoccupied portions of a listed species' historical range when doing so would foster the conservation and recovery of the species. However, local citizens often opposed these reintroductions because they were concerned about placement of restrictions and prohibitions on Federal and private activities. Under section 10(j), the Secretary of the Department of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range, as "experimental." On the basis of the best available information, we must determine whether an experimental population is "essential" or "nonessential" to the continued existence of the species. Regulatory restrictions are considerably reduced under a Nonessential Experimental Population (NEP) designation.

Under the Act, species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of endangered wildlife. "Take" is defined by the Act as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibition on take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitats. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private lands unless they are authorized, funded, or carried out by a Federal agency.

For purposes of section 9 of the Act, a population designated as experimental is treated as threatened regardless of the species' designation elsewhere in its range. Through section 4(d) of the Act, threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. Regulations issued under section 4(d) for NEPs are usually more compatible with routine human activities in the reintroduction area.

For the purposes of section 7 of the Act, we treat NEPs as threatened species when the NEP is located within a National Wildlife Refuge or National Park, and thus section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to conserve listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, ensure any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing and only two provisions of section 7 apply: section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

Individual animals used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. In this case, the donor ferret population is a captive-bred population, which was propagated with the intention of re-establishing wild populations to achieve recovery goals. In addition, wild progeny from other NEPs (and which also originated from captive sources)

may be directly translocated to the reintroduction site.

2. *Biological:* The black-footed ferret is a member of the Mustelid or weasel family; has a black facemask, black legs, and a black-tipped tail; is nearly 60 centimeters (2 feet) in length; and weighs up to 1.1 kilograms (2.5 pounds). It is the only ferret species native to North America. The historical range of the species, based on specimen collections, extends over 12 western States (Arizona, Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming) and the Canadian Provinces of Alberta and Saskatchewan. Prehistoric evidence indicates that ferrets once occurred from the Yukon Territory in Canada to Mexico and Texas (Anderson *et al.*, 1986).

Black-footed ferrets depend almost exclusively on prairie dog colonies for food, shelter, and denning (Henderson *et al.*, 1969, updated 1974; Forrest *et al.*, 1985). The range of the ferret coincides with that of prairie dogs (Anderson *et al.*, 1986), and ferrets with young have been documented only in the vicinity of active prairie dog colonies. Historically, black-footed ferrets have been reported in association with black-tailed prairie dog (*Cynomys ludovicianus*), white-tailed prairie dog (*Cynomys leucurus*), and Gunnison's prairie dog (*Cynomys gunnisoni*) towns (Anderson *et al.*, 1986).

Significant reductions in both prairie dog numbers and distribution occurred during the last century due to widespread poisoning of prairie dogs, the conversion of native prairie to farmland, and outbreaks of sylvatic plague, particularly in the southern portions of the ranges of several species of prairie dog in North America. Sylvatic plague arrived from Asia in approximately 1900 (Eskey and Haas, 1940). It is an exotic disease foreign to the evolutionary history of prairie dogs, which have little or no immunity to it. Black-footed ferrets also are highly susceptible to sylvatic plague (Williams *et al.*, 1991 and Williams *et al.*, 1994). This severe reduction in the availability of their principal prey species, in combination with other factors such as secondary poisoning from toxicants ingested by prairie dogs, resulted in the near extinction of the black-footed ferret in the wild by the early 1970s (U.S. Fish and Wildlife Service, 1988).

In 1974, a remnant wild population of ferrets in South Dakota, originally discovered in 1964, abruptly disappeared (Henderson *et al.*, 1969, updated 1974). As a result, we believed the species to be extinct. However, in 1981, a small population was discovered near Meeteetse, Wyoming (Schroeder and Martin, 1982). In 1985–86, the Meeteetse population declined to only 18 animals due to an outbreak of sylvatic plague and canine distemper (U.S. Fish and Wildlife Service, 1988). Following this critical decline, the remaining individuals were taken into captivity in 1986–1987 to serve as founders for a captive propagation program. Since that time, captive-breeding efforts have been highly successful and have facilitated ferret reintroductions over a broad area of formerly occupied range. Today, the captive population of juveniles and adults annually fluctuates between 300 and 600 animals depending on time of year, yearly reproductive success, and annual mortalities. The captive ferret population is currently divided among six captive-breeding facilities throughout the United States and Canada, with a small number on display for educational purposes at several facilities. Also, 65 to 90 ferrets are located at several field-based captive-breeding sites in Arizona, Colorado, Montana, and New Mexico.

3. *Recovery Goals/Objectives:* The recovery plan for the black-footed ferret (U.S. Fish and Wildlife Service, 1988) contains the following recovery objectives for reclassification of the species from endangered to threatened:

(a) Increasing the captive population of ferrets to 200 breeding adults by 1991 (achieved);

(b) Establishing a prebreeding population of 1,500 free-ranging breeding adults in 10 or more different populations, with no fewer than 30 breeding adults in each population by the year 2010 (ongoing); and,

(c) Encouraging the widest possible distribution of reintroduced animals throughout their historical range (ongoing).

Although several reintroduction efforts have occurred throughout the ferret's range, populations may have become self-sustaining at only one site in South Dakota (Lockhart, Black-footed Ferret Coordinator, pers. comm. 2002).

We can reclassify the black-footed ferret from endangered to threatened status when the recovery objectives listed above have been achieved, assuming that the mortality rate of established populations remains at or below a rate at which new populations become established or increase. We have been successful in rearing black-footed ferrets in captivity, and, in 1997, we reached captive-breeding program objectives.

In 1988, we divided the single captive population into three subpopulations to avoid the possibility of a catastrophic event (*e.g.*, contagious disease) eliminating the entire captive population. Additional breeding centers were added later, and presently there are six separate subpopulations in captivity. Current recovery efforts emphasize the reintroduction of animals back into the wild from the captive source stock. Surplus individuals produced in captivity are now available for use in reintroduction areas.

4. *Reintroduction Sites:* The Service, in cooperation with western State and Federal agencies, Tribal representatives, and conservation groups, evaluates potential black-footed ferret reintroduction sites and has previously initiated ferret reintroduction projects at several sites within the historical range of the black-footed ferret. The first reintroduction project occurred in Wyoming in 1991, and subsequent efforts have taken place in South Dakota and Montana in 1994, Arizona in 1996, a second effort in Montana in 1997, Colorado/Utah in 1999, a second site in South Dakota in 2000, and Mexico in 2001. The Service and the Black-footed Ferret Recovery Implementation Team (comprising 27 State and Federal agencies, Native American tribes, and conservation organizations) have identified the Rosebud Sioux Reservation (Reservation) as a high-priority black-footed ferret reintroduction site due to its extensive black-tailed prairie dog habitat and the absence of sylvatic plague (Black-footed Ferret Recovery Implementation Team, 2000).

In the early 1990s, the Bureau of Indian Affairs (1995) estimated the acreage of prairie dog colonies on Rosebud Tribal Trust lands at 18,000 hectares (ha) (45,000 acres (ac)). In the mid-1990s, the Tribe evaluated a black-footed ferret reintroduction effort and completed some of the activities (*i.e.*, habitat evaluations) necessary to begin such reintroduction efforts. In 2001, the Tribe began additional activities to work toward ferret reintroduction and has worked with the Service to gather information necessary to establish an NEP designation for any ferret reintroductions that may occur.

(a.) *Rosebud Sioux Reservation Experimental Population Reintroduction Area:* The area designated as the Rosebud Sioux Reservation Black-footed Ferret Experimental Population Area (Experimental Population Area) overlays all of Gregory, Mellette, Todd, and Tripp Counties in South Dakota. Any black-footed ferret found within these four counties will be considered part of an NEP. Within the Experimental Population Area, the primary

reintroduction area will be in large black-tailed prairie dog complexes located in Todd County near the town of Parmelee. The Town of Rosebud is approximately 10-air miles away and is the location of the Rosebud Sioux Tribal offices. Rosebud is approximately 160 kilometers (100 miles) south of Pierre, the capital of South Dakota.

The Experimental Population Area supports at least two large complexes of black-tailed prairie dog colonies located within the four-county area. These counties encompass approximately 1,391,862 ha (3,437,900 ac). Approximately 26 percent or 356,411 ha (880,336 ac) of the Experimental Population Area is Tribal and Allotted Trust lands of the Rosebud Sioux Tribe. The majority of this Tribal and Allotted Trust land is native rangeland used for grazing.

Approximately 70 percent of the land within the Experimental Population Area is owned by private landowners, although less than 20 percent of the land in the primary reintroduction area is privately owned. No ferrets will be released on private lands. Designating reintroduced ferrets as an NEP should minimize potential issues that may arise with a reintroduction in the vicinity of private lands. The Service, Tribe, and other cooperators agree that, if ferrets disperse onto private lands, program officials will capture and translocate the ferrets back to Tribal lands if requested by the landowner or if necessary for the protection of the ferrets. Any activity needing access to private lands will be conducted only with the permission of the landowner.

Black-footed ferret dispersal to and occupation of areas outside of the Experimental Population Area is unlikely to occur toward the east, north, and south due to the large size of the Experimental Population Area, the absence of suitable nearby habitat (*i.e.*, large contiguous prairie dog colonies), cropland barriers (*e.g.*, expansive cultivation over the eastern portion of the Experimental Population Area), and physical barriers (*e.g.*, the Missouri River to the east). Any expansion westerly from the reintroduction site will be handled by recapturing ferrets, upon request by a landowner, and bringing them into Experimental Population Area or handled through future cooperative efforts with the Pine Ridge Indian Reservation. The Tribe estimates a minimum of approximately 6,000 ha (15,000 ac) of black-tailed prairie dog colonies are potentially available to black-footed ferrets in a localized area in northwestern Todd County and could support over 150 ferret families (characterized as an adult female, 3 kits, and one-half adult male; *i.e.*, 1 adult male for every 2 adult females) (Biggins *et al.*, 1993). Large, contiguous prairie dog colonies and the absence of physical barriers between prairie dog colonies in this portion of the Reservation (the primary ferret release area) should facilitate ferret distribution throughout this complex.

(b.) *Primary Reintroduction Area:* The primary reintroduction area within the Experimental Population Area will occur on prairie dog colonies near Parmelee, in northwestern Todd County. The last remaining population of ferrets in South Dakota was known to exist in this area and adjacent Mellette County until the early 1970s (Henderson *et al.*, 1969, updated 1974). This population was studied and monitored extensively until it disappeared from the wild by 1974 (Henderson *et al.*, 1969, updated 1974). During monitoring efforts of this ferret population in the 1960s, researchers located eight road-killed ferrets during their years of work (Hillman and Linder, 1973). No road-killed ferrets have been turned in or noted from that area since the population was believed extirpated in the early 1970s. There have been many ferret surveys conducted in this area in the 1980s and 1990s with no ferrets being located (Hanebury, 1988; Bureau of Indian Affairs, 1995). The Tribe conducted additional ferret surveys in 2002 and did not locate any ferrets (Lonewolf, Rosebud Game Fish and Parks, pers. comm. 2002).

Black-footed ferrets will be released only if biological conditions are suitable and meet the management framework developed by the Tribe, in cooperation with the Bureau of Indian Affairs, the Service, and landowners/land managers. The Service will reevaluate ferret reintroduction efforts in the Experimental Population Area should any of the following conditions occur:

(i) Failure to maintain sufficient habitat on specific reintroduction areas to support at least 30 breeding adults after 5 years.

(ii) Failure to maintain sufficient prairie dog habitat in the primary reintroduction area as available in 2002.

(iii) A wild ferret population is found within the Experimental Population Area following the initial reintroduction and prior to the first breeding season. The only black-footed ferrets currently occurring in the wild result from reintroductions in Arizona, Colorado/Utah, Montana, South Dakota, Wyoming, and Mexico. Consequently, the discovery of a black-footed ferret population at the Experimental Population Area prior to the reintroduction would confirm the presence of a new population and would prevent designation of an experimental population for the area.

(iv) Discovery in any animal on or near the reintroduction area 6 months prior to the scheduled release of an active case of canine distemper or any other disease contagious to black-footed ferrets that the cooperators believe may compromise the reintroduction.

(v) Fewer than 20 captive black-footed ferrets are available for the first release.

(vi) Funding is not available to implement the reintroduction phase of the project on the Reservation.

(vii) Land ownership changes significantly or cooperators withdraw from the project.

All the above conditions will be based on information routinely collected by us or the Tribe (*see* "Paperwork Reduction Act" under the REQUIRED DETERMINATIONS section).

5. *Reintroduction Procedures:* In conformance with standard black-footed ferret reintroduction protocol, no fewer than 20 captive-raised or wild-translocated black-footed ferrets will be released in the Experimental Population Area in the first year of the program, and 20 or more animals will be released annually for the next 2 to 4 years. We anticipate releasing 50 or more ferrets in the first year and believe a self-sustaining wild population could be established on the Reservation within 5 years. Released ferrets will be excess to the needs of the captive-breeding program and their use will not affect the genetic diversity of the captive ferret population (ferrets used for reintroduction efforts can be replaced through captive breeding). In the future, it may be necessary to interchange ferrets from established, reintroduced populations to enhance the genetic diversity of the population on the Experimental Population Area.

Recent studies (Biggins *et al.*, 1998; Vargas *et al.*, 1998) have documented the importance of outdoor "preconditioning" experience on captive-reared ferrets prior to release in the wild. Ferrets exposed to natural prairie dog burrows in outdoor pens and natural prey prior to release survive in the wild at significantly higher rates than do cage-reared, non-preconditioned ferrets. At a minimum, all captive-reared ferrets released within the Experimental Population Area will receive adequate pre-conditioning treatments at existing pen facilities in South Dakota or other western States. In addition, we may translocate wild-born ferrets (from other NEPs with self-sustaining populations of ferrets) to the Experimental Population Area.

The Tribe will develop specific reintroduction plans and submit them in a proposal to the Service as part of an established, annual black-footed ferret allocation process. Ferret reintroduction cooperators submit proposals by mid-March of each year, and the Service makes preliminary allocation decisions (numbers of ferrets provided to specific projects) by May. Proposals submitted to the Service include updated information on habitat, disease, project/ferret status, proposed reintroduction and monitoring methods, and predator management. In this manner, the Service and reintroduction cooperators evaluate the success of the prior year's efforts and apply current knowledge to various aspects of reintroduction efforts, thereby providing greater assurance of long-range reintroduction success.

We will transport ferrets to identified reintroduction areas within the Experimental Population Area and release them directly from transport cages into prairie dog burrows. Depending on the availability of suitable vaccine, we will vaccinate released animals against certain diseases (especially canine distemper) and take appropriate measures to reduce predation from coyotes, badgers, and raptors, where warranted. All ferrets we release will be marked with passive integrated transponder tags (PIT tags), and we may promote radio-telemetry studies to document ferret behavior and movements. Other monitoring will include spotlight surveys, snow tracking surveys, and visual surveillance.

Since captive-born ferrets are more susceptible to predation, starvation, and environmental conditions than wild animals, up to 90 percent of the released ferrets could die during the first year of release. Mortality is usually highest during the first month following release. In the first year of the program, a realistic goal is to have at least 25 percent of the animals survive the first winter. The goal of the Reservation reintroduction project is to establish a free-ranging population of at least 30 adults within the Experimental Population Area within 5 years of release. At the release site, population demographics and potential sources of mortality will be monitored on an annual basis (for up to 5 years). We do not intend to change the nonessential designation for this experimental population unless we deem this reintroduction a failure or the black-footed ferret is recovered in the wild.

6. *Status of Reintroduced Population:* We determine this reintroduction to be nonessential to the continued existence of the species for the following reasons:

(a) The captive population (founder population of the species) is protected against the threat of extinction from a single catastrophic event by housing ferrets in six separate subpopulations. As a result, any loss of an experimental population in the wild will not threaten the survival of the species as a whole.

(b) The primary repository of genetic diversity for the species is 240 adult ferrets maintained in the captive-breeding population. Animals selected for reintroduction purposes are surplus to the captive population. Hence, any use of animals for reintroduction efforts will not affect the overall genetic diversity of the species.

(c) Captive-breeding can replace any ferrets lost during this reintroduction attempt. Juvenile ferrets produced in excess of the numbers needed to maintain the captive-breeding population are available for reintroduction.

This reintroduction will be the ninth release of ferrets back into the wild. The other experimental populations occur in Wyoming, southwestern South Dakota, north-central Montana (with two separate reintroduction efforts), Arizona, Colorado/Utah (a single reintroduction area that overlays both States), and north-central South Dakota. A population of ferrets also has been established in Mexico. Reintroductions are necessary to further the recovery of this species. The NEP designation alleviates landowner concerns about possible land use restrictions. This nonessential experimental designation provides a flexible management framework for protecting and recovering black-footed ferrets while ensuring that the daily activities of landowners are unaffected.

7. *Location of Reintroduced Population:* Section 10(j) of the Act requires that an experimental population be geographically separate from other wild populations of the same species. Since the mid-1980s, black-footed ferret surveys have been conducted in the Experimental Population Area or close by, and no wild ferrets have been located (Hanebury, 1988; Bureau of Indian Affairs, 1995; Lonewolf, Rosebud Game Fish and Parks, pers. comm. 2002). Over 120,000 ha (300,000 ac) of prairie dog colonies were surveyed for black-footed ferrets in the mid-1980s during a prairie dog control effort on the Oglala Sioux Tribe's Pine Ridge Indian Reservation (Superintendent Memorandum, 1989). No ferrets were located. In addition to these surveys, the Tribe and others have spent many hours surveying prairie dog colonies at the primary reintroduction site (Hanebury, 1988; Bureau of Indian Affairs, 1995). No ferrets or signs of ferrets (*e.g.*, skulls, feces, trenches) were located. Therefore, we conclude that wild ferrets are no longer present in the Experimental Population Area, and that this reintroduction will not overlap with any wild population.

All released ferrets and their offspring should remain in the Experimental Population Area due to the presence of prime habitat (*i.e.*, lands occupied by prairie dog colonies) and surrounding geographic barriers. We will capture any ferret that leaves the Experimental Population Area, attempt to identify its origin, and either return it to the release site, translocate it to another site, or place it in captivity. If a ferret leaves the primary reintroduction area but remains within the Experimental Population Area and occupies private property, the landowner can request its removal. Ferrets will remain on private lands only when the landowner does not object to their presence there.

We will mark all released ferrets and will attempt to determine the source of any unmarked animals found. Any ferret found outside the Experimental Population Area is considered endangered, as provided under the Act. We will undertake efforts to confirm whether any ferret found outside the Experimental Population Area originated from captive stock. If the animal is unrelated to members of this or other experimental populations (*i.e.*, it is from non-captive stock), we will place it in captivity as part of the breeding population to improve the overall genetic diversity of the captive population. Existing contingency plans allow for the capture and retention of up to nine ferrets shown not to be from any captive stock. In the highly unlikely event that a ferret from captive stock is found outside the Experimental Population Area, and if landowner permission is granted, we will move the ferret back to habitats that support the primary population(s) of ferrets.

8. *Management:* This reintroduction is undertaken in cooperation with the Rosebud Sioux Tribe, the Bureau of Indian Affairs, and the Forest Service in accordance with the "Cooperative Management Plan for Black-footed Ferrets, Rosebud Sioux Reservation." Copies of the Cooperative Management Plan may be obtained from the Rosebud Sioux Tribe, Game, Fish and Parks Department, P.O. Box 430, Rosebud, South Dakota 57570. In the future, we will evaluate whether other black-footed ferret reintroductions are feasible within the Experimental Population Area. Cooperating Tribes, agencies, and private landowners will be involved in the selection of any additional sites.

Management considerations of this reintroduction project include:

(a) *Monitoring:* Several monitoring efforts will occur during the first 5 years of the program. We will annually monitor prairie dog distribution and numbers, and the occurrence of sylvatic plague. Testing resident carnivores (*e.g.*, coyotes) for canine distemper will begin prior to the first ferret release and continue each year. We will monitor released ferrets and their offspring annually using spotlight surveys, snowtracking, other visual survey techniques, and possibly radio-telemetry on some individuals. The surveys will incorporate methods to monitor breeding success and long-term survival rates.

Through public outreach programs, we will inform the public and other appropriate State and Federal agencies about the presence of ferrets in the Experimental Population Area and the handling of any sick or injured ferrets. To meet our responsibilities to treat the Tribe on a Government-to-Government basis, we will request that the Tribe inform Tribal members of the presence of ferrets on Reservation lands and the proper handling of any sick or injured ferrets that are found. The Tribe will serve as the primary point of contact to report any injured or dead ferrets. Reports of injured or dead ferrets also must be provided to the Service Field Supervisor (*see* **ADDRESSES** section). It is important that we determine the cause of death for any ferret carcass found. Therefore, we request that discovered ferret carcasses not be disturbed but reported as soon as possible to appropriate Tribal and Service offices.

(b) *Disease:* The presence of canine distemper in any mammal on or near the reintroduction site will cause us to reevaluate the reintroduction program. Prior to releasing ferrets, we will establish the presence or absence of canine distemper in the release area by collecting at least 20 coyotes (and possibly other carnivores). Sampled predators will be tested for canine distemper and other diseases.

We will attempt to limit the spread of distemper by discouraging people from bringing unvaccinated pets into core ferret release areas. Any dead mammal or any unusual behavior observed in animals found within the area should be reported to us (*see* **ADDRESSES** section). Efforts are under way to develop an effective canine distemper vaccine for black-footed ferrets. Routine sampling for sylvatic plague in prairie dog towns will take place before and during the reintroduction effort, and annually thereafter.

(c) *Genetics:* Ferrets selected for reintroduction are excess to the needs of the captive population. Experimental populations of ferrets are usually less genetically diverse than overall captive populations. Selecting and reestablishing breeding ferrets that compensate for any genetic biases in earlier releases may correct this disparity. The ultimate goal is to establish wild ferret populations with the maximum genetic diversity that is possible from the founder ferrets. The eventual interchange of ferrets between established populations found elsewhere in the western United States will ensure that genetic diversity is maintained to the extent possible.

(d) *Prairie Dog Management:* We will work with the Tribe, affected landowners, and other Federal and State agencies to resolve any management conflicts in order to maintain: (1) Sufficient prairie dog acreage and density to support no less than 30 adult black-footed ferrets; and (2) suitable prairie dog habitat on core release areas at or above 2002 survey levels.

(e) *Mortality:* We will only reintroduce ferrets that are surplus to the captive-breeding program. Predator control, prairie dog management, vaccination, ferret preconditioning, and improved release methods should reduce mortality. Public education will help reduce potential sources of human-caused mortality.

The Act defines "incidental take" as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as recreation, livestock grazing, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. A person may take a ferret within the Experimental Population Area provided that the take is unintentional and was not due to negligent conduct. Such conduct will not constitute "knowing take", and we will not pursue legal action. However, when we have evidence of knowing (*i.e.*, intentional) take of a ferret, we will refer matters to the appropriate authorities for prosecution. Any take of a black-footed ferret, whether incidental or not, must be reported to the local Service Field Supervisor (*see* **ADDRESSES** section) and should be reported to the Tribe as primary point of contact for this NEP. We expect levels of incidental take to be low since the reintroduction is compatible with existing land-use practices for the area.

Based on studies of wild black-footed ferrets at Meeteetse, Wyoming, and other places, black-footed ferrets can be killed by motor vehicles and dogs (Hillman and Linder, 1973; Schroeder and Martin, 1982). We expect a rate of mortality similar to what was documented at Meeteetse, and, therefore, we estimate a human-related annual mortality rate of about 12 percent or less of all reintroduced ferrets and their offspring. If this level is exceeded in any given year, we will develop and implement measures to reduce the level of mortality.

(f) *Special Handling:* Service employees and authorized agents acting on their behalf may handle black-footed ferrets for scientific purposes; to relocate ferrets to avoid conflict with human activities; for recovery purposes; to relocate ferrets to other reintroduction sites; to aid sick, injured, and orphaned ferrets; and to salvage dead ferrets. We will return to captivity any ferret we determine to be unfit to remain in the wild. We also will determine the disposition of all sick, injured, orphaned, and dead ferrets.

(g) *Coordination with Landowners and Land Managers:* The Service and cooperators identified issues and concerns associated with this ferret reintroduction before the development of the proposed rule. The reintroduction also has been discussed with potentially affected State agencies and landowners within the release area. Affected Tribes, State agencies, landowners, and land managers have indicated support for the reintroduction if ferrets released in the Experimental Population Area are established as an NEP and if land use activities in the Experimental Population Area are not constrained without the consent of affected landowners.

(h) *Potential for Conflict with Grazing and Recreational Activities:* We do not expect conflicts between livestock grazing and ferret management. Grazing and prairie dog management on private lands within the Experimental Population Area will continue without additional restriction during implementation of the ferret recovery activities. With proper management, we do not expect adverse impacts to ferrets from hunting, prairie dog shooting, prairie dog control, and trapping of furbearers or predators in the Experimental Population Area. If proposed prairie dog shooting or control locally may affect the ferret's prey base within the primary release area, State, Tribal, and Federal biologists will determine whether ferrets could be impacted and, if necessary, take steps to avoid such impacts. However, because of the NEP designation, these steps will be voluntary measures since any recommendations by biologists will be advisory only. If private activities impede the establishment of ferrets, we

will work closely with the Tribe and landowners to suggest alternative procedures to minimize conflicts.

(i) *Protection of Black-footed Ferrets:* We will release ferrets in a manner that provides short-term protection from natural (*e.g.*, predators, disease, lack of prey base) and human-related sources of mortality. Improved release methods, vaccination, predator control, and management of prairie dog populations should help reduce natural mortality. Releasing ferrets in areas with little human activity and development will minimize human-related sources of mortality. We will work with the Tribe and landowners to help avoid certain activities that could impair ferret recovery.

(j) *Public Awareness and Cooperation:* We will inform the general public of the importance of this reintroduction project in the overall recovery of the black-footed ferret. The designation of the NEP for the Reservation and adjacent areas will provide greater flexibility in the management of the reintroduced ferrets. The NEP designation is necessary to secure needed cooperation of the Tribe, landowners, agencies, and other interests in the affected area.

Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that releasing black-footed ferrets into the Experimental Population Area will further the conservation of the species.

Previous Federal Action

The proposal to designate a NEP in south-central South Dakota was published in the **Federal Register** on September 11, 2002 (67 FR 57558) concurrent with a notice of a public hearing on September 26, 2002 at the Multi-Cultural Center in Mission, South Dakota. Informational meetings regarding the Rosebud ferret reintroduction effort were held on August 13, 15, and 16, 2002, at He Dog, Parmelee, and Rosebud Communities in Todd County, South Dakota and on August 29, 2002, at the Rosebud Casino located on the Rosebud Sioux Reservation. In addition, we have held numerous meetings with the various Tribal Council members and other interested parties throughout this rulemaking process.

Peer Review

In accordance with our policy on peer review published on July 1, 1994 (59 FR 34270), Interagency Cooperative Policy on Peer Review (Peer Review Policy), we requested the expert opinions of independent specialists regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information for this NEP rule. Reviewers were asked to review the proposed rule and the supporting data, to point out any mistakes in our data or analysis, and to identify any relevant data that we might have overlooked. We did not received any requests for substantive changes from these reviewers, but we did receive comments that the proposal had merit and recommendations of support.

Summary of Comments and Recommendations

The September 11, 2002, proposed rule and associated notifications requested all interested parties to submit factual reports or information that might contribute to the development of a final rule. Appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting public comment and advertising the public hearing on the proposal were published in South Dakota newspapers and broadcast on local radio stations in the reintroduction area. These included the *Todd County Tribune* in August and September 2002, and KINI radio announcements in August 2002.

The Service also mailed the proposed rule to 29 people representing individuals; State, Federal, and local governments; corporations; and nongovernmental organizations affiliated with environmental, grazing, and recreational interests in South Dakota. This mailing list was from previous meetings and open houses we conducted for other ferret reintroduction efforts in South Dakota. A total of seven written comments were received during the comment period.

In addition, we received seven comment letters prior to publication of the proposed rule. These were mainly letters encouraging the Service and the Tribe to proceed with a reintroduction effort on the Rosebud Reservation. All seven comment letters received prior to the publication of the proposed rule supported the reintroduction effort. Of the seven comment letters received during the comment period, two were opposed to the reintroduction efforts, three expressed concerns about the process of designating a 10(j) area and/or about prairie dogs and various control options, and two commenters supported the Rosebud reintroduction effort.

As mentioned above in "Previous Federal Actions," we also hosted informational meetings and a public hearing to explain this rulemaking. At the informational meetings, most participants were not supportive of a ferret reintroduction effort. At the public hearing conducted a few weeks after the informational meetings, the Tribe was able to discuss their entire Prairie Management Plan, of which the ferret reintroduction is one component. Many of the concerns expressed at the informational meetings, such as management of prairie dogs, loss of revenue from prairie dogs, and range improvements, are addressed in the Rosebud Prairie Management Plan. Consequently, attendees at the public hearing voiced few comments against the ferret reintroduction. However, it must be noted that very few (five) people provided comments at the public hearing. Most of the attendees asked questions and left without providing verbal or written comments during the public hearing. Most of the written and verbal comments received addressed the potential for the designation to interfere with current and proposed land uses within the experimental population boundary, the loss of revenue associated with prairie dog colonies, and the concern that the Service may change the NEP designation in the future. The following summary addresses the written and verbal comments received during the informational meetings, public hearing, and comment period. Our response to each issue is given below.

Issue 1: Some commenters were concerned that the Service will change the NEP designation in the future.

Service Response: As stated under "5. Reintroduction Procedures" in the **SUPPLEMENTARY INFORMATION** section of this final rule, we do not expect to change the designation unless the reintroduction effort fails or the species recovers. Presently, there are no proposals by the Service, or any requests on the part of other agencies or nongovernmental organizations, to amend this or any of the prior designations. Consequently, we anticipate that the NEP designation for south-central South Dakota will continue in the future. If the release fails, we may abandon the NEP designation because such a designation is unnecessary given the absence of the species in the area. Success under an NEP designation will argue against upgrading the designation to essential, or reinstating an endangered or threatened designation because of potential conflicts with ongoing activities in the area. If the Service and cooperating agencies are able to recover a species under an NEP designation, then we will have no cause to increase

the degree of protection allowed under the Act. In any case, making any change to the NEP designation will require a new proposed rule, a public comment period, public meetings, National Environmental Policy Act compliance, and other documentation prior to publication of a final rule to change or abandon the designation.

Issue 2: Some commenters raised concerns that ferrets may disperse from their release site, potentially affecting land uses in areas outside the release area, and cause the Service to impose stricter rules governing resource development activities outside the boundaries of the Experimental Population Area.

Service Response: Investigations of black-footed ferret dispersal at existing experimental release sites and research conducted at Meeteetse, Wyoming, confirm that ferret dispersal to areas outside of active prairie dog colonies is rare (Forrest *et al.*, 1985). Ferrets are not known to establish residence away from active prairie dog colonies (Henderson *et al.*, 1996 updated 1974; Hillman and Linder, 1973). Recent modifications to ferret husbandry techniques have been successful in developing captive-reared animals that stay nearer to release sites than the ferrets raised in captivity and released in earlier trials. The Rosebud Experimental Population Area encompasses sufficient prairie dog colonies believed to be necessary for long-term occupation by ferrets. Consequently, we believe it is unlikely that ferrets will disperse to and establish permanent residence within areas outside the Experimental Population Area. Contingencies stated earlier under "7. Location of Reintroduced Population" of the **SUPPLEMENTARY INFORMATION** section in this final rule allow for capture and return of ferrets to the Experimental Population Area, should this occur.

Issue 3: Some commenters expressed their opinion that releases should only occur on Rosebud Trust lands or lands of individuals who are cooperating with the Rosebud Sioux Tribe.

Service Response: Black-footed ferrets will only be released on Rosebud Trust lands and deeded land of those individuals who choose to cooperate with the Rosebud Sioux Tribe in this reintroduction.

Issue 4: Some commenters suggested that Gregory and Tripp Counties should not be included as part of the Experimental Population Area.

Service Response: The primary reintroduction area for ferrets in the Rosebud Experimental Population Area will occur in Todd County. Including Gregory, Mellette, and Tripp Counties in the Experimental Population Area only means that, if a ferret were to be located in those counties, it will be considered part of the NEP. The Tribe also has significant acreages of Trust land in those counties, but there is no intent to reintroduce ferrets in those counties. Including those counties will block-clear the area for prairie dog control purposes as well. Congress amended the Endangered Species Act to incorporate section 10(j) to enhance the opportunity for release of federally listed species on private lands. However, we believe that including most of Rosebud Trust lands within the Experimental Population Area will provide the flexibility for management of ferrets sought by the Tribe and the Service. The number of prairie dog colonies in Gregory and Tripp Counties is far smaller than in the proposed reintroduction site, and ferrets are not expected to inhabit those counties.

Issue 5: Some commenters expressed concern that the process has proceeded too fast and more comment time is needed.

Service Response: The Service and the Rosebud Sioux Tribe have been discussing ferret reintroduction on the Rosebud Reservation since 1996. Considerable progress was made toward that effort and Tribal resolutions were passed at that time, but ultimately the Tribe chose not to proceed. In 2001, the Tribe again expressed an interest and, in 2002, asked the Service to complete the process for an NEP designation. The Service has proceeded accordingly and will continue to follow the Tribal Council direction as to whether to proceed with reintroduction efforts. The ferret reintroduction effort will be managed and undertaken by the Rosebud Game, Fish, and Parks Department.

Issue 6: Some commenters stated that black-footed ferrets are not native to this area.

Service Response: The last remaining population of wild black-footed ferrets in South Dakota was known to exist in this area and adjacent Mellette County until the early 1970s (Henderson *et al.*, 1969, updated 1974). The Service and Tribe believe that black-footed ferrets are native to the Rosebud Reservation.

Issue 7: Some commenters state their concern that the proposed rule gives biologists too much authority to change plans and take steps as they deem necessary to avoid impacts to ferrets from activities that may impact prairie dogs.

Service Response: While biologists from different entities (*e.g.*, Service, Rosebud Sioux Tribe, Forest Service) may assist with this reintroduction effort, any comments from a biologist on effects of human activities on private lands that may affect the reintroduced ferrets are advisory in nature under this NEP designation. Prairie dog control on deeded land will remain with the landowners to be managed in compliance with State rules and other applicable Federal and local laws, while prairie dog control on Tribal lands will remain under the authority of the Rosebud Sioux Tribe. Landowners within the Experimental Population Area will still be allowed to conduct lawful control of prairie dogs. We do not anticipate any additional restrictions on grazing and prairie dog management on private lands within the Experimental Population Area during implementation of the ferret recovery activities.

Issue 8: Some commenters raised concern that this rule will have a substantial impact on private land and private property rights.

Service Response: Using section 10(j) of the Act to designate a reintroduced population of black-footed ferret as an NEP removes most regulatory burdens that might otherwise be associated with reintroduction of an endangered species. The remaining restrictions are related to intentional or negligent take of ferrets. For instance, deliberately shooting a ferret is a prohibited activity, but prairie dog control actions are not prohibited. In addition, any activity needing access to private lands will be conducted only with the permission of the landowner.

Issue 9: Some commenters suggested that the black-footed ferret should be delisted under the Act after a viable population is established and confined to Badlands National Park.

Service Response: At this time, the recovery goals for completely removing the species from the protections of the Act are not defined, but recovery of this species will depend on more than viable populations of ferrets at Badlands National Park or other National Parks. The Black-footed Ferret Recovery Plan (U.S. Fish and Wildlife Service, 1988) lists the requirements for downlisting the species from endangered to threatened, including "encouraging the widest possible distribution of reintroduced animals throughout their historical range." It is imperative that sites outside of the few National Parks with suitable prairie habitat are used to ensure the widest distribution of this species across its historic habitat and to avoid the possibility of a catastrophic event devastating the species once again.

Issue 10: Some commenters raised concerns that reintroduced ferrets may carry diseases.

Service Response: Under 8(b) "Disease" of the **SUPPLEMENTARY INFORMATION** section of this final rule, we address the implications of disease to the success of the actions under this rule. Management plans for ferret reintroductions in South Dakota also have contingencies developed relating to disease management. These contingencies include: Vaccinating all black-footed ferrets prior to release into pre-release conditioning pens, vaccinating black-footed ferret kits at least once prior to release, re-administering medications to ferrets captured during monitoring, discouraging presence of domestic dogs near the pre-conditioning pens, and encouraging routine vaccination of dogs. Management plans also call for continued monitoring of prairie dog populations and certain predators to determine if various disease outbreaks are occurring. It is the Service and Tribe's intent to avoid any disease outbreaks.

Issue 11: Commenters also expressed concern that prairie dog colonies on Tribal Trust lands could result in less revenue generated from grazing receipts for the Tribe and Allottees.

Service Response: The Rosebud Prairie Management Plan proposes to offset the loss of revenue to the Tribe and Allottees by making a payment to those entities with prairie dog colonies on Tribal Trust Lands. The efforts to develop a payment to offset revenue loss from prairie dogs was developed in response to comments received at informational meetings and incorporated into the Rosebud Prairie Management Plan.

Issue 12: Other commenters voiced concern that an incentive payment for prairie dogs might make individuals uninterested in prairie dog control.

Service Response: Any payments for prairie dog acreage will be at the discretion of the Rosebud Sioux Tribe.

Issue 13: Some commenters mentioned that prairie dog control and management is needed before reintroducing ferrets on Rosebud Reservation.

Service Response: The Rosebud Prairie Management Plan will actively manage the existing prairie dog population on Trust lands including prairie dog control and range improvements. Ferret reintroduction will not affect the ability to control prairie dogs in the counties designated as part of the Experimental Population Area.

Issue 14: Some commenters asked what the penalties are for killing black-footed ferrets while driving cars or conducting other activities in the Experimental Population Area.

Service Response: Section 8.(e) "Mortality" of this final rule addresses the issue of incidental take of black-footed ferrets within the Experimental Population Area. Basically, any take of a ferret within the experimental population boundary that is incidental to an otherwise lawful activity will not constitute "knowing take" for the purposes of this regulation. Consequently, we will investigate any ferret killed by an automobile or by other actions to determine if the death was entirely accidental, or whether there was any intention to deliberately kill the ferret. If the ferret was killed unintentionally and reasonable care was given to avoid the ferret, there will be no penalty for killing of the ferret. All ferret deaths must be reported (see **ADDRESSES** section) so that cause of death can be determined and to assist the Tribe in maintenance of its records on the status of the reintroduced population.

Issue 15: Some commenters asked, "What are the effects of the proposal on private lands?"

Service Response: This NEP designation will impose no additional restrictions on activities on private lands other than those that currently exist, except for restricting intentional take of the reintroduced ferrets. This NEP designation relaxes the consultation process under section 7 of the Act for any activity requiring Federal approval. For example, prairie dog control on private lands will continue to be subject to the rodenticide label restrictions. Killing a black-footed ferret on private lands requires reporting the incident to the proper authorities for determination of whether the take was incidental or intentional. The black-footed ferret management plans prepared for the Rosebud reintroduction effort predict that all current land uses on private lands in these areas will continue to operate following reintroduction of black-footed ferrets.

Effective Date Justification

We find good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to make this rule effective upon publication. Making this rule effective immediately allows for the timely transfer of suitable black-footed ferret preconditioned animals or those that are wild-born to the Experimental Population Area. The following biological considerations necessitate this approach. Weather conditions may preclude the ability to trap and move wild-born ferrets. The opportunity to release ferrets on Rosebud Tribal Trust lands is dependent upon the availability of animals for translocation, which may be limited in the captive population. The success of the reintroduction effort may be related, at least in part, to the ability to release animals immediately upon publication of this rule. Therefore, we are making this rule effective immediately upon publication.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

In accordance with the criteria in Executive Order 12866, the designation of NEP status for the black-footed ferret reintroduction into south-central South Dakota is not a significant regulatory action subject to Office of Management and Budget review. This rule will not have an annual economic effect of $100 million and will not have an adverse effect upon any economic sector, productivity, jobs, the environment, or other units of government. Therefore, a cost-benefit and economic analysis is not required.

Lands within the Experimental Population Area affected by this rule include Gregory, Mellette, Todd, and Tripp Counties in South Dakota. The primary reintroduction area where ferrets will be released is Rosebud Tribal Trust lands in Todd County, and most of the prairie dog colonies within the primary release area are on these lands. Prairie dog colonies off the Rosebud Tribal Trust lands but within the primary reintroduction area and those colonies within Experimental Population Area but outside the primary reintroduction area are not needed for the Reservation reintroduction effort to have a successful site. Land uses on private, Tribal, and State school lands will not be hindered by the proposal, and only voluntary participation by private landowners will occur.

This rule will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are primarily other Department of the Interior bureaus (*i.e.*, Bureau of Indian Affairs) and the Department of Agriculture (Forest Service). This rulemaking is consistent with the policies and guidelines of the other Interior bureaus. Because of the substantial regulatory relief provided by the NEP designation, we believe the reintroduction of the black-footed ferret in the areas described will not conflict with existing human activities or hinder public utilization of the area.

This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations

of their recipients. This rule will not raise novel legal or policy issues. The Service has previously designated experimental populations of black-footed ferrets at seven other locations (in Colorado/Utah, Montana, South Dakota, Arizona, and Wyoming) and for other species at numerous locations throughout the nation.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The area affected by this rule consists of the Rosebud Indian Reservation, and private, Federal, and State lands that fall within the south-central tier of counties in South Dakota (Mellette, Todd, Tripp, and Gregory Counties). Reintroduction of ferrets allowed by this rule will not have any significant effect on recreational activities in the Experimental Population Area. We do not expect any closures of roads, trails, or other recreational areas. Suspension of prairie dog shooting for ferret management purposes will be localized and prescribed by the Tribe. We do not expect ferret reintroduction activities to affect grazing operations, resource development actions, or the status of any other plant or animal species within the release area. Because participation in ferret reintroduction by private landowners is voluntary, this rulemaking is not expected to have any significant impact on private activities in the affected area. The designation of the NEP in this rule will significantly reduce the regulatory requirements regarding the reintroduction of these ferrets, will not create inconsistencies with other agency actions, and will not conflict with existing or proposed human activity, or Tribal and public use of the land.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more for reasons outlined above. It will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The NEP designation will not place any additional requirements on any city, county, or other local municipalities. The specific site designated for release of the experimental population of ferrets is predominantly Rosebud Sioux Tribal Trust land administered by the Rosebud Sioux Tribe, who support this project. The State of South Dakota has expressed support for accomplishing the reintroduction through a nonessential experimental designation. Accordingly, this rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Since this rulemaking does not require that any action be taken by local or State government or private entities, we have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities (*i.e.*, it is not a "significant regulatory action" under the Act).

Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. Designating reintroduced populations of federally listed species as NEPs significantly reduces the Act's regulatory requirements with respect to the reintroduced listed species within the NEP. Under NEP designations, the Act requires a Federal agency to confer with the Service if the agency determines its action within the NEP is likely to jeopardize the continued existence of the reintroduced species. However, even if an agency action totally eliminated a reintroduced species from an NEP and jeopardized the species' continued existence, the Act does not compel a Federal agency to stop a project, deny issuing a permit, or cease any activity. Additionally, regulatory relief can be provided regarding take of reintroduced species within NEPs, and a special rule has been developed stipulating that unintentional take (including killing or injuring) of the reintroduced black-footed ferrets will not be a violation of the Act, when such take is incidental to an otherwise legal activity (*e.g.*, livestock management, mineral development) that is in accordance with Federal, Tribal, State, and local laws and regulations.

Most of the lands within the primary reintroduction area are administered by the Rosebud Sioux Tribe. Multiple-use management of these lands by industry and recreation interests will not change as a result of the experimental designation. Private landowners within the Experimental Population Area will still be allowed to conduct lawful control of prairie dogs, and may elect to have black-footed ferrets removed from their land should ferrets move to private lands. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reintroduction of ferrets will conflict with existing human activities or hinder public use of the area. The South Dakota Department of Game, Fish, and Parks has previously endorsed ferret reintroductions under NEP designations and continues to do so for this effort. The NEP designation will not require the South Dakota Department of Game, Fish, and Parks to specifically manage for reintroduced ferrets. A takings implication assessment is not required.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment. As stated above, most of the lands within the primary reintroduction area are Tribal Trust lands, and multiple-use management of these lands will not change to accommodate black-footed ferrets. The designation will not impose any new restrictions on the State of South Dakota. The Service has coordinated extensively with the Tribe and State of South Dakota, and they endorse the NEP designation as the only feasible way to pursue ferret recovery in the area. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Department of the Interior has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the order.

Paperwork Reduction Act

This regulation contains information collection requirements under the Paperwork Reduction Act (and approval by the Office of Management and Budget (OMB)) under 44 U.S.C. 3501 *et seq.* The collected information covers general take or removal, depredation-related take, and specimen collection. Authorization for this information collection has been approved by OMB and has been assigned OMB control number 1018–0095, which expires October 31, 2004. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

National Environmental Policy Act

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act of 1969. We have prepared an environmental assessment as defined under the authority of NEPA, which is available from the Service office identified in the **ADDRESSES** section. In that environmental assessment, we determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes (E.O. 13175)

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), E.O. 13175, and 512 DM 2, we have closely coordinated this rule with the affected tribe, the Rosebud Sioux Tribe. Throughout development of this rule, we have maintained regular contact with the Rosebud Sioux Tribe and have received their support for this reintroduction and NEP designation.

Energy Supply, Distribution, or Use (E.O. 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this final rule is not a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

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Authors

The primary authors of this rule are Mike Lockhart and Scott Larson (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulations Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the U.S. Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the existing entry for "Ferret, black-footed" under "MAMMALS" to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Ferret, black-footed	*Mustela nigripes* ...	Western U.S.A., Western Canada.	Entire, except where listed as an experimental population.	E	1, 3, 433, 545, 546, 582, 646, 703, 737.	NA	NA
Do	.....do	.....do	U.S.A. (specified portions of AZ, CO, MT, SD, UT, and WY, see 17.84(g)(9)).	XN	433, 545, 546, 582, 646, 703, 737.	NA	17.84(g)
*	*	*	*	*	*		*

■ 3. Amend § 17.84 by revising paragraphs (g)(1) and (g)(4)(iii) and by adding paragraphs (g)(6)(vii) and (g)(9)(vii) to read as follows, and by adding a map to follow the existing maps at the end of this paragraph (g):

§ 17.84 Special rules—vertebrates.

* * * * *

(g) Black-footed ferret (*Mustela nigripes*).

(1) The black-footed ferret populations identified in paragraph (g)(9)(i) through (vii) of this section are nonessential experimental populations. We will manage each of these populations in accordance with their respective management plans.

* * * * *

(4) * * *

(iii) To relocate a ferret that has moved outside the Little Snake Black-footed Ferret Management Area/Coyote Basin Primary Management Zone or the Rosebud Sioux Reservation Experimental Population Area when that relocation is necessary to protect the ferret or is requested by an affected landowner or land manager, or whose removal is requested pursuant to paragraph (g)(12) of this section.

* * * * *

(6) * * *

(vii) Report such taking in the Rosebud Sioux Reservation Experimental Population Area to the Field Supervisor, Ecological Services, U.S. Fish and Wildlife Service, Pierre, South Dakota (telephone 605/224–8693).

* * * * *

(9) * * *

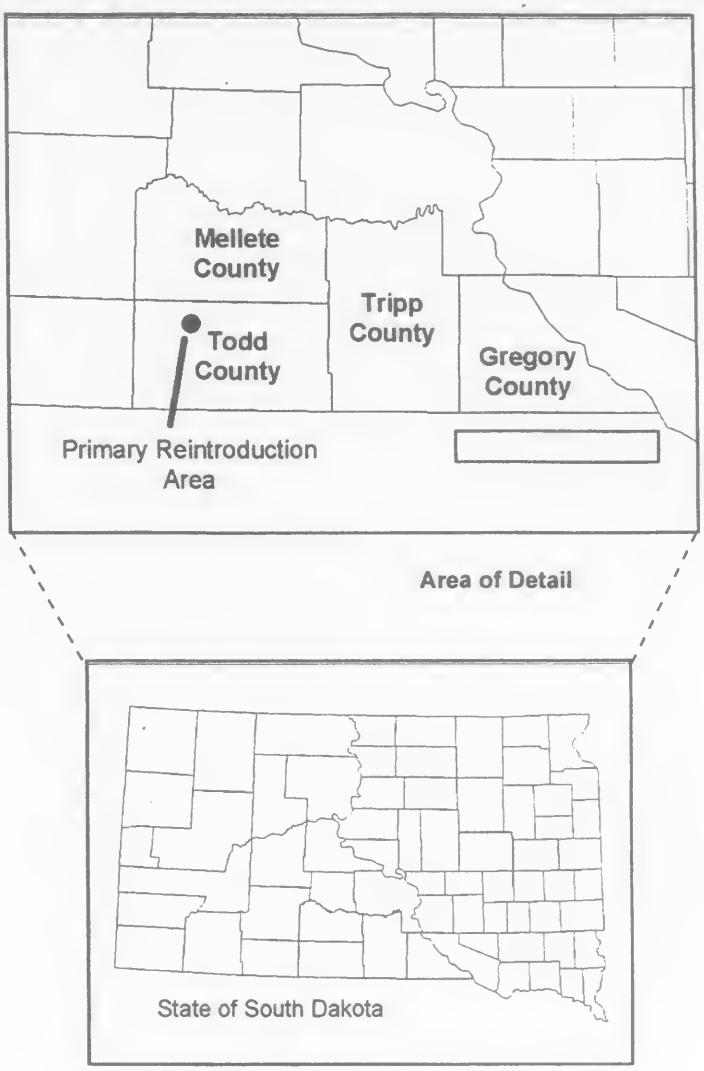
(vii) The Rosebud Sioux Reservation Experimental Population Area is shown on the map of south-central South Dakota at the end of paragraph (g) of this section. The boundaries of the nonessential experimental population area include all of Gregory, Mellette, Todd, and Tripp Counties in South Dakota. Any black-footed ferret found within these four counties will be considered part of the nonessential experimental population after the first breeding season following the first year of black-footed ferret release. A black-footed ferret occurring outside the nonessential experimental population area in south-central South Dakota will initially be considered as endangered but may be captured for genetic testing. If necessary, disposition of the captured animal may occur in the following ways:

(A) If an animal is genetically determined to have originated from the experimental population, we may return it to the reintroduction area or to a captive-breeding facility.

(B) If an animal is determined to be genetically unrelated to the experimental population, we will place it in captivity under an existing contingency plan. Up to nine black-footed ferrets may be taken for use in the captive-breeding program.

* * * * *

BILLING CODE 4310–55–P



Rosebud Sioux Tribe ITOPA SAPA KIN (Black-footed Ferret)
Experimental Population Area - South Dakota

Dated: April 16, 2003.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03–12199 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 000407096–0096–01; I.D. 051203A]

Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Commercial Haddock Harvest

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

ACTION: Removal of haddock daily trip limit.

SUMMARY: NMFS announces that the Administrator, Northeast Region, NMFS (Regional Administrator) is suspending the haddock daily trip limit for the groundfish fishery for the remainder of the 2003 fishing year. The Regional Administrator has projected that less than 75 percent of the haddock target total allowable catch (TAC) will be harvested for the 2003 fishing year under the restrictive daily trip limits. This action is intended to allow fishermen to catch the haddock TAC, without exceeding it.

DATES: Effective May 13, 2003 through April 30, 2004.

FOR FURTHER INFORMATION CONTACT: Susan Chinn, Fishery Management Specialist, 978–281–9218.

SUPPLEMENTARY INFORMATION: Framework Adjustment 33 to the NE Multispecies Fishery Management Plan, which became effective May 1, 2000, implemented the current haddock trip limit regulations (65 FR 21658, April 24, 2000). To ensure that haddock landings do not exceed the appropriate target TAC, Framework 33 established a haddock trip limit of 3,000 lb (1,360.8 kg) per NE multispecies day-at-sea (DAS) fished and a maximum trip limit of 30,000 lb (13,608 kg) of haddock for the period May 1 through September 30; and 5,000 lb (2,268 kg) of haddock per DAS and 50,000 lb (22,680 kg) per trip from October 1 through April 30. Framework 33 also provided a mechanism to adjust the haddock trip limit based upon the percentage of TAC that is projected to be harvested. Section 648.86(a)(1)(iii)(B) specifies that, if the Regional Administrator projects that less than 75 percent of the haddock target TAC will be harvested in the fishing year, the trip limit may be adjusted. Further, this section stipulates that NMFS will publish notification in the **Federal Register** informing the public of the date of any changes to the trip limit.

Based on the March, 2002, "Final Report of the Working Group on Re-Evaluation of Biological Reference Points for New England Groundfish," (Report) the appropriate Georges Bank haddock target TAC for the 2002 fishing year was estimated to be 17,337 mt. A subsequent assessment of Georges Bank haddock by the Groundfish Assessment Review Meeting (GARM, October 2002) calculated a stock size similar to that noted in the March, 2002, Report. Therefore, the target TAC for the 2003 fishing year remains at 17,337 mt. Based on recent historical fishing practices, the Regional Administrator has projected that less than 75 percent of the haddock target TAC for the 2003 fishing year will be harvested by April 30, 2004, and has therefore determined that suspending the 3,000–lb (1,360.8–kg) and 5,000–lb (2,268–kg) daily haddock trip limits through April 30, 2004, while retaining the associated 30,000–lb (13,608–kg) and 50,000–lb (22,680–kg) per trip possession limits for May 1 through September 30, 2003, and October 1 through April 30, 2004, respectively, will provide the industry with the opportunity to harvest the target TAC for the 2003 fishing year. In order to prevent the TAC from being exceeded, the Regional Administrator may adjust this possession limit again through publication of a notification in the **Federal Register**, pursuant to § 648.86(a)(1)(iii).

Classification

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

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

Dated: May 12, 2003.

Bruce C. Morehead,

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

[FR Doc. 03–12299 Filed 5–13–03; 2:38 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 68, No. 95
Friday, May 16, 2003

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 50

RIN 3150–AG42

Risk-Informed Categorization and Treatment of Structures, Systems and Components for Nuclear Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to provide an alternative approach for establishing the requirements for treatment of structures, systems and components (SSCs) for nuclear power reactors using a risk-informed method of categorizing SSCs according to their safety significance. The proposed amendment would revise requirements with respect to "special treatment," that is, those requirements that provide increased assurance (beyond normal industrial practices) that SSCs perform their design basis functions. This proposed amendment would permit licensees (and applicants for licenses) to remove SSCs of low safety significance from the scope of certain identified special treatment requirements and revise requirements for SSCs of greater safety significance. In addition to the rulemaking and its associated analyses, the Commission is also proposing a draft regulatory guide to implement the rule.

DATES: Submit comments by July 30, 2003. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure 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–AG42) 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. Personal information 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 website to Carol Gallagher (301) 415–5905; email *cag@nrc.gov*.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm 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 examined and copied for a fee at the NRC's Public Document Room (PDR), Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. Selected documents, including comments, can 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/NRC/ADAMS/index.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 email to *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–1462; e-mail: *tar@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

The NRC has established a set of regulatory requirements for commercial nuclear reactors to ensure that a reactor facility does not impose an undue risk to the health and safety of the public, thereby providing reasonable assurance of adequate protection to public health and safety. The current body of NRC regulations and their implementation are largely based on a "deterministic" approach.

This deterministic approach establishes requirements for engineering margin, quality assurance in design, manufacture, and construction. In addition, it assumes that adverse conditions can exist (*e.g.*, equipment failures and human errors) and establishes a specific set of design basis events (DBEs). The deterministic approach contains implied elements of probability (qualitative risk considerations), from the selection of accidents to be analyzed (*e.g.*, reactor vessel rupture is considered too improbable to be included) to the system level requirements for emergency core cooling (*e.g.*, safety train redundancy and protection against single failure). The deterministic approach then requires that the licensed facility include safety systems capable of preventing and/or mitigating the consequences of those DBEs to protect public health and safety. Those SSCs necessary to defend against the DBEs were defined as "safety-related," and these SSCs were the subject of many regulatory requirements designed to ensure that they were of high quality, high reliability, and had capability to perform during postulated design basis

conditions. Typically, the regulations establish the scope of SSCs that receive special treatment using one of three different terms: "safety-related," "important to safety," or "basic component." The terms "safety-related" and "basic component" are defined in the regulations, while "important to safety" (used principally in the general design criteria of Appendix A to 10 CFR part 50) is not explicitly defined.

These prescriptive requirements as to how licensees were to treat SSCs, especially those that are defined as "safety-related," are referred to in the rulemaking as "special treatment requirements." These requirements were developed to provide greater assurance that these SSCs would perform their functions under particular conditions (*e.g.*, seismic events, or harsh environments), with high quality and reliability, for as long as they are part of the plant. These include particular examination techniques, testing strategies, documentation requirements, personnel qualification requirements, independent oversight, etc. In many instances, these "special treatment" requirements were developed as a means to gain assurance when more direct measures, *e.g.*, testing under design basis conditions or routine operation, could not show that SSCs were functionally capable.

Special treatment requirements are imposed on nuclear reactor applicants and licensees through numerous regulations that have been issued since the 1960's. These requirements specify different scopes of equipment for different special treatment requirements depending on the specific regulatory concern, but are derived from consideration of the deterministic DBEs.

Treatment for an SSC, as a general term and as it will be used in this rulemaking, refers to activities, processes, and/or controls that are performed or used in the design, installation, maintenance, and operation of structures, systems, or components as a means of (1) specifying and procuring SSCs that satisfy performance requirements; (2) verifying over time that performance is maintained; (3) controlling activities that could impact performance; and (4) providing assessment and feedback of results to adjust activities as needed to meet desired outcomes. Treatment includes, but is not limited to, quality assurance, testing, inspection, condition monitoring, assessment, evaluation, and resolution of deviations. The distinction between "treatment" and "special treatment" is the degree of NRC specification as to what must be implemented for particular SSCs or for particular conditions.

Defense-in-depth is an element of the NRC's safety philosophy that employs successive measures to prevent accidents or mitigate damage if a malfunction, accident, or naturally caused event occurs at a nuclear facility. Defense-in-depth is a philosophy used by the NRC to provide redundancy as well as the philosophy of a multiple-barrier approach against fission product releases. The defense-in-depth philosophy ensures that safety will not be wholly dependent on any single element of the design, construction, maintenance, or operation of a nuclear facility. The net effect of incorporating defense-in-depth into design, construction, maintenance, and operation is that the facility or system in question tends to be more tolerant of failures and external challenges.

A probabilistic approach to regulation enhances and extends the traditional deterministic approach by allowing consideration of a broader set of potential challenges to safety, providing a logical means for prioritizing these challenges based on safety significance, and allowing consideration of a broader set of resources to defend against these challenges. Until the accident at Three Mile Island (TMI), the NRC only used probabilistic criteria in specialized areas, such as for certain man-made hazards and for natural hazards (with respect to initiating event frequency). The major investigations of the TMI accident recommended that probabilistic risk assessment (PRA) techniques be used more widely to augment traditional nonprobabilistic methods of analyzing plant safety.

In contrast to the deterministic approach, PRAs address credible initiating events by assessing the event frequency. Mitigating system reliability is then assessed, including the potential for common cause failures. The probabilistic treatment goes beyond the single failure requirements used in the deterministic approach. The probabilistic approach to regulation is therefore considered an extension and enhancement of traditional regulation by considering risk in a more coherent and complete manner.

The primary need for improving the implementation of defense-in-depth in a risk-informed regulatory system is guidance to determine how many measures are appropriate and how good these should be. Instead of merely relying on bottom-line risk estimates, defense-in-depth is invoked as a strategy to ensure public safety given there exists both unquantified and unquantifiable uncertainty in engineering analyses (both deterministic and risk assessments).

Risk insights can make the elements of defense-in-depth clearer by quantifying them to the extent practicable. Although the uncertainties associated with the importance of some elements of defense may be substantial, the fact that these elements and uncertainties have been quantified can aid in determining how much defense makes regulatory sense. Decisions on the adequacy of, or the necessity for, elements of defense should reflect risk insights gained through identification of the individual performance of each defense system in relation to overall performance.

The Commission published a Policy Statement on the Use of Probabilistic Risk Assessment (PRA) on August 16, 1995 (60 FR 42622). In the policy statement, the Commission stated that the use of PRA technology should be increased in all regulatory matters to the extent supported by the state of the art in PRA methods and data, and in a manner that supports the NRC's traditional defense-in-depth philosophy. The policy statement also stated that in making regulatory judgments, the Commission's safety goals for nuclear power reactors and subsidiary numerical objectives (on core damage frequency and containment performance) should be used with appropriate consideration of uncertainties.

To implement this Commission policy, the staff developed guidance on the use of risk information for reactor license amendments and issued Regulatory Guide (RG) 1.174. This RG provided guidance on an acceptable approach to risk-informed decision-making consistent with the Commission's policy, including a set of key principles. These principles include:

(1) Be consistent with the defense-in-depth philosophy;

(2) Maintain sufficient safety margins;

(3) Any changes allowed must result in only a small increase in core damage frequency or risk, consistent with the intent of the Commission's Safety Goal Policy Statement; and

(4) Incorporate monitoring and performance measurement strategies.

Regulatory Guide 1.174 states that consistency with the defense-in-depth philosophy will be preserved by ensuring that:

(1) A reasonable balance is preserved among prevention of accidents, prevention of barrier failure, and mitigation of consequences;

(2) An over-reliance on programmatic activities to compensate for weaknesses

in equipment or device design is avoided;

(3) System redundancy, independence, and diversity are preserved commensurate with the expected frequency, consequences of challenges to the system, and uncertainties (*e.g.*, no risk outliers);

(4) Defenses against potential common cause failures are preserved, and the potential for the introduction of new common cause failure mechanisms is assessed;

(5) The independence of barriers is not degraded; and

(6) defenses against human errors are preserved.

II. Rule Initiation

In addition to RG 1.174, the NRC also issued other regulatory guides on risk-informed approaches for specific types of applications. These included RG 1.175, Risk-informed Inservice Testing, RG 1.176, Graded Quality Assurance, RG 1.177, Risk-informed Technical Specifications, and RG 1.178, Risk-informed Inservice Inspection. In this respect, the Commission has been successful in developing and implementing a regulatory means for considering risk insights into the current regulatory framework. One such risk-informed application, the South Texas Project (STP) submittal on graded quality assurance, is particularly noteworthy.

In March 1996, STP Nuclear Operating Company (STPNOC) requested that the NRC approve a revised Operations Quality Assurance Program (OQAP) that incorporated the methodology for grading quality assurance (QA) based on PRA insights. The STP graded QA proposal was an extension of the existing regulatory framework. Specifically, the STP approach continued to use the traditional safety-related categorization, but allowed for gradation of safety significance within the "safety-related" categorization (consistent with 10 CFR Part 50 Appendix B) through use of a risk-informed process. Following extensive discussions with the licensee and substantial review, the staff approved the proposed revision to the OQAP on November 6, 1997. Subsequent to NRC's approval, STPNOC identified implementation difficulties associated with the graded QA program. Despite the reduced QA requirement applied for a large number of SSCs in which the licensee judged to be of low safety significance, other regulatory requirements such as environmental qualification, the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, or seismic continue to impose substantial burdens. As a result, the replacement of such a low safety significant component needs to satisfy other special requirements during a procurement process. These requirements prevented STPNOC from realizing the full potential reduction in unnecessary regulatory burden for SSCs judged to have little or no safety importance. In an effort to achieve the full benefit of the graded QA program (and in fact go beyond the staff's previous approval of graded QA), STPNOC submitted a request, dated July 13, 1999, asking for an exemption from the scope of numerous special treatment regulations (including 10 CFR 50 Appendix B) for SSCs categorized as low safety significant or as non-risk significant. STPNOC's exemption was ultimately approved by the staff in August 2001 (further discussed in Section IV.4).

The experience with graded QA was a principal factor in the NRC's determination that rule changes would be necessary to proceed with some activities to risk-inform requirements. The Commission also believes that the development of PRA technology and decision-making tools for using risk information together with deterministic information supported rulemaking activities to allow the NRC to refocus certain regulatory requirements using this type of information.

Under Option 2 of SECY–98–300, "Options for Risk-Informed Revisions to 10 CFR Part 50—'Domestic Licensing of Production and Utilization Facilities,'" dated December 23, 1998, the NRC staff recommended that risk-informed approaches to the application of special treatment requirements be developed as one application of risk-informed regulatory changes. Option 2 (also referred to as RIP50 Option 2) addresses the implementation of changes to the scope of SSCs needing special treatment while still providing assurance that the SSCs will perform their design functions. Changes to the requirements pertaining to the design of the plant or the design basis accidents are not included in Option 2. These technical risk-informed changes are addressed under Option 3 of SECY–98–300. The Commission approved proceeding with Option 2 in a staff requirements memorandum (SRM) dated June 8, 1999.

The stated purpose of the "Option 2" rulemaking was to develop an alternative regulatory framework that enables licensees, using a risk-informed process for categorizing SSCs according to their safety significance (*i.e.*, a decision that considers both traditional deterministic insights and risk insights), to reduce unnecessary regulatory burden for SSCs of low safety significance by removing these SSCs from the scope of special treatment requirements. As part of this process, those SSCs found to be of risk-significance would be brought under a greater degree of regulatory control through the requirements being added to the rule designed to maintain consistency between actual performance and the performance considered in the assessment process that determines their significance. As a result, both the NRC staff and industry should be able to better focus their resources on regulatory issues of greater safety significance.

The Commission directed the staff to evaluate strategies to make the scope of the nuclear power reactor regulations that impose special treatment risk-informed. SECY–99–256, "Rulemaking Plan for Risk-Informing Special Treatment Requirements," dated October 29, 1999, was sent to the Commission to obtain approval for a rulemaking plan and issuance of an Advance Notice of Proposed Rulemaking (ANPR). By SRM dated January 31, 2000, the Commission approved publication of the ANPR and approved the rulemaking plan. The ANPR was published in the **Federal Register** on March 3, 2000 (65 FR 11488) for a 75-day comment period, which ended on May 17, 2000. In the rulemaking plan, the NRC proposed to create a new section within part 50, referred to as § 50.69, to contain these alternative requirements.

The Commission received more than 200 comments in response to the ANPR. The staff sent the Commission SECY–00–194 "Risk-Informing Special Treatment Requirements," dated September 7, 2000, which provided the staff's preliminary views on the ANPR comments and additional thoughts on the preliminary regulatory framework for implementing a rule to revise the scope of special treatment requirements for SSCs. The comments from the ANPR are further discussed in Section IV.1.0 below.

The concept developed for this proposed rule, discussed at length in the ANPR, was to apply treatment requirements based upon the safety-significance of SSCs, determined through consideration of both risk insights and deterministic information. Thus, the risk-informed approach discussed in this proposed rule for establishing an alternative scope of SSCs subject to special treatment requirements uses both risk and traditional deterministic methods in a blended "risk-informed" approach. The Commission finds the risk-informed

approach outlined in RG 1.174 is appropriate for use in this rulemaking.

It is important to note that this rulemaking effort, while intended to ensure that the scope of special treatment requirements imposed on SSCs is risk-informed, is not intended to allow for the elimination of SSC functional requirements, or to allow equipment that is required by the deterministic design basis to be removed from the facility (*i.e.*, changes to the design of the facility must continue to meet the current requirements governing design change, most notably § 50.59). Instead, this rulemaking should enable licensees and the staff to focus their resources on SSCs that make a significant contribution to plant safety by restructuring the regulations to allow an alternative risk-informed approach to special treatment. Conversely, for SSCs that do not significantly contribute to plant safety, this approach should allow an acceptable, though reduced, level of assurance that these SSCs will satisfy functional requirements.

III. Proposed Regulations

The Commission is proposing to establish § 50.69 as an alternative set of requirements whereby a licensee may undertake categorization of its SSCs using risk insights and adjust treatment requirements based upon their resulting significance. Under this approach, a licensee would be allowed to reduce special treatment requirements for SSCs that are determined to be of low safety significance and would enhance requirements for treatment of other SSCs that are found to be safety significant. The proposed requirements would establish a process by which a licensee would categorize SSCs using a risk-informed process, adjust treatment requirements consistent with the relative significance of the SSC, and manage the process over the lifetime of the plant. To implement these requirements, a risk-informed categorization process would be employed to determine the safety significance of SSCs and place the SSCs into one of four risk-informed safety class (RISC) categories. It is important that this categorization process be robust to enable the Commission to remove requirements for SSCs determined to be of low safety significance. The determination of safety significance would be performed by an integrated decisionmaking process which uses both risk insights and traditional engineering insights. The safety functions would include both the design basis functions (derived from the "safety-related" definition, which includes external events), as well as functions credited for severe accidents (including external events). Treatment requirements for the SSCs are applied as necessary to maintain functionality and reliability, and are a function of the category into which the SSC is categorized. Finally, assessment activities would be conducted to make adjustments to the categorization and treatment processes as needed so that SSCs continue to meet applicable requirements. The proposed rule also contains requirements for obtaining NRC approval of the categorization process and for maintaining plant records and reports.

III.1.0 Categorization of SSCs

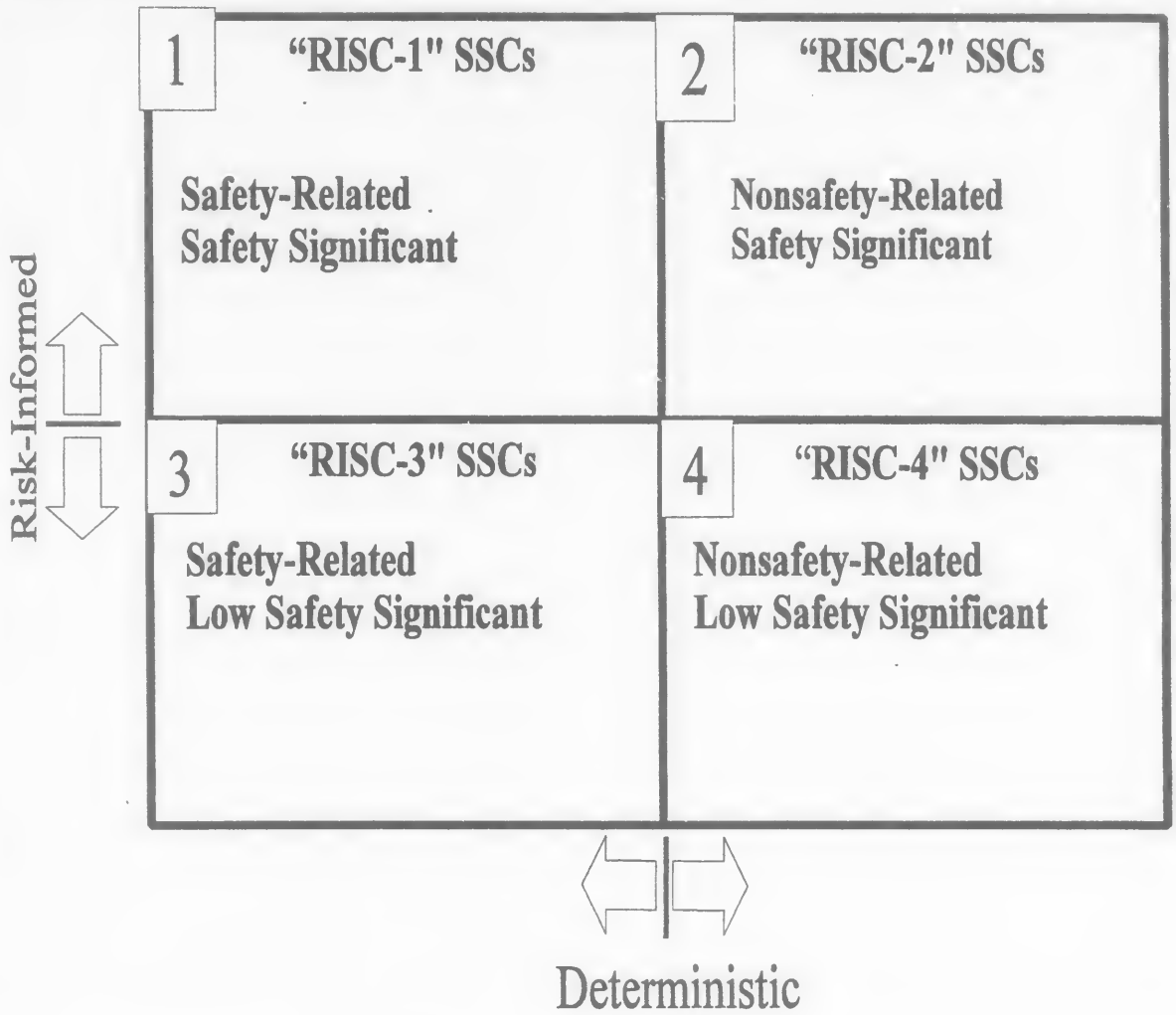
Section 50.69 would define four RISC categories into which SSCs are categorized. Four categories were chosen because it is the simplest approach for transitioning between the previous SSC classification scheme and the new scheme used in the proposed § 50.69. The depiction in Figure 1 provides a conceptual understanding of the new RISC categories. The figure depicts the current safety-related versus nonsafety-related SSC categorization scheme with an overlay of the new risk-informed categorization. In the traditional deterministic approach, SSCs were generally categorized as either "safety-related" (as defined in § 50.2) or nonsafety-related. This division is shown by the vertical line in the figure. Risk insights, including consideration of severe accidents, can be used to identify SSCs as being either safety-significant or low safety-significant (shown by the horizontal line). Hence, the application of a risk-informed categorization results in SSCs being grouped into one of four categories as represented by the four boxes in Figure 1.

Box 1 of Figure 1 depicts safety-related SSCs that a risk-informed categorization process determines are significant contributors to plant safety. These SSCs are termed RISC–1 SSCs. RISC–2 SSCs are nonsafety-related, and the risk-informed categorization determines them to be significant contributors to plant safety. The third category are those SSCs that are safety-related SSCs and that a risk-informed categorization process determines are not significant contributors to plant safety. These SSCs are termed RISC–3 SSCs. Finally, there are SSCs that are nonsafety-related and that a risk-informed categorization process determines are not significant contributors to plant safety. These SSCs are termed RISC–4 SSCs.

Section 50.69 would define the terminology "safety-significant function" as functions whose loss or degradation could have a significant adverse effect on defense-in-depth, safety margins or risk. This definition was chosen to be consistent with the concepts described in RG 1.174. The proposed rule would impose greater treatment requirements on SSCs that perform safety-significant functions (RISC–1 and RISC–2 SSCs) to ensure that defense-in-depth and safety margins are maintained. The proposed rule would also require that the change in risk associated with implementation of proposed § 50.69 be small.

III.2.0 Methodology for Categorization

The cornerstone of proposed § 50.69 is the establishment of a robust, risk-informed categorization process that provides high confidence that the safety significance of SSCs is correctly determined considering all relevant information. As such, all the categorization requirements incorporated into proposed § 50.69 are to achieve this objective. Essentially the process is structured to ensure that all relevant information pertaining to SSC safety significance is considered by a panel that has the expertise and capabilities for making a sound decision regarding the SSC's categorization, and that information is considered in a manner that ensures the Commission's criteria for risk-informed applications are satisfied (*i.e.*, that defense-in-depth is maintained, safety margins are maintained, any risk change is small, and a monitoring and performance assessment strategy is used). This process enables SSCs to be placed in the correct RISC category such that the appropriate treatment requirements will be applied commensurate with their safety significance. A safety-significant SSC is an SSC that performs a safety-significant function. The proposed rule would require that SSC safety significance be determined using quantitative information from an up-to-date PRA reasonably representing the current plant configuration, which as a minimum covers internal events at full power, and other available risk analyses and traditional engineering information to supplement the quantitative PRA results.



Section 50.69 would contain requirements to ensure that the PRA is adequate for this application. The proposed rule would require that as part of the categorization process defense-in-depth is considered, and that the revised treatment applied to RISC–3 SSCs be considered for its potential impact on risk. As an example, the Commission's position is that the containment and its systems are important in the preservation of the defense-in-depth philosophy (in terms of both large early and large late releases). As part of meeting the defense-in-depth principle, a licensee must demonstrate that the function of the containment as a barrier (including fission product retention and removal) is not significantly degraded when SSCs that support the functions are moved to RISC–3. Thus, the rule contains requirements for the IDP to consider defense-in-depth as part of the categorization process.

The risk insights and other traditional information are required to be evaluated by an Integrated Decision-Making Panel (IDP) comprised of expert, plant-knowledgeable members whose expertise includes PRA, safety analysis, plant operation, design engineering, and system engineering. Because the IDP makes the final determination about the safety significance of an SSC, it is important that the membership include a variety of expertise about the plant, how it is operated, and the safety analyses (both deterministic and probabilistic), so that all pertinent information is considered. Hence the available deterministic and probabilistic information pertaining to SSC safety significance is considered in the decision process. The information considered must reflect the as-built and as-operated plant, so that the decisions are based upon correct information, leading to proper categorization. Where applicable, the information is to come from a PRA that is adequate for this application (*i.e.*, categorization of SSC safety significance). From this perspective, the IDP decision process can be viewed as an extension of the previous process for determining SSC safety classification (*i.e.*, safety-related or nonsafety-related), in that it is making use of relevant risk information which was either not considered, or not available when the SSCs were initially classified. The IDP makes the final determination of the safety significance of SSCs using a process that takes all this information into consideration, in a structured, documented manner. The structure provides consistency to decisions that may be made over a period of time, and the documentation

gives both the licensee and the NRC the ability to understand the basis for the categorization decision, should questions arise at a later date.

The proposed rule would contain general requirements for consideration of SSCs, modes of operation or initiating events not modeled in the PRA. As a result, the implementing guidance plays a significant role in effective implementation, and bolsters the need for NRC review and approval of the categorization process before implementation. As noted in the ANPR, the Commission could include more requirements in the rule itself, rather than only being in the guidance. Public comment is requested on the merits of placing the additional detail shown in the guidance and discussed in Section V.4 of the Statement of Considerations (SOC) in the rule.

Implementation of the categorization process relies heavily on the skills, knowledge, and experience of the people that implement the process, in particular on the qualifications of IDP members. Therefore, the Commission concludes that requirements are necessary for the composition of the panel to be experienced personnel who possess diverse knowledge and insights in plant design and operation and who are capable in the use of deterministic knowledge and risk insights in making SSC classifications.

The PRA used to provide the risk information to the categorization process is required to be subjected to a peer review. The peer review focuses on the PRA completeness and technical adequacy for determining importance of particular SSCs, including consideration of the scope, level of detail, and technical quality of the PRA model, the assumptions made in the development of the results, and the uncertainties that impact the analysis. This provides assurance that for IDP decisions that utilize PRA information that the results of the categorization process provide a valid representation of the risk importance of SSCs.

Before implementation of § 50.69, the NRC will approve the categorization process, through a license amendment, because of the importance of the PRA and categorization process to successful implementation of the proposed rule. This review will determine whether the licensee's application satisfies the § 50.69 requirements, and consider the adequacy of the PRA, focusing on the results of the peer review and the actions taken by the licensee to address any peer review findings. The Commission has determined that a focused NRC staff review of the PRA is necessary because there are key assumptions and modeling parameters that can have a significant enough impact on the results such that NRC review of their adequacy for this application is considered necessary to verify that the overall categorization process will yield acceptable decisions.

Section 50.69(c)(iv) would require that a licensee or applicant provide reasonable confidence that for SSCs categorized as RISC–3, sufficient safety margins are maintained and that any potential changes in core damage frequency (CDF) and large early release frequency (LERF) resulting from the implementation of § 50.69 are small. That is, plants with total baseline CDF of 10^{-4} per year or less would be permitted CDF increases of up to 10^{-5} per year, and plants with total baseline CDF greater than 10^{-4} per year would be permitted CDF increases of up to 10^{-6} per year. Plants with total baseline LERFs of 10^{-5} per year or less would be permitted LERF increases of up to 10^{-6} per year, and plants with total baseline LERFs greater than 10^{-5} per year would be permitted LERF increases of up to 10^{-7} per year. However, if there is an indication that the baseline CDF or LERF may be considerably higher than these values, the focus of the licensee should be on finding ways to reduce risk and the licensee may be required to present arguments as to why steps should not be taken to reduce risk in order to consider the reduction in special treatment requirements. This is consistent with the guidance in Section 2.2.4 of RG 1.174. It should be noted that this allowed increase shall be applied to the overall categorization process, even for those licensees that will implement § 50.69 in a phased manner. Thus, the allowable potential increase in risk must be determined in a cumulative way for all the SSCs being recategorized.

Section 50.69 contains requirements for maintaining the design basis of the facility. These requirements, considered in conjunction with the requirements to maintain the potential change in risk as small (as discussed above), ensure that safety margins are maintained. The performance of candidate RISC–3 SSCs should not be significantly degraded by the removal of special treatment. This is because the licensee is required to implement processes that provide reasonable confidence that SSCs remain functional, that is, remain capable of performing their function with a reliability that is not significantly degraded to such an extent that there will be a significant number of failures that can lead to unacceptable increases in CDF or LERF.

The proposed rule would require applicants and licensees to perform evaluations to assess the potential impact on risk from changes to treatment. For SSCs modeled in the PRA, this would likely be accomplished by sensitivity studies to assess the impact of changes in SSC failure probabilities or reliabilities that might occur due to the revised treatment. For example, a licensee would be expected to increase the failure rates of RISC–3 SSCs by appropriate factors to understand the potential effect of applying reduced treatment to these SSCs (*e.g.*, reduced maintenance, testing, inspection, and quality assurance). For other SSCs, other types evaluations would be used to provide the basis for concluding that the potential increase in risk would be small. A licensee will need to submit its basis to support that the evaluations are bounding estimates of the potential change in risk and that programs already in existence or implemented for proposed § 50.69 can provide sufficient information that any potential risk change remains small over the lifetime of the plant. A licensee is required to consider potential effects of common-cause interaction susceptibility and potential impacts from known degradation mechanisms. To meet this requirement, a licensee would need to: (a) Maintain an understanding of common-cause effects and degradation mechanisms and their potential impact on RISC–3 SSCs; (b) maintain an understanding of the programmatic activities that provide defenses against common cause failures (CCFs) and failures resulting from degradation; and (c) factor this knowledge into the treatment applied to the RISC–3 SSCs.

The proposed rule focuses on common-cause effects because significant increases in common-cause failures could invalidate the evaluations, such as sensitivity studies, performed to show a small change in risk due to implementation of § 50.69. With respect to known degradation mechanisms, this is an acknowledgment that certain treatment requirements have evolved over time to deal with such mechanisms (*e.g.*, use of particular inspection techniques or frequencies), and that when contemplating changes to treatment, the lessons from this experience are to be taken into account.

For SSCs categorized by means other than PRA models, the licensee would need to provide a basis to conclude that the small increase in risk requirement would still be met in light of potential changes in treatment. All of these requirements are included in § 50.69 so that a licensee has a basis for

concluding that the evaluations performed to show a small change in risk remain valid.

In addition, the rule would require that implementation be done for an entire system or structure and not for selected components within a system or structure. This required scope ensures that all safety functions associated with a system or structure are properly identified and evaluated when determining the safety significance of individual components within a system or structure and that the entire set of components that comprise a system or structure are considered and addressed.

III.3.0 Treatment Requirements

Treatment requirements are applied to SSCs commensurate with SSC safety significance and as a function of the RISC category into which the SSCs are categorized.

III.3.1 RISC–1 and RISC–2 Treatment

For SSCs determined by the IDP to be safety-significant (*i.e.*, RISC–1 and RISC–2 SSCs), § 50.69 would maintain the current regulatory requirements (*i.e.*, it does not remove any requirements from these SSCs) for special treatment. These current requirements are adequate for addressing design basis performance of these SSCs. Additional requirements are being added to these SSCs to ensure that their performance remains consistent with the assumed performance in the categorization process (including the PRA) for beyond design basis conditions. For example, in developing the PRA model, a licensee will make assumptions regarding the availability, capability, and reliability of RISC–1 and RISC–2 SSCs in performing specific functions under various plant conditions. These functions may be beyond the design basis for individual SSCs. Further, the conditions under which those functions are assumed to be performed may exceed the design-basis conditions for the applicable SSCs. In the proposed rule, a licensee would be required to ensure that the treatment applied to RISC–1 and RISC–2 SSCs is consistent with the performance credited in the categorization process. This includes credit with respect to prevention and mitigation of severe accidents. In some cases, licensees might need to enhance the treatment applied to RISC–1 or RISC–2 SSCs to support the credit taken in the categorization process, or conversely adjust the categorization assumptions to reflect actual treatment practices. In addition, requirements exist for monitoring and adjustment of treatment processes (or categorization decisions) as needed based upon performance.

III.3.2 RISC–3 Treatment

For RISC–3 SSCs, § 50.69 would impose requirements which are intended to maintain their design basis capability. Although individually RISC–3 SSCs are not significant contributors to plant safety, they do perform functions necessary to respond to certain design basis events of the facility. Thus, collectively, RISC–3 SSCs can be safety-significant and it is important to maintain their design basis functional capability. Maintenance of RISC–3 design basis functionality is important to ensuring that defense-in-depth and safety margins are maintained. As a result, § 50.69(d)(2) would require licensees or applicants to have processes in place that provide reasonable confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design basis conditions throughout the service life. The proposed rule contains high-level requirements for the treatment of RISC–3 SSCs with respect to design control; procurement; maintenance, inspection, test, and surveillance; and corrective action. These alternative treatment requirements for RISC–3 SSCs represent a relaxation of those special treatment requirements that are removed for RISC–3 SSCs by the proposed rule. For example, the alternative treatment requirements for RISC–3 SSCs in proposed § 50.69 are less detailed than provided in the special treatment requirements, and allow significantly more flexibility by licensees in treating RISC–3 SSCs. The Commission is allowing greater flexibility and a lower level of assurance to be provided for RISC–3 SSCs in recognition of their low safety significance, and this recognition includes a consideration for the potential change in reliability that might occur when treatment is reduced from what had previously been required by the special treatment requirements.

The Commission is proposing to specify four processes that must be controlled and accomplished for RISC–3 SSCs: Design Control; Procurement; Maintenance, Inspection, Testing, and Surveillance; and Corrective Action. The high level RISC–3 requirements are structured to address the various key elements of SSC functionality by focusing in these areas. When SSCs are replaced, RISC–3 SSCs must remain capable of performing design basis functions. Hence, the high level requirements focus on maintaining this capability through design control and procurement requirements. During the operating life of a RISC–3 SSC, a sufficient level of confidence is necessary that the SSC continues to be able to perform its design basis function; hence, the inclusion of high level requirements for maintenance, inspection, test, and surveillance. Finally, when data is collected, it must be fed back into the categorization and treatment processes, and when important deficiencies are found, they must be corrected; hence, requirements are also provided in these areas.

In devising these requirements, the Commission has focused upon those critical aspects of the various processes that must exist to provide assurance of performance. Thus, in the design area, for instance, the design conditions under which equipment is expected to perform, such as environmental conditions or seismic conditions, are still to be met. As another example, in the procurement area, procured items are to satisfy their design requirements. These steps provide the basis for concluding that a newly designed and procured replacement item will be capable of meeting its design requirements, even though the special treatment requirements that previously existed are no longer being required.

In implementing the processes required by the proposed rule, licensees will need to obtain data or information sufficient to make a technical judgement that RISC–3 SSCs will remain capable of performing their safety-related functions under design basis conditions. These requirements are necessary because they require the licensee to obtain the data necessary to continue to conclude that RISC–3 SSCs remain capable of performing design basis functions, and to enable the licensee to take actions to restore equipment performance consistent with corrective action requirements included in the proposed rule.

Effective implementation of the treatment requirements provides reasonable confidence in the capability of RISC–3 SSCs to perform their safety function under normal and design basis conditions. This level of confidence is both less than that associated with RISC–1 SSCs, which are subject to all special treatment requirements, and consistent with their low safety significance.

It is noted that changes that affect any non-treatment aspects of an SSC (*e.g.*, changes to the SSC design basis functional requirements) are still required to be evaluated in accordance with other regulatory requirements such as § 50.59. Section 50.69(d)(2)(i), which focuses upon design control, is intended to draw a distinction between treatment (managed through § 50.69) and design changes (managed through other processes such as § 50.59). As

previously noted, this rulemaking is only risk-informing the scope of special treatment requirements. The process and requirements established in § 50.69 do not extend to making changes to the design basis of SSCs.

III.3.3 RISC–4 Treatment

Section § 50.69 would not impose treatment requirements on RISC–4 SSCs. Instead RISC–4 SSCs are simply removed from the scope of any applicable special treatment requirements. This is justified in view of their low significance considering both safety-related and risk information. Any changes (beyond changes to special treatment requirements) must be made per existing design change control requirements including § 50.59 as applicable.

III.4.0 Removal of RISC–3 and RISC–4 SSCs From the Scope of Special Treatment Requirements

RISC–3 and RISC–4 SSCs, through the application of § 50.69, are removed from the scope of specific special treatment requirements listed in proposed § 50.69. These requirements were initially identified in the ANPR based upon a set of criteria as to whether the regulation imposed requirements relating to quality assurance, qualification, documentation, testing, etc., that were intended to add assurance to performance of SSCs.

The special treatment requirements were originally imposed to provide a very high level of assurance that safety-related SSCs would perform when called upon with high reliability. As previously noted, the requirements include extensive quality assurance requirements, qualification testing requirements, as well as inservice inspection and testing requirements. These requirements can be quite demanding and expensive, as indicated in the data provided in the regulatory analysis on procurement costs. For those SSCs that this new categorization identifies as most safety-significant (RISC–1 and RISC–2), the existing special treatment requirements are being maintained because the Commission still desires a high level of assurance. However, the Commission concluded that for the less significant SSCs, it was no longer necessary to have the same high level of assurance that they would perform as specified. This is because some increased likelihood of failure can be tolerated without significantly impacting safety. Thus, the Commission decided to remove the RISC–3 and RISC–4 SSCs from those detailed, specific requirements that provided the very high level of assurance. However, the functional requirements for these SSCs remain. As an example, a RISC–3 component must still be designed to withstand any harsh environment it would experience under a design basis event, but the NRC will not require that this capability be demonstrated by a qualification test. Further, the performance (and treatment) of these RISC–3 SSCs remain under regulatory control, but in a different way. Instead of the special treatment requirements, the Commission has set forth more general requirements by which a licensee is to maintain functionality. These requirements give the licensee more latitude in applying its treatment processes to achieve performance objectives. The more general requirements that the Commission is specifying for the RISC–3 SSCs include steps to procure SSCs suitable for the conditions under which they are to perform, to conduct performance and/or condition monitoring and to take corrective action, as a means of maintaining functionality. As discussed elsewhere in this notice, the Commission concludes that the requirements in § 50.69 maintain adequate protection of public health and safety. Hence, implementation of § 50.69 should result in a better focus for both the licensee and the regulator on issues that pertain to plant safety, and is consistent with the Commission's policy statement for the use of PRA.

In some cases, the Commission concluded that the RISC–3 and RISC–4 SSCs could be totally removed from the scope of specific special treatment requirements while in other cases the Commission concluded that only partial removal was appropriate. The reduced assurance for the RISC–3 SSC would be provided by the alternative requirements being added by this proposed rule. Finally, there was a set of requirements initially identified as special treatment for which the Commission is not proposing to remove RISC–3 and RISC–4 SSCs from their scopes. These requirements are discussed at the end of this section (III.4.9).

III.4.1 Reporting Requirements Under 10 CFR Part 21 and § 50.55(e)

Section 206 of the Energy Reorganization Act of 1974 (ERA) requires the directors and responsible officers of nuclear power plant licensees and firms supplying "components of any facility or activity * * * licensed or otherwise regulated by the Commission" to "immediately report" to the Commission if they have information that "such facility, activity, or basic components supplied to such facility or activity either fails to comply with the AEA, or Commission rule, regulation, order or license "relating to substantial safety hazards," or contains a "defect which could create a substantial safety hazard * * *." *Id.*, paragraph (a). Congress adopted Section 206 to ensure that individuals, and responsible directors and officers of licensees and firms supplying important components to nuclear power plants notify the NRC in a timely fashion of potentially significant safety problems or non-compliance with NRC requirements. The NRC then may assess the reported information and take any necessary regulatory action in a timely fashion to protect public health and safety or common defense and security. Congress did not include definitions for the terms, "components," "basic components," or "substantial safety hazard," in Section 206, but instead directed the Commission to promulgate regulations defining these terms.

The Commission's regulations implementing Section 206 are set forth in 10 CFR Part 21 and § 50.55(e) for license holders and construction permit holders, respectively. The definitions of "basic component," "defect," and "substantial safety hazard" in Part 21 were established by the Commission based upon the premise that the deterministic regulatory paradigm embedded in the Commission's regulations would continue to be the appropriate basis for determining the safety significance of an SSC, and therefore the extent of the reporting obligation under Section 206. This is most evident in the § 21.3 definition of "basic component," which is very similar to the definition of "safety-related" SSCs in § 50.2 (originally embodied in § 50.49). Part 21 also recognizes that Congress did not intend that every potential noncompliance or "defect" in a component raises such significant safety issues that the NRC must be informed of every identified or potential noncompliance or defect. Instead, Congress limited the Section 206 reporting requirement to those instances of noncompliance and defects which represent a "substantial safety hazard." Thus, Part 21 limits the reporting requirement to instances of noncompliance and defects representing "substantial safety hazard," which Part 21 defines as:

> A loss of safety function to the extent there is a major reduction in the degree of protection afforded to public health and safety for any facility or activity licensed, other than for export, pursuant to parts 30, 40, 50, 60, 61, 63, 70, 71, or 72 of this chapter.

Finally, part 21 establishes that a licensee or vendor should "immediately report" potential noncompliance or defects to the NRC in a telephonic "notification" (*see* § 21.3) within two (2) days of receipt of information identifying a noncompliance or defect in a basic component (*see* § 21.21(d)). In addition, part 21 requires that vendors/suppliers of basic components must make notifications to purchasers or licensees of a reportable noncompliance or defect within five (5) working days of completion of evaluations for determining whether noncompliance or defect constitutes a substantial safety hazard (see § 21.21(b)). Thus, Part 21 establishes a reporting scheme for immediate reporting of the most safety-significant noncompliances and defects, as contemplated by Section 206 of the ERA.

Section 50.69 would substitute a risk-informed approach for regulating nuclear power plant SSCs for the current deterministic approach. Therefore, it is necessary from the standpoint of regulatory coherence to determine: (1) What categories of SSCs (*i.e.*, RISC–1, RISC–2, RISC–3 and RISC–4) should be subject to Part 21 and § 50.55(e) reporting under proposed § 50.69, and whether changes to Part 21 and/or § 50.55(e) are necessary to ensure proper reporting of substantial safety hazards; and (2) the appropriate reporting obligations of licensees and vendors under proposed § 50.69, and whether changes to Part 21 and/or § 50.55(e) are necessary to impose the intended reporting obligations on these entities under proposed § 50.69.

III.4.1.1 RISC–1, RISC–2, RISC–3, and RISC–4 SSCs

After consideration of the underlying purposes of Section 206 and the risk-informed approach embodied in § 50.69 (which blends both deterministic and risk information), the Commission believes that RISC–1 SSCs should be subject to the reporting requirements in Part 21 and § 50.55(e) because of their high safety significance. The NRC should be informed of any potential defects or noncompliance with respect to RISC–1 SSCs, so that it may evaluate the significance of the defects or noncompliance and take appropriate action. The fact that properly-categorized RISC–1 SSCs in all likelihood fall within the Commission's definition of "basic components" and are currently subject to Part 21 and § 50.55(e) provides confirmation that the Commission's determination is prudent.

Similarly, the Commission believes that SSCs which are categorized as RISC–4 should continue to be beyond the scope of, and not be subject to, Part 21 and § 50.55(e). SSCs properly categorized as RISC–4 have little or no risk significance, and it is highly unlikely that any significant regulatory action would be taken by the NRC based upon information on defects or instances of noncompliance in RISC–4 SSCs. Inasmuch as no regulatory purpose would be served by reporting for RISC–4 SSCs, the Commission proposes that RISC–4 SSCs should not be subject to part 21 or § 50.55(e). Again, the fact that SSCs properly categorized as RISC–4 do not otherwise fall within the definition of "basic component" and, therefore, are not subject to Part 21 and § 50.55(e), provides some confirmation of the prudence of the Commission's determination.

Thus, the most problematic issue from the standpoint of regulatory coherence, is determining the appropriate scope of reporting for RISC–2 and RISC–3 SSCs. For the reasons discussed below, the Commission proposes that neither RISC–2 nor RISC–3 SSCs be subject to part 21 and § 50.55(e) reporting requirements.

The Commission begins by considering the regulatory objective of Part 21 and § 50.55(e) reporting under Section 206, and believes that there are two parallel regulatory purposes inherent in these reporting schemes. The first objective is to ensure that the NRC is immediately informed of a potentially significant noncompliance or defect in supplied components (in the broad sense of "basic components" as defined in § 21.3), so that the NRC may make a determination as to whether such a safety hazard requires that immediate NRC regulatory action at one or more nuclear power plants be taken to ensure adequate protection to public health and safety or common defense and security. The second is to ensure that nuclear power plant licensees are immediately informed of a potentially significant noncompliance or defect in supplied components. Such reporting allows a licensee using such components to immediately evaluate the noncompliance or defect to determine if a safety hazard exists at the plant, and take timely corrective action as necessary. In both cases, the regulatory objective is limited to components which have the highest significance with respect to ensuring adequate protection to public health and safety and common defense and security, and whose failure or lack of proper functioning could create an imminent safety hazard such that immediate evaluation of the situation and implementation of necessary corrective action is necessary to ensure adequate protection. In the context of a construction permit, the safety hazard is two-fold: First, that a non-compliance or defect could be incorporated into construction where it could never be detected; and second, that a noncompliance or defect would, upon initial operation and without prior indications of failure, create a substantial safety hazard.

The Commission believes that the regulatory objectives embodied in Part 21 and § 50.55(e) reporting remain the same regardless of whether the nuclear power plant is operating under the existing, deterministic regulatory system or the proposed alternative, risk-informed system embodied in § 50.69. In both cases, the reporting scheme should focus on immediate reporting to the NRC and licensee of potentially significant noncompliances and defects that could create a safety hazard requiring immediate evaluation and corrective action to ensure continuing adequate protection. Accordingly, in determining whether RISC–2 and RISC–3 SSCs should be subject to part 21 reporting, the Commission assessed whether failure or malfunction of these SSCs could reasonably lead to a safety hazard such that immediate evaluation of the situation and implementation of necessary corrective action is necessary to ensure adequate protection.

For RISC–2 SSCs, the Commission does not believe their failure or malfunction could reasonably lead to a safety hazard such that immediate licensee and NRC evaluation of the situation and implementation of necessary corrective action is necessary to ensure adequate protection. Although a RISC–2 SSC may be of significance for particular sequences and conditions, for the reasons discussed below, the Commission believes that no RISC–2 SSC, in and of itself, is of such significance that its failure or lack of function would necessitate immediate notification and action by licensees and the NRC.

The categorization process embodied in § 50.69 determines the relative significance of SSCs, with those in RISC–1 and RISC–2 being more significant than those in RISC–3 or RISC–4. This does not mean that any RISC–2 SSC would rise to the level of necessitating immediate action if defects were identified.

Those SSCs that are viewed as being of sufficient safety significance to require Part 21 reporting are RISC–1 SSCs. It is the capability provided by these RISC–1 SSCs for purposes of satisfying safety-related functional requirements that also leads to RISC–1 SSCs as being safety-significant, as these

are key functions in prevention and mitigation of severe accidents. Thus, RISC–1 SSCs are generally significant for a range of events and conditions and as the primary means of accident prevention and mitigation, the Commission wants to continue to achieve the high level of quality, reliability, preservation of margins, and assurance of performance of current regulatory requirements.

By contrast, RISC–2 SSCs are less important than RISC–1 SSCs because they do not play a role in prevention and mitigation of design basis events (*i.e.*, the SSCs that maintain integrity of fission product barriers, that provide or support the primary success paths for shutdown, or that prevent or mitigate accidents that could lead to potential offsite exposures). They are not part of the reactor protection system or engineered safety features that perform critical safety functions such as reactivity control, inventory control and heat removal. When viewed from a deterministic standpoint, RISC–2 SSC are not considered to rise to the level of a potential substantial safety hazard. From the risk-informed perspective, SSCs may end up classified as RISC–2 for a number of reasons. The classification might occur because they: (i) Contribute to plant risk by initiating transients that could lead to severe accidents (if multiple failures of other mitigating SSCs were to occur), or (ii) they can reduce risk by providing backup mitigation to RISC–1 SSCs in response to an event. The Commission recognizes that, on its face, noncompliance by or defects in RISC–2 SSCs, which could increase risk, such as by more frequent initiation of a transient, may appear to constitute a "substantial safety hazard." However, upon closer examination, the Commission believes otherwise. The risk significance of such "transient initiating" RISC–2 SSCs depends upon their frequency of initiation, with resultant consequences depending upon the failure of multiple other components of varying types in different systems. Further, their risk significance, as identified by the categorization process, is a result of the reliability (failure rates) currently being achieved for these SSC being treated as commercial-grade components, which includes the possibility of noncompliances and defects. Because requirements on RISC–2 SSCs are not being reduced, there is no reason to believe that their performance would degrade as a result of implementation of § 50.69. In fact, by better understanding of their safety significance, and through the added requirements in this rule for RISC–2 SSCs for consistency between the categorization assumptions and how they are treated, performance should only be enhanced. As discussed in Sections III.3 and III.5 of this SOC, the Commission is proposing that additional regulatory controls be imposed on RISC–2 SSCs to prevent their performance from degrading. In addition, the Commission is proposing that licensees evaluate treatment being applied for consistency with key categorization assumptions, monitor the performance of these SSCs, take corrective actions, and report when a loss of a safety-significant function occurs. The requirements of the maintenance rule (§ 50.65 (a)(1) through (a)(3)) also continue to apply to these SSCs. Thus, there are requirements for corrective action by the licensee if noncompliances involving these SSCs are identified. The Commission concludes that these requirements are sufficient because no RISC–2 SSC is so significant as to necessitate immediate Commission (or licensee) action.

For RISC–2 SSCs that provide backup mitigation to RISC–1 SSCs, the Commission also finds it prudent and desirable from a risk-informed standpoint to provide an enhanced level of assurance that RISC–2 SSCs can perform their safety-significant functions, but the failure or malfunction of such RISC–2 SSCs also does not raise a concern about imminent safety hazards.

Moreover, over the last several years, the current fleet of power reactors have been subjected to a number of risk studies, including WASH–1400 (Reactor Safety Study), and other generic and plant-specific reviews. While some safety improvements have been identified as a result of these reviews, none has been of such significance as to require immediate action. This essentially means that no SSCs that would be categorized as RISC–2 SSC would rise to the level of significance that their failure or lack of functionality would constitute a substantial safety hazard requiring immediate regulatory action. For example, in the case of two key risk scenarios, Station Blackout and Anticipated Transient without Scram, the Commission imposed regulatory requirements to reduce risk from these events; however, the rules were promulgated as cost-beneficial safety improvements. The equipment used for station blackout or anticipated transients without scram would generally fall within the RISC–2 category. The Commission believes its conclusion about the relative significance of RISC–2 SSC is also supported by plant-specific risk studies, such as the IPE and IPEEE [1], conducted to identify (and correct) any plant-specific vulnerabilities to severe accident risk. NRC's review of the responses to the licensee submittals has not identified any situations requiring immediate action for protection of public health and safety. In addition, as part of license renewal reviews, the NRC reviews severe accident mitigation alternatives, to identify and evaluate plant design changes with the potential for improving severe accident safety performance. In the license renewals completed to date, only a few candidate SAMAs were found to be cost-beneficial (and none were considered necessary to provide adequate protection of public health and safety).

In sum, the Commission believes that in light of risk assessments and actions that have already been implemented, there would be no SSCs categorized under 50.69 as RISC–2 whose failure would represent a significant and substantial safety concern such that immediate notification and action is required. Accordingly, the results of these risk assessments provide additional confidence to the Commission that Part 21 requirements need not be imposed on RISC–2 SSCs.

The Commission believes that the multiple simultaneous failures of either RISC–2 or RISC–3 components, in the same or in different systems, is not a concern such that Part 21 reporting is necessary. Even for components of the same type, it is not likely that the installed components are identical in terms of their specific characteristics or operating and maintenance history such that a defect would lead to simultaneous failure of multiple components at the same time. For both RISC categories, there are requirements to collect data about performance of the SSCs, to review the data to determine if adverse performance is occurring and to take

[1] In Generic letter 88–20, dated November 23, 1988, licensees were requested to perform individual plant examinations to identify plant-specific vulnerabilities to severe accidents that might exist in their facilities and report the results to the Commission. As part of their review and report, licensees were asked to determine any cost-beneficial improvements to reduce risk. In supplement 4 to the generic letter dated June 28, 1991, this request was extended to include external events (earthquakes, fires, floods). The NRC staff reviewed the plant-specific responses and prepared a staff evaluation report on each submittal. Further, the set of results were presented in NUREG–1560, IPE Program: Perspectives on Reactor Safety and Plant Performance. A similar report on IPEEE results was issued as NUREG–1742. In addition, as discussed in SECY–00–0062, the staff has conducted IPE follow-up activities with owners groups and licensees to confirm that identified improvements have been implemented and if any other actions were warranted.

appropriate action (*e.g.*, correct failures and adjust treatment processes). Thus, it would be expected that degradation or problems affecting a component type would be detected and dealt with before multiple failures becomes likely. For many RISC–2 SSCs, failures tend to be self-revealing (as it is initiation of a transient as a result of failure of many RISC–2 SSC that makes them significant). For RISC–3 SSCs, requirements exist for design and procurement for any replacement components to meet their design conditions, thus making it unlikely that unsuitable components would be installed. Further, for the RISC–3 SSCs, evaluations will be performed, assuming significantly increased failure rates for large number of components occurring simultaneously to show that there is no more than a small (potential) change in risk. Therefore, the Commission believes appropriate regulatory attention has been given to the potential for multiple simultaneous failures.

The Commission also considered the question as to whether notification of component defects should be required from the perspective of other potentially-affected licensees. The set of SSCs that are RISC–2 would vary from site to site, because it depends upon specifics of plant design and operation, particularly for the balance-of-plant which typically differs more from plant to plant than does the nuclear steam supply part. Further, the suppliers of these components would then also vary. Therefore, the specific type of notifications under Part 21, for the purposes of NRC assessment of generic implications of component defects and to assure notification of licensees with the same components in service, would not fulfill a useful regulatory function. The Commission notes that although Part 21 and § 50.55(e) (component defect) reporting will not be required for RISC–2 SSCs, proposed § 50.69(g) contains enhanced reporting requirements applicable to loss of system function attributable to, *inter alia*, failure or lack of function of RISC–2 SSCs. This is discussed in greater detail in Section III.5.

The Commission does not believe that any changes to Part 21 are necessary to accomplish the Commission's proposal, and that this proposal is consistent with the statutory requirements in Section 206 of the ERA. Section 206 does not contain any definition of "substantial safety hazard," but contains a direction to the Commission to define this term by regulation. Nothing in the legislative history suggests that Congress had in mind a fixed and unchanging concept of "substantial safety hazard," or that the term was limited to deterministic regulatory principles. Hence, the Commission has broad discretion and authority to determine the appropriate scope of reporting under Section 206. The Commission believes that the current definition of "substantial safety hazard" in § 21.3 is broadly written to permit the Commission to determine that a RISC–2 SSC does not represent a "substantial safety hazard" as defined in § 21.3 in the context of a risk-informed regulatory approach.

Therefore, because of the more supporting role that the RISC–2 SSCs play with respect to ensuring critical safety functions, a noncompliance or defect in a RISC–2 SSC would not result in a safety hazard such that immediate licensee and NRC evaluation of the situation and implementation of necessary corrective action is necessary to ensure adequate protection. Thus, the Commission believes that a noncompliance or defect in a RISC–2 SSC does not constitute a substantial safety hazard for which reporting is necessary under Part 21. Accordingly, the Commission proposes that reporting requirements to comply with Section 206 of the ERA are not necessary for RISC–2 SSCs and that the scope of part 21 and § 50.55(e) reporting requirements should exclude RISC–2 SSCs.

The Commission also proposes that RISC–3 SSCs should not be subject to part 21 and § 50.55(e) reporting. A failure of a properly-categorized RISC–3 SSC should result in, at most, only a small change in risk, and should not result in a major degradation of essential safety-related equipment (see NUREG–0302, Rev. 1).[2] As discussed above, the body of regulatory requirements (the retained requirements and the requirements contained in this proposed rule) are sufficient such that simultaneous failures in multiple systems (as would be necessary to lead to a substantial safety hazard involving RISC–3 SSCs) would not occur. Thus, there is little regulatory need for the NRC to be informed of instances of noncompliance and defects with RISC–3 SSCs. This is consistent with the NRC's current position that a "substantial safety hazard" involves a major degradation of essential safety-related equipment (see NUREG–0302). Accordingly, the Commission proposes that RISC–3 SSCs should not be subject to reporting requirements of part 21 and § 50.55(e).

In sum, the Commission proposes that part 21 reporting requirements should extend only to SSCs classified as RISC–1 SSCs, since these SSCs are those that are important in ensuring public health and safety and minimizing risk. RISC–2 SSCs should not be subject to reporting because play a lesser role than RISC–1 SSC in protection of public health and safety and no regulatory purpose would be served by part 21 reporting (as discussed above). RISC–3 and RISC–4 SSCs have little or no risk significance and no regulatory purpose would be served by subjecting RISC–3 and RISC–4 SSCS to part 21 and § 50.55(e).

The Commission does not believe that any changes to part 21 or § 50.55(e) are necessary to accomplish the Commission's proposals with respect to RISC–2 and RISC–3 SSCs, and that this proposal is consistent with the statutory requirements in Section 206 of the ERA. As discussed above, Section 206 does not contain any definition of "substantial safety hazard," but contains a direction to the Commission to define this term by regulation. Nothing in the legislative history suggests that Congress had in mind a fixed and unchanging concept of "substantial safety hazard," or that the term was limited to deterministic regulatory principles. Hence, the Commission has broad discretion and authority to determine the appropriate scope of reporting under Section 206. The Commission believes that the current definition of "substantial safety hazard" in § 21.3 is broadly written to permit the Commission to interpret it as applying, in the context of a risk-informed regulatory approach, only to RISC–1 SSCs. As discussed earlier, § 50.69 embodies a risk-informed regulatory paradigm which is different in key respects from the Commission's historical deterministic approach, and applies the risk-informed approach to classifying a nuclear power plant's SSCs according to the SSC's risk significance. SSCs that are classified as RISC–1 are those that represent the most important SSCs from both a risk and deterministic standpoint: They perform the key functions of preventing, controlling and mitigating accidents and controlling risk. Failure of RISC–1 SSCs represent, from a risk-informed regulatory perspective, the most important and significant safety concerns (*i.e.*, a

[2] NUREG–0302, "Remarks Presented (Questions and Answers Discussed) At Public Regional Meetings to Discuss Regulations (10 CFR part 21) for Reporting of Defects and Noncompliances." Copies of NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington DC 20013–7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and/or copying for a fee at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Public File Area O1–F21, Rockville, MD.

"substantial safety hazard)." Therefore, the Commission believes that, in the context of the risk-informed regulatory approach embodied in § 50.69, it is reasonable for the Commission to interpret "substantial safety hazard" as applying to RISC–1 SSCs and that reporting under Section 206 may be limited to RISC–1 SSCs.

The Commission considered two alternative approaches for limiting the reporting requirements in part 21 and § 50.55(e) to RISC–1 SSCs: (i) Interpreting "basic component" to encompass a risk-informed view of what SSCs the term encompasses, and (ii) including a second definition of "basic component" in § 21.3, which would apply only to those portions of a plant which have been categorized in accordance with § 50.69, and would be defined as an SSC categorized as RISC–1 under § 50.69.

The Commission does not believe that the part 21 definition of "basic component" may easily be read as simultaneously permitting both a deterministic concept of basic component and risk-informed concept, inasmuch as the part 21 definition was drawn from, and was intended to be consistent with the definition of "safety-related SSC" in § 50.2. The § 50.2 definition of "safety-related SSC" refers to the ability of the SSC to remain functional during "design basis events." The term, "design basis events" in Commission practice has referred to the deterministic approach of defining the events and conditions (*e.g.*, shutdown, normal operation, accident) for which an SSC is expected to function (or not fail). Identification of design basis events is inherently different conceptually when compared to a risk-informed approach, which attempts to identify all possible outcomes (or a reasonable surrogate) and assign a probability to each outcome and consequence before integrating the probability of the total set of outcomes. The Commission rejected the second approach of adopting an alternative definition of "basic component," because a change to the definition in § 21.3 could be misunderstood as a change to the reporting requirements for licensees who choose not to comply with § 50.69.

III.4.1.2 Reporting Obligations of Vendors for RISC–3 SSCs

The reporting requirements of Section 206 apply to individuals, directors and responsible officers of a firm constructing, owning, operating or supplying the basic components of any NRC-licensed facility or activity. Nuclear power plant licensees and nuclear power plant construction permit holders are subject to reporting under Section 206, and part 21 and § 50.55(e) will continue to provide for such reporting by those entities. Section 206 also imposes a reporting obligation on "vendors" (*i.e.*, firms who supply basic components to nuclear power plant licensees and construction permit holders). The Commission does not intend to change the reporting obligations under part 21 or § 50.55(e) for licensees, construction permit holders, or vendors with respect to RISC–1 SSCs, and the Commission does not intend to require reporting under part 21 and § 50.55(e) for RISC–2, RISC–3 or RISC–4 SSCs.

Thus, a vendor who supplied a safety-related component to a licensee that was subsequently classified by the licensee as RISC–3 would no longer be legally obligated to comply with part 21 or § 50.55(e) reporting requirements. However, as a practical matter that vendor would likely continue to comply with part 21 or § 50.55(e). Vendors are informed of their part 21 or § 50.55(e) obligations as part of the contract supplying the basic component to the licensee/construction permit holder. Vendors supplying basic components that have been categorized as RISC–3 at the time of contract ratification would know that they have no part 21 or § 50.55(e) obligations. However, vendors that provide (or in the past provided) safety-related SSCs would not know, absent communication from the licensee or construction permit holder implementing § 50.69, whether the SSCs which they provided under contract as safety-related are now categorized as RISC–3, thereby removing the vendor's reporting obligation under either part 21 or § 50.55(e). Failing to inform a vendor that a safety-related SSC which it provided is no longer subject to part 21 or § 50.55(e) reporting because of its reclassification as a RISC–3 SSC could result in unnecessary reporting to the licensee and the NRC. It may also result in unnecessary expenditure of resources by the vendor in determining whether a problem with a supplied SSC rises to the level of a reportable defect or noncompliance under the existing provisions of part 21 and § 50.55(e).

To address the potential for unnecessary reporting under proposed § 50.69, the Commission considered including a new requirement in either proposed § 50.69, or part 21 and § 50.55(e). The new provision would require the licensee or construction permit holder to inform a vendor that a safety-related SSC which it provided has been categorized as RISC–3. After consideration, the Commission believes that it is unlikely that such a provision would result in any great reduction in the potential scope of reporting by vendors. The NRC does not receive many part 21 reports, so the overall reporting burden to be reduced may be insubstantial. Furthermore, the Commission believes that the proposal could cause confusion, inasmuch as a vendor may supply many identical components to a licensee/holder, with some of the items intended for use in SSCs categorized as RISC–3, and other items intended in non-safety-related applications. A vendor would have some difficulty in determining whether the problem with the supplied SSC potentially affects the SSC recategorized as RISC–3 (as opposed to the supplied SSC used in nonsafety-related applications). The Commission also believes there may be some value in notification of the NRC when defects are identified, as they may reveal issues about the quality processes, or implications for basic components at other facilities. Finally, the NRC notes that the vendor has already been compensated by the licensee for the burden associated with part 21 and § 50.55(e) as part of the initial procurement process. For these reasons, the Commission does not propose to adopt a provision in § 50.69, part 21 or § 50.55(e) requiring a licensee or construction permit holder to inform a vendor of safety-related SSCs that its SSCs have been categorized as RISC–3.

III.4.1.3 Criminal Liability Under Section 223.b. of the AEA

As discussed earlier, Section 206 of the AEA authorizes the imposition of civil penalties for a licensee's and vendor's failure to report instances of noncompliance or defects in "basic components" that create a "substantial safety hazard." However, in addition to the civil penalties authorized by Section 206, criminal penalties may be imposed under Section 223.b. of the AEA on an individual director, officer or employee of a firm that supplies components to a nuclear power plant, that knowingly and willfully violate regulations that results (or could have resulted) in a "significant impairment of a basic component * * *." Licensees, applicants and vendors should note the difference in the definition of "basic component" in part 21, versus the definition set forth in Section 223.b:

For the purposes of this subsection, the term "basic component" means a facility structure, system, component or part thereof necessary to assure—

(1) The integrity of the reactor coolant pressure boundary,

(2) The capability to shut-down the facility and maintain it in a safe shut-down condition, or

(3) The capability to prevent or mitigate the consequences of accidents which could result in an unplanned offsite release of quantities of fission products in excess of the limits established by the Commission.

The U.S. Department of Justice is responsible for prosecutorial decisions involving violations of Section 223.b.

III.4.1.4 Posting Requirements

Both AEA Section 223.b and ERA Section 206 require posting of their statutory requirements at the premises of all licensed facilities. This is implemented through 10 CFR Parts 19 and 21.

As a result of implementation of § 50.69, rights and responsibilities of licensee workers would be slightly different. For instance, SSCs categorized as RISC–3 would no longer be subject to Part 21. However, RISC–1 SSCs (and "safety-related" SSCs not yet categorized per § 50.69), are subject to the Part 21 requirements. No additional responsibilities for identification or notification are involved. The supporting information such as procedures to be made available to workers would need to reflect the reduction in scope of requirements. For the reasons already mentioned, the Commission concludes that there would be no impact on vendors with respect to posting requirements in that these changes in categorization would be "transparent" to them as suppliers.

III.4.2 Section 50.49 Environmental Qualification of Electrical Equipment

The general requirement that certain SSCs be designed to be compatible with environmental conditions associated with postulated accidents is contained in GDC–4. Section 50.49 was written to provide specific programmatic requirements for a qualification program and documentation for electrical equipment, and thus, is a special treatment requirement.

Section 50.49(b), imposes requirements on licensees to have an environmental qualification program that meets the requirements contained therein. It defines the scope of electrical equipment important to safety that must be included under the environmental qualification program. Further, this regulation specifies methods to be used for qualification of the equipment for identified environmental conditions and documentation requirements.

RISC–3 and RISC–4 SSCs would be removed from the scope of the requirements of § 50.49 through § 50.69(b)(2)(ii). For SSCs categorized as RISC–3 or RISC–4, the Commission has concluded that for low safety-significant SSCs, additional assurance, such as that provided by the detailed provisions in § 50.49 for testing, documentation files and application of margins, are not necessary (see Section III.4.0). The requirements from GDC–4 as they relate to RISC–3 and RISC–4 SSCs, and the design basis requirements for these SSCs, including the environmental conditions such as temperature and pressure, remain in effect. Thus, these SSCs must continue to remain capable of performing their safety-related functions under design basis environmental conditions.

III.4.3 Section 50.55a(f), (g), and (h) Codes and Standards

Section 50.69(b)(2)(iv), would remove RISC–3 SSCs from the scope of certain provisions of § 50.55a, relating to Codes and Standards. The provisions being removed are those that relate to "treatment" aspects, such as inspection and testing, but not those pertaining to design requirements established in § 50.55a. Each of the subsections being removed is discussed in the paragraphs below.

Section 50.55a(f) incorporates by reference provisions of the ASME Code as endorsed by NRC that contains inservice testing requirements. These are special treatment requirements. Through this proposed rulemaking, RISC–3 SSCs would be removed from the scope of these requirements, and instead would be subject to the requirements in § 50.69(d)(2)(iii). For the reasons discussed in Section III.4.0, the Commission has determined that for low safety-significant SSCs, it is not necessary to impose the specific detailed provisions of the Code, as endorsed by NRC, and these requirements can be replaced by the more "high-level" alternative treatment requirements, which allow greater flexibility to licensees in implementation.

Section 50.55a(g) incorporates by reference provisions of the ASME Code as endorsed by NRC that contains the inservice inspection, and repair and replacement requirements for ASME Class 2 and Class 3 SSCs. The Commission will not remove the repair and replacement provisions of the ASME BPV Code required by § 50.55a(g) for ASME Class 1 SSCs, even if they were categorized as RISC–3, because those SSCs constitute principal fission product barriers as part of the reactor coolant system or containment. For Class 2 and 3 SSCs that are shown to be of low safety-significance if categorized as RISC–3, the additional assurance from the specific provisions of the ASME Code is not considered necessary.

Section 50.55a(h) incorporates by reference the requirements in either Institute of Electrical and Electronics Engineers (IEEE) 279, "Criteria for Protection Systems for Nuclear Power Generating Stations," or IEEE 603–1991 "IEEE Standard Criteria for Safety Systems for Nuclear Power Generating Stations." Within these IEEE standards are special treatment requirements. Specifically, sections 4.3 and 4.4 of IEEE 279 and sections 5.3 and 5.4 of IEEE 603–1991 contain quality and environmental qualification requirements. RISC–3 SSCs are being removed from the scope of this special treatment requirement consistent with the Commission decision already discussed.

III.4.4 Section 50.65 Monitoring the Effectiveness of Maintenance

The Commission is proposing to remove RISC–3 and RISC–4 SSCs from the scope of the requirements of § 50.65 (except for paragraph (a)(4)). The basis for this includes Section III.4.0 and the following discussion.

Section 50.65, referred to as the Maintenance Rule, imposes requirements for licensees to monitor the effectiveness of maintenance activities for safety-significant plant equipment to minimize the likelihood of failures and events caused by the lack of effective maintenance. Specifically, § 50.65 requires the performance of SSCs defined in § 50.65(b) to be monitored against licensee established goals, in a manner sufficient to provide confidence that the SSCs are capable of fulfilling their intended functions. The rule further requires that where performance does not match the goals, appropriate corrective action shall be taken. Included within the scope of § 50.65(b) are SSCs that are relied upon to remain functional during design basis events or in emergency operating procedures, and nonsafety-related SSCs whose failure could result in the failure of a safety function or cause a reactor scram or activation of a safety-related system.

Sections 50.65(a)(1), (a)(2), and (a)(3) impose documentation and action requirements; thus, they are special treatment requirements. Upon implementation of § 50.69, a licensee would not be required to apply maintenance rule monitoring, goal setting, corrective action, alternate demonstration, or periodic evaluation treatments required by §§ 50.65(a)(1), (a)(2), and (a)(3) to RISC–3 and RISC–4

SSCs. The proposed rule does include in § 50.69(e)(3) provisions for a licensee to use performance information to feedback into its processes to adjust treatment (or categorization) when results so indicate. However, this requirement does not require the specific monitoring and goal setting as required in § 50.65, in consideration of the lesser safety-significance of these SSCs.

RISC–1 and RISC–2 SSCs that are currently within the scope of § 50.65(b) would remain subject to existing maintenance rule requirements. Any RISC–1 or RISC–2 function not currently within the scope of § 50.65(b) would be added to the scope of the maintenance rule (as a result of the requirement in § 50.69(e)(2) that requires monitoring, evaluation and appropriate action for these SSCs).

The proposed removal of RISC–3 and 4 SSCs from the scope of requirements does not include § 50.65(a)(4), which contains requirements to assess and manage the increase in risk that may result from proposed maintenance activities. The requirements in § 50.65(a)(4) remain in effect. It is noted that § 50.65(a)(4) already includes provisions by which a licensee can limit the scope of the assessment required to SSCs that a risk-informed evaluation process has shown to be significant to public health and safety. Thus, there is no need to revise the requirements to permit a licensee to apply requirements commensurate with safety-significance.

III.4.5 Sections 50.72 and 50.73 Reporting Requirements

This proposed rule would remove the requirements in §§ 50.72 and 50.73 for RISC–3 and RISC–4 SSCs. The basis for this removal follows.

Sections 50.72 and 50.73 contain requirements for licensees to report events involving certain SSCs. These reporting requirements are special treatment requirements . NRC requires event reports in part so that it can follow-up on corrective action for these circumstances. Through this rulemaking, the Commission proposes to remove RISC–3 and RISC–4 SSCs from the scope of these requirements. The low safety-significance of these SSCs does not warrant the burden associated with reporting events or conditions only affecting such SSCs, for the reasons already discussed.In particular, under NRC's risk-informed inspection process, NRC follow-up of corrective action will be focused upon safety-significant situations.

III.4.6 10 CFR Part 50 Appendix B Quality Assurance Requirements

This proposed rule would remove RISC–3 SSCs from the scope of requirements in Appendix B to 10 CFR Part 50. These requirements are currently not applicable to RISC–4 SSCs so there is no change for these SSCs. Appendix B contains requirements for a quality assurance program meeting specified attributes. While many of the general attributes are still appropriate for RISC–3 SSCs (and in some instances are included within the high-level requirements in § 50.69(d)(2)), it was considered simpler to remove RISC–3 SSCs from the scope of the existing requirements in Appendix B (with its attendant set of guidance and implementing documents), and to add back the minimum set of requirements viewed as necessary for RISC–3 SSCs, rather than to subdivide the existing Appendix B requirements for this purpose.

The intent of Appendix B to 10 CFR Part 50, and the complementary regulations is to provide quality assurance requirements for the design, construction, and operation of nuclear power plants. The quality assurance requirements of Appendix B are to provide adequate confidence that an SSC will perform satisfactorily in service; these requirements were developed to apply to safety-related SSCs. In the implementation of Appendix B, a licensee is bound to detailed and prescriptive quality requirements to apply to activities affecting those SSCs. As such, these requirements meet the Commission's definition of special treatment requirements. These requirements are removed from application to RISC–3 and RISC–4 SSCs because their low safety-significance does not warrant the level of quality requirements that currently exist with Appendix B.

III.4.7 10 CFR Part 50, Appendix J Containment Leakage Testing

The proposed rule would remove a subset of RISC–3 and RISC–4 SSCs from the scope of the requirements in Appendix J to Part 50 that pertain to containment leakage testing. Specifically, RISC–3 and RISC–4 SSCs that meet specified criteria would be removed from the scope of the requirements for Type B and Type C testing. The basis for the removal is described below.

One of the conditions of all operating licenses for water-cooled power reactors as specified in § 50.54(o) is that primary reactor containments shall meet the containment leakage test requirements set forth in Appendix J to 10 CFR Part 50. These test requirements provide for preoperational and periodic verification by tests of the leak-tight integrity of the primary reactor containment, and systems and components which penetrate containment of water-cooled power reactors, and establish the acceptance criteria for these tests. As such, these tests are special treatment requirements. The purposes of the tests are to assure that (a) leakage through the primary reactor containment, or through systems and components penetrating primary containment, shall not exceed allowable leakage rate values as specified in the technical specifications, and (b) periodic surveillance of reactor containment penetrations and isolation valves is performed so that proper maintenance and repairs are made during the service life of the containment, and systems and components penetrating primary containment. Appendix J includes two Options, Option A and Option B. Option A includes prescriptive requirements while Option B identifies performance-based requirements and criteria for preoperational and subsequent periodic leakage-rate testing. A licensee may choose either option for meeting the requirement of Appendix J.

The discussion contained in Appendix J to 10 CFR Part 50 can be divided into two categories. Parts of Appendix J contain testing requirements. Other parts contain information, such as definitions or clarifications, necessary to explain the testing requirements. A review of Appendix J did not identify any technical requirements other than those describing the methods of the required testing. Therefore, Appendix J was considered to be, in its entirety, a special treatment requirement.

The NRC believes that risk-informing this appendix may lead to less testing and therefore would reduce unnecessary regulatory burden on the licensees. Although the 1995 revision to Appendix J was characterized as risk-informed, the changes were not as extensive as those expected in the risk-informed Part 50 effort. The revision primarily decreased testing frequencies, whereas risk-informing the scope of SSCs that are subject to Appendix J testing would remove some components from testing (*i.e.*, to the extent that defense-in-depth is maintained in accordance with the risk-informed categorization process).

The proposed rule would exclude certain identified containment isolation valves from Type C testing. For RISC–3 components, which includes containment isolation valves, leak testing is not required. The reliability

strategy is to monitor and restore component functions once they are identified through the corrective action program or the periodic feedback process. Similarly, requirements for Type B testing of certain penetrations would not be required. The relief from testing is limited to components meeting specified criteria such that acceptable results for large early release and defense-in-depth are maintained.

III.4.7.1 Types of Tests Required by Appendix J

Appendix J testing is divided into three types: Type A, Type B, and Type C. Type A tests are intended to measure the primary reactor containment overall integrated leakage rate after the containment has been completed and is ready for operation, and at periodic intervals thereafter. Type B tests are intended to detect local leaks and to measure leakage across each pressure-containing or leakage-limiting boundary. Primary reactor containment penetrations required to be Type B tested are identified in Appendix J. Type C tests are intended to measure containment isolation valve leakage rates. The containment isolation valves required to be Type C tested are identified in Appendix J.

III.4.7.2 Reduction in Scope for Appendix J Testing

Type A Testing: The Commission concludes that Type A testing should continue to be required as described in Appendix J.

Type B Testing: The Commission concludes that Type B testing should continue to be required for air lock door seals, including door operating mechanism penetrations which are part of the containment pressure boundary and doors with resilient seals or gaskets except for seal-welded doors. Type B testing is not necessary for other penetrations that are determined to be of low safety significance and that meet one or both of the following criteria:

1. Penetrations pressurized with the pressure being continuously monitored.

2. Penetrations less than 1 inch in equivalent diameter.

Type C Testing: The Commission concludes that Type C testing is not necessary for valves that are determined to be of low safety significance and that meet one or more of the following criteria:

1. The valve is required to be open under accident conditions to prevent or mitigate core damage events.

2. The valve is normally closed and in a physically closed, water filled system.

3. The valve is in a physically closed system whose piping pressure rating exceeds the containment design pressure rating and that is not connected to the reactor coolant pressure boundary.

4. The valve size is 1-inch nominal pipe size or less.

III.4.7.3 Basis for Reduction of Scope

The first criterion for Type B testing deals with penetrations that are pressurized with the pressures in the penetrations being continuously monitored by licensees. The pressurization itself establishes a leak tight barrier, for such penetrations. The monitoring of the pressures in the penetrations, in conjunction with the proposed requirements for RISC 3 SSCs (including taking corrective action when an SSC fails) provide sufficient assurance, without the need for Type B testing, to ensure that these penetrations are functional.

The second criterion for reducing the scope of Type B testing (*i.e.*, penetrations less than 1 inch in equivalent diameter) is essentially the same as the fifth criterion for reducing the scope of Type C testing (*i.e.*, valve size is 1-inch or less). By definition penetrations of this size do not contribute to large early release.

The Commission finds that these criteria for reducing the scope of the Type C testing requirements are reasonable in that, even without Type C testing, the probability of significant leakage during an accident (that is, leakage to the extent that public health and safety is affected) is small. This is true even though some of the valves that satisfy these criteria may be fairly large.

Appendix J to 10 CFR part 50 deals only with leakage rate testing of the primary reactor containment and its penetrations. It assumes that containment isolation valves are in their safe position. No failure is assumed that would cause the containment isolation valves to be open when they are supposed to be closed. The valve would be open if needed to transmit fluid into or out of containment to mitigate an accident or closed if not needed for this purpose. For purposes of this evaluation, if a valve is open, it is assumed to be capable of being closed. Testing to ensure the capability of containment isolation valves to reach their safe position is not within the scope of Appendix J, and as such is not within the scope of this evaluation. Therefore, the valves addressed by this evaluation are considered to be closed, but may be leaking. The increase in risk due to this proposed revision affecting Appendix J is negligible.

Past studies (*e.g.*, NUREG–1150, "Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants; Final Summary Report," dated December 1990) show that the overall reactor accident risks are not sensitive to variations in containment leakage rate. This is because reactor accident risk is dominated by accident scenarios in which the containment either fails or is bypassed. These very low probability scenarios dominate predicted accident risks due to their high consequences.

The Commission examined in more detail the effect of containment leakage on risk as part of the Appendix J to 10 CFR Part 50, Option B, rulemaking. The results of these studies are applicable to this evaluation. NUREG–1493, "Performance-Based Containment Leak-Test Program," dated September 1995, calculated the containment leakage necessary to cause a significant increase in risk and found that the leakage rate must typically be approximately 100 times the Technical Specification leak rate, L_a. It is improbable that even the leakage of multiple valves in the categories under consideration would exceed this amount. Operating experience shows that most measured leaks are much less than 100 times L_a. A more direct estimate of the increase in risk for the proposed revision to Appendix J can be obtained from the Electric Power Research Institute (EPRI) report TR–104285, "Risk Impact Assessment of Revised Containment Leak Rate Testing Intervals," dated August 1994. This report examined the change in the baseline risk (as determined by a plant's IPE risk assessment) due to extending the leakage rate test intervals. For the pressurized water reactor (PWR) large dry containment examined in the EPRI report, for example, the percent increase in baseline risk from extending the Type C test interval from 2 years to 10 years was less than 0.1 percent. While this result was for a test interval of 10 years vs. the current proposal to do no more Type C testing of the subject valves for the life of a plant, the analysis may reasonably apply to this situation because it contains several conservative assumptions which offset the 10-year time interval. These assumptions include the following:

1. The study used leakage rate data from operating plants. Any leakage over the plant's administrative leakage limit was considered a leakage failure. An administrative limit is a utility's internal limit and does not imply violation of any Appendix J limits. Therefore, the probability of a leakage failure is overestimated.

2. Failure of one valve to meet the administrative limit does not imply that the penetration would leak because

containment penetrations typically have redundant isolation valves. While one valve may leak, the other may remain leak-tight. The study assumed that failure of one valve in a series failed the penetration; however, the probability of failure was that for a single valve.

3. The analysis assumed possible leakage of all valves subject to Type C testing, not just those subject to the proposed revision.

According to this analysis, the proposed revision would not have a significant effect on risk. The NUREG–1493 analysis shows that the amount of leakage necessary to significantly increase risk is two orders of magnitude greater than a typical Technical Specification leakage rate limit. Therefore, the risk to the public will not significantly increase due to the proposed relief from the requirements of Appendix J to 10 CFR part 50.

III.4.8 Appendix A to 10 CFR Part 100 (and Appendix S to 10 CFR Part 50 (Seismic Requirements))

The proposed rule would remove RISC–3 and RISC–4 SSCs from the requirement in Appendix A to Part 100 to demonstrate that SSCs are designed to withstand the safe shutdown earthquake (SSE) by qualification testing or specific engineering methods. GDC 2 requires that SSCs "important to safety" be capable of withstanding the effects of natural phenomena such as earthquakes. The requirements of 10 CFR Part 100 pertain to reactor site criteria and its Appendix A addresses seismic and geologic siting criteria used by the Commission to evaluate suitability of plant design bases in consideration of these characteristics. Sections VI(a)(1) and (2) of Appendix A to 10 CFR Part 100 address the engineering design for the SSE and Operating Basis Earthquake (OBE), respectively. The rule change would exclude RISC–3 and RISC–4 SSCs from the scope of the requirements of sections VI(a)(1) and (2) of Appendix A to 10 CFR Part 100, only to the extent that the rule requires testing and specific types of analyses to demonstrate that safety-related SSCs are designed to withstand the SSE and OBE. It is only these aspects of Appendix A to 10 CFR Part 100 that are considered special treatment. As discussed in Section III.4.0, because of the low safety significance of the RISC–3 and RISC–4 SSCs, the additional assurance provided by qualification testing (or engineering analyses) is not considered necessary.

For current operating reactors, Appendix A to part 100 is applicable. For new plant applications, the seismic design requirements are set forth in Appendix S to Part 50. The NRC has determined that Appendix S does not need to be included in the proposed § 50.69 because the wording of the requirements with respect to "qualification" by testing or specific types of analysis is not present in this rule. Therefore, a rule change would not be necessary to permit a licensee to implement means other than qualification testing or the specified methods to demonstrate SSC capability.

III.4.9 Requirements Not Removed by § 50.69(b)(1)

In the following paragraphs, the Commission discusses certain rules that were considered as candidates for removal as requirements for RISC–3 and RISC–4 SSCs during development of this rulemaking. These rules were identified as candidate rules in SECY–99–256. They are not part of this rulemaking for the reasons presented.

III.4.9.1 Section 50.34 Contents of Applications

Section 50.34 identifies the required information that applicants must provide in preliminary and final safety analysis reports. Because § 50.69 contains the documentation requirements for licensees and applicants who choose to implement § 50.69, and these requirements do not conflict with § 50.34, it is not necessary to revise § 50.34 to implement § 50.69.

III.4.9.2 Section 50.36 Technical Specifications

Section 50.36 establishes operability, surveillance, limiting conditions for operation and other requirements on certain SSCs. To the extent that this rule specified testing and related requirements, it was considered as a candidate for being "special treatment". However, the Commission concluded that it was not appropriate to revise § 50.36 for several reasons. First, risk-informed criteria have already been established in § 50.36 for determining which SSCs should have TS requirements. Improved standard TS have already resulted in relocation of requirements for less important SSCs to other documents. Further, other improvement efforts are underway that could be implemented by individual licensees to make their plant-specific requirements more risk-informed. Thus, no changes to this rule (or its implementation) are necessary as part of § 50.69 to make the TS risk-informed or to accommodate the revised requirements of this proposed rule.

III.4.9.3 Section 50.44 Combustible Gas Control

Certain provisions within § 50.44 were identified as containing special treatment requirements in that they specified conformance with Appendix B for particular design features, specified requirements for qualification, and related statements. The Commission notes that a separate rulemaking is underway to "rebaseline" the requirements in § 50.44 using risk insights (see August 2, 2002; 67 FR 50374). Therefore, the NRC believes that there is no need to include those sections of (existing) § 50.44 as being removed for RISC–3 SSC. If portions of § 50.44 that were identified as special treatment requirements are retained, and/or relocated to other rules (and they are not necessary for RISC–3 SSCs), then there may be a need to reference these rules within § 50.69(b)(1) when § 50.69 is issued as a final rule.

III.4.9.4 Section 50.48 (Appendix R and GDC 3) Fire Protection

Initially, fire protection requirements were considered to be within the scope of this rulemaking effort. There are augmented quality provisions applied to fire protection systems and these augmented quality provisions are considered special treatment requirements. However, these provisions are not contained in the rules themselves. The Commission has developed a proposed rulemaking (see November 1, 2002; 67 FR 66578) to allow licensees to voluntarily adopt National Fire Protection Association (NFPA)-805 requirements in lieu of other fire protection requirements. NFPA–805 would permit a licensee to implement a risk-informed fire protection program as a voluntary alternative to compliance with § 50.48 and 10 CFR Part 50, Appendix R. Accordingly, changes to these regulations were not included in the scope of the § 50.69 rulemaking.

III.4.9.5 Section 50.59 Changes, Tests and Experiments

The Commission does not believe that a § 50.59 evaluation need be performed when a licensee implements § 50.69 by changing the special treatment requirement for RISC–3 and RISC–4 SSCs. Accordingly, § 50.69(f)(iii) contains language that removes the requirement for a § 50.59 evaluation of the changes in special treatment as part of implementation. The process of adjusting treatment for RISC–3 and RISC–4 SSCs does not need to be subject to § 50.59 because the rulemaking already provides the decision process

for recategorization and determination of revision to requirements resulting from the categorization. Thus, subjecting the implementation steps as they relate to changes to treatment from what was described in the final safety analysis report (FSAR), to determine if NRC approval is needed of those changes, is an unnecessary step. Since it is only in the area of treatment for RISC–3 and RISC–4 SSCs that might be viewed as involving a reduction in requirements, these are the only aspects for which this rule provision would have any effect. As required by § 50.69(f)(ii), the licensee/applicant will be required to update the FSAR appropriately to reflect incorporation of its treatment processes into the FSAR.

However, it is important to recognize that changes that affect any non-treatment aspects of an SSC (*e.g.,* changes to the SSC design basis functional requirements) are required to be evaluated in accordance with the requirements of § 50.59. Section 50.69(d)(2)(i), which focuses upon design control, is intended to draw a distinction between treatment (managed through § 50.69) and design changes (managed through other processes such as § 50.59). As previously noted, this rulemaking is only risk-informing the scope of special treatment requirements. The process and requirements established in § 50.69 do not extend to making changes to the design basis of SSCs.

III.4.9.6 Appendix A to 10 CFR Part 50 General Design Criteria (GDC)

The NRC has concluded that the GDC of Appendix A to 10 CFR Part 50 do not need to be revised because they specify design requirements and do not specify special treatment requirements. Because this rulemaking is not revising the design basis of the facility, the GDC should remain intact and are not within the scope of § 50.69. This subject is discussed in more detail in the NRC's action on the South Texas exemption request, in which their request for exemption from certain GDCs was denied as being unnecessary to accomplish what was proposed (see Section IV.4.0).

III.4.9.7 10 CFR Part 52 Early Site Permits, Standard Design Certifications and Combined Operating Licenses

Part 52 contains, by cross-reference, regulations from other parts of Chapter 10 of the Code of Federal Regulations, most notably Part 50. Therefore, it was initially considered for inclusion in the rulemaking effort. However, with the proposed "applicability" paragraph (§ 50.69(b)) extending to applicants for a facility license or design certification under Part 52, the Commission presently sees no need for revisions to Part 52 itself.

III.4.9.8 10 CFR Part 54 License Renewal

In SECY–99–256, 10 CFR part 54, which provides license renewal requirements, was identified as a candidate regulation for removal from scope of applicability to low significance SSCs. The aging management requirements could be viewed as being special treatment requirements in that they provide assurance that SSCs will continue to meet their licensing basis requirements during the renewed license period. Section 54.4 explicitly defines the scope of the license renewal rule using the traditional deterministic approach. Part 54 imposes aging management requirements in § 54.21 on the scope of SSCs meeting § 54.4.

In SECY–00–0194, the NRC staff provided its preliminary view that RISC–3 SSCs should not be removed from the scope of part 54, and that licensees can renew their licenses in accordance with part 54 by demonstrating that the § 50.69 treatment provides adequate aging management in accordance with § 54.21. The NRC staff suggested that no changes are necessary to part 54 to implement § 50.69 either prior to renewing a licensing or after license renewal.

The goal of the license renewal program is to establish a stable, predictable, and efficient license renewal process. The Commission believes that a revision of part 54 at this time could have a significant effect on the stability and consistency of the processes established for preparation of license renewal applications, and for NRC staff review. Further, as discussed below, the Commission believes that the requirements in part 54 are compatible with the § 50.69 approach, including use of risk information in establishing treatment (aging management) requirements. Refer to Section V.3.0 for additional discussion regarding the implementation of § 50.69 for a facility that has already received a renewed license. Thus, part 54 requires no changes at this time. However, in the future, the Commission will consider whether revisions to the scope of part 54 are appropriate.

The use of risk in establishing the scoping criteria within part 54 was addressed by the Commission on May 8, 1995 (60 FR 22461), when amending part 54. In the 1995 amendment, the Commission stated that the current licensing basis for current operating plants is largely based on deterministic engineering criteria. Consequently, there was considerable logic in establishing license renewal scoping criteria that recognized the deterministic nature of a plant's licensing basis. Without the necessary regulatory requirements and appropriate controls for plant-specific PRAs, the Commission concluded that it was inappropriate to establish a license renewal scoping criterion that relied on plant-specific probabilistic analyses. Therefore, the Commission concluded further that within the construct of the final rule, PRA techniques were of very limited use for license renewal scoping (60 FR 22468).

The 1995 amendment to part 54 excluded active components to "reflect a greater reliance on existing licensee programs that manage the detrimental effects of aging on functionality, including those activities implemented to meet the requirements of the maintenance rule," (60 FR 22471). Although § 50.69 would remove RISC–3 components from the scope of the maintenance rule requirements in § 50.65(a)(1), (a)(2), and (a)(3), a licensee is required under the proposed § 50.69(d)(2) to provide confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design-basis conditions when challenged. The SOC for part 54 also indicated the Commission's recognition that risk insights could be used in evaluating the robustness of an aging management program (60 FR 22468). The NRC staff has received and accepted one proposal (Arkansas Unit 1) for a risk-informed program for small-bore piping which demonstrates that risk arguments can be used to a degree.

III.4.9.9 Other Requirements

In the ANPR and related documents, the staff and stakeholders suggested a number of other regulatory requirements that might be candidates for inclusion in § 50.69. These included § 50.12 (exemptions), § 50.54(a), (p), and (q) (plan change control), and § 50.71(e) (FSAR updates). As the rulemaking progressed, the Commission concluded that these requirements did not need to be changed to allow a licensee to adopt § 50.69 as it is being proposed.

III.5.0 Evaluation and Feedback, Corrective Action and Reporting Requirements

The validity of the categorization process relies on ensuring that the performance and condition of SSCs continues to be maintained consistent with applicable assumptions. Changes in the level of treatment applied to an SSC might result in changes in the

reliability of the SSCs which are used in the categorization process. Additionally, plant changes, changes to operational practices, and industry operational experience may impact the categorization assumptions. Consequently, the proposed rule contains requirements for updating the categorization and treatment processes when conditions warrant to assure that continued SSC performance is consistent with the categorization process and results.

Specifically the proposed rule would require licensees to review in a timely manner but no longer than every 36 months, the changes to the plant, operational practices, applicable industry operational experience, and, as appropriate, update the PRA and SSC categorization. In addition, licensees would be required to obtain sufficient information on SSC performance to verify that the categorization process and its results remain valid. For RISC–1 SSCs, much of this information may be obtained from present programs for inspection, testing, surveillance, and maintenance. However for RISC–2 SSCs and for RISC–1 SSCs credited for beyond design basis accidents, licensees would need to ensure that sufficient information is obtained. For RISC–3 SSCs, there is a relaxation of requirements for obtaining information when compared to the applicable special treatment requirements; however sufficient information would need to be obtained, and rule requirements are being proposed to consider performance data, see if adverse changes in performance might occur, and to make necessary adjustments such that desired performance is achieved so that the evaluations conducted to meet § 50.69(c)(1)(iv) remain valid. The feedback and adjustment process is crucial to ensuring that the SSC performance is maintained consistent with the categorization process and its results.

Taking timely corrective action is an essential element for maintaining the validity of the categorization and treatment processes used to implement proposed § 50.69. For safety-significant SSCs, all current requirements would continue to apply and, as a consequence, Appendix B corrective action requirements would be applied to RISC–1 SSCs to ensure that conditions adverse to quality are corrected. For both RISC–1 and RISC–2 SSCs, requirements would be included in § 50.69(e)(2) for monitoring and for taking action when SSC performance degrades.

When a licensee or applicant determines that a RISC–3 SSC does not meet its established acceptance criteria for performance of design basis functions, the proposed rule would require that a licensee perform timely corrective action (§ 50.69(d)(2)(iv)). Further, as part of the feedback process, review of operational data may reveal inappropriate assumptions for reliability or performance and a licensee would need to re-visit the findings made in the categorization process or modify the treatment for the applicable SSCs (§ 50.69(e)(3)). These provisions would then restore the facility to the conditions that were considered in the categorization, and would also restore the capability of SSCs to perform their functions.

Finally, the proposed rule would require reports of events or conditions that would have prevented RISC–1 and RISC–2 SSCs from being able to perform their safety-significant functions. A new reporting requirement would be added in § 50.69(g) for events or conditions that would prevent RISC–2 SSCs from performing their safety-significant functions (if not otherwise reportable). Because the categorization process has determined that RISC–2 SSCs are of safety significance, NRC is interested in reports about circumstances where the safety-significant function would have been prevented because of events or conditions. This reporting will enable NRC to be aware of situations impacting those functions found to be significant under § 50.69, such that NRC can take any actions deemed appropriate.

Properly implemented, these requirements would ensure that validity of the categorization process and results are maintained throughout the operational life of the plant.

III.6.0 Implementation Process Requirements

The proposed rule would also contain requirements specifying how a licensee (or applicant) would be able to use the alternative requirements in lieu of the existing requirements. The rule would specify applicability requirements as well as requirements on the Commission approval process for implementation.

The Commission is making the provisions of § 50.69 available to both applicants for licenses or design certification rules and to holders of facility licenses for light-water reactors. The proposed rule would be limited to light-water reactors because it was developed to risk-inform the scope of special treatment requirements which are applied to light-water reactors. Consequently, the technical aspects of the rule (*e.g.*, providing reasonable confidence that risk increases (*e.g.*, changes in CDF and LERF are small) including the implementation guidance, are specific to light-water reactor designs.

Proposed § 50.69 would rely on robust categorization to provide high confidence that the safety significance of SSCs is correctly determined. To ensure a robust categorization is employed, proposed § 50.69 would require the categorization process to be reviewed and approved prior to implementation of § 50.69 either by following the license amendment process of § 50.90 or as part of the license application review. While detailed regulatory guidance has been developed to provide guidance for implementing categorization consistent with the proposed rule requirements, the Commission concluded that a prior review and approval was still necessary to enable the NRC staff to review the scope and quality of the plant-specific PRA taking into account peer review results. The NRC staff would also review other evaluations and approaches to be used such as margins-type analyses. Additionally, this review would examine any aspects of the proposed categorization guidance that are not consistent with the staff's regulatory guidance for implementing § 50.69. Thus, the proposed rule would require that a licensee who wishes to implement § 50.69 submit an application for license amendment to the NRC containing information about the categorization process and about the peer review process employed. An applicant would submit this information as part of its license application. The Commission will approve, by license amendment, a request to allow a licensee to implement § 50.69 if it is satisfied that the categorization process to be used meets the requirements in § 50.69. Commission action on an applicant's request would be part of the Commission decision on the license application.

The Commission is proposing that the approval for a licensee to implement § 50.69 be by license amendment. As discussed above, prior NRC review and approval of the licensee's proposed PRA, basis for sensitivity studies and evaluations, and results of PRA review process is required. This review will involve substantial professional judgment on the part of NRC reviewers, inasmuch as the rule does not contain objective, non-discretionary criteria for assessing the adequacy of the PRA process, PRA review results and sensitivity studies. Consistent with the

Commission's decision in Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI–96–13, 44 NRC 315 (1996), the proposed rule would require NRC approval to be provided by issuance of a license amendment. The Nuclear Energy Institute (NEI) submitted a paper, "License Amendments: Analysis of Statutory and Legal Requirements" (NEI Analysis) in a July 10, 2002, letter to the Director of NRR. In this analysis, NEI contends that approval of a licensee's/applicant's request to implement § 50.69 need not be accomplished by a license amendment. NEI essentially argues that the proposed rule does not increase the licensee's operating authority, but merely provides a "different means of complying with the existing regulations * * *" Id., p.8. The Commission disagrees with this position, inasmuch as proposed § 50.69 would permit the licensee/applicant, once having obtained approval from the NRC, to depart from compliance with the "special treatment" requirements set forth in those regulations delineated in § 50.69. NEI also argues that the NRC's review and approval of the SSC categorization process under proposed § 50.69 is analogous to the review and approval process in Perry, which the Commission determined did not require a license amendment. Unlike the Perry case, where the license already provided for the possibility of material withdrawal schedule changes and the governing American Society for Testing and Materials (ASTM) standard set forth objective, non-discretionary criteria for changes to the withdrawal schedule, § 50.69 does not contain such criteria for assessing the adequacy of the PRA process, PRA review results, and the sensitivity studies. Hence, the NRC's approval of a request to implement § 50.69 will involve substantial professional judgment and discretion. In sum, the Commission does not agree with NEI's assertion that the NRC's approval of a request to implement § 50.69 may be made without a license amendment in accordance with the Perry decision.

The Commission does not believe it necessary to perform a prior review of the treatment processes to be implemented for RISC–3 SSCs in lieu of the special treatment requirements. Instead, the NRC has developed proposed § 50.69 to contain requirements that ensure the categorization is robust to provide high confidence that SSC safety significance is correctly determined; sufficient requirements on RISC–3 SSCs to provide a level of assurance that these SSCs remain capable of performing their design basis functions commensurate with their low safety significance; and requirements for obtaining sufficient information concerning the performance of these SSCs to enable corrective actions to be taken before RISC–3 SSC reliability degrades beyond the values used in the evaluations conducted to satisfy § 50.69(c)(1)(iv). The NRC concludes that compliance with these requirements, in conjunction with inspection of § 50.69 licensees is a sufficient level of regulatory oversight for these SSCs.

The Commission recognizes that this proposed rule may have implications with respect to NRC's reactor oversight process including the inspection program, significance determination process, and enforcement approach. In its final decision on this rulemaking, the Commission proposes to document its conclusions as to whether new or revised inspection or enforcement guidance is necessary.

The Commission included requirements in the proposed rule for documenting categorization decisions to facilitate NRC oversight of a licensee's or applicant's implementation of the alternative requirements. The proposed rule would also include provisions to have the FSAR and other documents updated to reflect the revised requirements and progress in implementation. These requirements will allow the NRC and other stakeholders to remain knowledgeable about how a licensee is implementing its regulatory obligations as it transitions from past requirements to the revised requirements in § 50.69. As part of these provisions, the Commission has concluded that requiring evaluations under § 50.59 (for changes to the facility or procedures as described in the FSAR) or under § 50.54(a) (for changes to the quality assurance plan) is not necessary for those changes directly related to implementation of § 50.69. For implementation of treatment processes for low safety-significant SSC, in accordance with the rule requirements contained in § 50.69, the Commission concludes that requiring further review as to whether NRC approval might be required for such changes is unnecessary burden. If a licensee is satisfying the rule requirements, as applied to RISC–3 SSC, the Commission could not postulate circumstances under which NRC approval of such changes would be required. Thus, a licensee would be permitted to make changes concerning treatment requirements that might be contained in these documents. The Commission is limiting this relief to changes directly related to implementation (with respect to treatment processes). Changes that affect any non-treatment aspects of an SSC (*e.g.*, changes to the SSC design basis functional requirements) are still required to be evaluated in accordance with other regulatory requirements such as § 50.59. This rulemaking is only risk-informing the scope of special treatment requirements. The process and requirements established in § 50.69 do not extend to making changes to the design basis of SSCs.

III.7.0 Adequate Protection

The Commission believes that reasonable assurance of adequate protection of public health and safety will be provided by applying the following principles in the development and implementation of proposed § 50.69:

(1) The net increase in plant risk is small;

(2) Defense-in-depth is maintained;

(3) Safety margins are maintained; and

(4) Monitoring and performance assessment strategies are used.

As described previously, these principles were established in RG 1.174, which provided guidance on an acceptable approach to risk-informed decision-making consistent with the 1995 Commission policy on the use of PRA. Proposed § 50.69 was developed to incorporate these principles, both to ensure consistency with Commission policy, and to ensure that the proposed rule maintains adequate protection of public health and safety.

The following discusses how proposed § 50.69 meets the four criteria, and as a result, maintains adequate protection of public health and safety.

III.7.1 Net Increase In Risk is Small

Proposed § 50.69 requires the use of a robust, risk-informed categorization process that ensures that all relevant information concerning the safety significance of an SSC is considered by a competent and knowledgeable panel who makes the final determination of the safety significance of SSCs. The review and approval of the categorization process ensures that it meets the requirements of § 50.69(c) and that as a result, the correct SSC safety significance is determined with high confidence. Correctly determining safety significance of an SSC provides confidence that special treatment requirements are only removed from SSCs with low safety significance, and that these requirements continue to be satisfied for SSCs of safety significance. The proposed rule requires that the

potential net increase in risk from implementation of proposed § 50.69 be assessed, and that this risk change is small. These requirements to provide reasonable confidence that the net change in risk is small as part of the categorization decision, in conjunction with the proposed rule requirements for maintaining design basis functions, and the processes noted below for feedback and adjustment over time, all contribute to preventing risk from increasing beyond the ranges that the Commission has determined to be appropriate. As a result, these requirements are a contributing element for maintaining adequate protection of public health and safety.

III.7.2 Defense-in-Depth Is Maintained

Section 50.69 would require that the defense-in-depth philosophy be maintained as part of the categorization requirements of § 50.69(c)(1) and as a result, defense-in-depth is considered explicitly in the categorization process. Thus, SSCs that are important to defense-in-depth, as outlined in the implementation guidance, will be categorized as safety-significant (and will retain their treatment requirements). For safety-significant SSCs (*i.e.*, RISC–1 and RISC–2 SSCs), all current special treatment requirements would remain (*i.e.*, the proposed rule does not remove any of these requirements) to provide high confidence that they can perform design basis functions, and additionally requires sufficient treatment be applied to support the credit taken for these SSCs for beyond design basis events. For RISC–3 SSCs, proposed § 50.69 would impose high level treatment requirements that when effectively implemented, maintain the capability of RISC–3 SSCs to perform their design basis functions. Thus, the complement of SSCs installed at the facility that provide the defense-in-depth will continue to be available. The proposed rule does not change the design basis of the facility, which was established based upon defense-in-depth considerations. Accordingly, the Commission concludes that the proposed rule maintains defense-in-depth.

III.7.3. Safety Margins Are Maintained

Proposed § 50.69 maintains sufficient safety margins by a combination of:

(1) Maintaining all existing functional and treatment requirements on RISC–1 and RISC–2 SSCs and additionally ensuring that any credit for these SSCs for beyond design basis conditions is valid and maintained; (2) maintaining the design basis of the facility for all SSCs, including RISC–3 SSCs as described above; and (3) requiring a licensee to have reasonable confidence that the overall increase in risk that may result due to implementation of proposed § 50.69 is small.

Maintaining current requirements on RISC–1 and RISC–2 SSCs, and ensuring that credit taken for these SSCs in the PRA for beyond design basis events is maintained, provides assurance that the safety-significant SSCs continue to perform as assumed in the categorization process. Maintaining the design basis ensures that SSCs continue to be designed to criteria that ensure the SSCs perform their design basis functions, and therefore are nominally capable of performing their design basis functions. Because the only requirements that are relaxed are those related to treatment, existing safety margins for SSCs arising from the design technical and functional requirements would remain. The proposed rule would also require (through monitoring requirements) that the SSCs must be maintained such that they continue to be capable of performing their design basis functions. The reduction in treatment applied to RISC–3 SSCs may result in an increase in RISC–3 failure rates (*i.e.*, a reduction in RISC–3 reliability). To address how this relates to safety margin, proposed § 50.69 would require that there be reasonable confidence that any potential increases in CDF and LERF be small from assumed changes in reliability resulting from the treatment changes permitted by the proposed rule. As a result, individual SSCs continue to be capable of performing their design basis functions, as well as to perform any beyond design basis functions consistent with the categorization process and results. Therefore, the Commission concludes that the proposed rule preserves sufficient safety margins.

III.7.4 Monitoring and Performance Assessment Strategies Are Used

Proposed § 50.69(e) would contain requirements that ensure that the risk-informed categorization and treatment processes are maintained, and reflect operational practices, the facility configuration, and SSC performance. In addition, proposed § 50.69(g) would contain requirements that reports are made to NRC of conditions preventing SSCs from performing their safety-significant functions. Together, these requirements maintain the validity of the risk-informed categorization and treatment processes such that the above criteria will continue to be satisfied over the life of the facility.

III.7.5 Summary and Conclusions

Proposed § 50.69 would contain requirements such that the net risk increase from implementation of its requirements is small; defense-in-depth is maintained; safety margins are maintained; and monitoring and performance assessment strategies are used. Together, these requirements result in a proposed § 50.69 that is consistent with Commission policy on the use of PRA, and that maintains adequate protection of public health and safety.

IV. Public Input to the Proposed Rule

IV.1.0 Advance Notice of Proposed Rulemaking (ANPR) Comments

The Commission published an ANPR (March 3, 2000; 65 FR 11488) to solicit public input on the direction and scope of this rulemaking. A number of comments were received. The NRC staff provided its preliminary responses to the issues raised by the commenters in SECY–00–194, dated September 7, 2000. The Commission has considered these issues in developing the proposed rule. More detailed discussion of the comments and the Commission's preliminary positions are contained in a separate document (see Section X, Availability of Documents). A summary of some of the more substantive issues follows.

IV.1.1 Need for Prior NRC Review and PRA "Quality"

As originally envisioned in the ANPR, with development of a detailed Appendix T to contain the categorization process requirements, implementation of § 50.69 could be undertaken without a prior NRC review and approval. As the rulemaking, guidance development, and pilot reviews progressed, it became apparent that some degree of NRC review would be necessary to determine that the PRA was technically adequate to support its use in the categorization process. While the completion of documents such as the ASME Standard for Probabilistic Risk Assessments for Nuclear Power Plant Applications and completion of peer reviews can lead to improved PRAs, there is still some lack of definitive guidance on preparation of PRAs that would allow use of PRA results in the manner anticipated without some degree of NRC review of the PRA itself. Concerns were also raised that excessive detail in the rule might be problematic and require exemptions. Thus, the approach that has been developed is for a rule with the minimum elements of the categorization process defined in the rule, a

requirement for NRC review and approval of the categorization process (including PRA peer review information) to be used, and detailed implementation guidance (in the form of a regulatory guide).

IV.1.2 Treatment Attributes

Many of the ANPR comments focused on what treatment requirements should be established for various RISC categories of SSC. For example, there were comments that the requirements should not be "added-on" to existing requirements, but should reflect the significance of the SSCs. The Statement of Considerations of this rulemaking provides details about the decisions the Commission has made concerning the appropriate treatment requirements to include for the various categories of SSCs.

IV.1.3 Selective Implementation

The Commission received a number of comments on selective implementation, both during the ANPR process and later. The Commission concludes that selective implementation of § 50.69 should be allowed to permit a licensee/applicant to depart from compliance with a limited set of the special treatment rules delineated in § 50.69(b)(1). This topic is discussed further in Section V.5.1. Because of the existing requirements that would remain in place, a licensee could choose not to revise requirements for all of the rules within the scope of § 50.69(b). However, there is no selective implementation for the overall requirements in § 50.69. Thus for example, a licensee could not elect to adopt paragraph (b)(1) and not (d)(2).

The other question was whether selective implementation with respect to the scope of SSCs to be categorized should be allowed. The Commission has determined that selective implementation on a system basis should be allowed, but not for components within a system. The rule includes specific language about this limitation. This required scope ensures that all safety functions associated with a system or structure are properly identified and evaluated when determining the safety significance of individual components within a system or structure and that the entire set of components that comprise a system or structure are considered and addressed. As further discussed in Section III.2, the implementation, including the categorization process must address an entire system or structure, not selected components within a system.

With respect to the question about categorizing only some systems, because the process of categorization of individual components within the systems can be time-consuming, categorization will occur over a period of time. In theory, certain systems might not be categorized at all. Initially there was some reservation that a licensee might only choose to categorize in systems where they anticipated relief from requirements (*i.e.*, with a large set of RISC–3 SSCs) and would not categorize a system that would have RISC–2 SSCs. The Commission notes that requirements remain for RISC–3 SSCs until they are recategorized, and both sets of requirements are intended to maintain the design basis functions of RISC–3 SSCs. However, in categorizing any SSC, the categorization process may result in making assumptions about other SSCs in the plant (through the PRA modeling and in the IDP). In other words, for some SSCs to be of low safety significance, it is necessary for other SSCs to be safety-significant. For example, a RISC–2 SSC may be credited in the categorization process and subsequently another SSC becomes RISC–3 (low safety-significant). If a licensee wants to selectively implement § 50.69 just for the system in which a particular RISC–3 SSC resides, then the licensee would also have to assure that the credit for the RISC–2 SSC is maintained also. To ensure that the categorization process is valid, such assumptions and credit must be retained over time, as determined by the PRA update process. Because the NRC will be reviewing the categorization process before implementation, NRC can determine if the categorization process is compatible with this approach.

IV.2.0 Draft Rule Comments

On November 29, 2001 (66 FR 59546), the NRC staff released draft rule language for proposed § 50.69, in response to guidance from the Commission dated August 2, 2001. The draft rule language was released to stakeholders as a means of obtaining early input from stakeholders about the rulemaking and how it would be implemented. The NRC staff received ten sets of comments from stakeholders in response to the FR notice. The NRC staff revised the draft rule and re-issued the revised language on April 5, 2002, taking into account the issues raised by the stakeholders. A third draft of the rule was made publicly available on August 2, 2002. Some revisions to the rule resulted from the input provided by the stakeholders and others were taken into account in the development of the SOC. The remaining discussion identifies the significant comments which resulted in changes to the draft rule.

Many of the comments received related to the way in which the high-level treatment requirements for RISC–3 SSCs were organized and worded. Based upon these comments, the NRC reduced the number of separate subsections (from 8 to 4), and simplified the wording by removing duplication of phrases. Suggested simplifications that were accepted were the deletion of details of the types of maintenance (corrective, predictive), and deletion of the words "design inputs." Some stakeholders, such as the NEI, stated that the requirements were overly prescriptive and were not consistent with the concept of removing SSCs from the scope of NRC special treatment requirements. The issue about level of detail is the topic that drew the most comment during the draft rule language process. At the same time, comments and input from other stakeholders (including the Advisory Committee on Reactor Safeguards (ACRS), were resulting in strengthening of the categorization process such that any individual SSC categorized as RISC–3 is of very low safety significance. Specific consideration was also added in the rule requirements to deal with potential common-cause failures. Based upon this evolution, concerns about prescriptiveness as stated in these comments led the Commission to simplify the requirements on treatment for RISC–3 SSCs.

Another part of the draft rule that drew comment was the requirement for monitoring of RISC–3 SSCs. Some of the comments indicated that this was not necessary for low safety-significant SSCs, and was inconsistent with the removal of maintenance rule monitoring (by removing § 50.65(a)(1) through (3) as requirements). In the proposed rule, the Commission has clarified that the type of monitoring of availability and failures under the maintenance rule is not necessary and that the type of monitoring appropriate for RISC–3 SSCs is the performance monitoring specified in § 50.69(d)(2)(iii) and the feedback specified in § 50.69(e)(3).

Other comments proposed that the scope of rules being removed should be expanded to include the requirements in § 50.55a (ASME code requirements), and Appendix A to Part 100. Rule language was added to accomplish this by listing specific subsections of § 50.55a and Appendix A to Part 100 in the list of requirements removed, and through other changes to the rule designed to maintain the necessary reliability of SSCs. The ASME provided comments on the draft rule language

stating that the risk-informed Code Cases and Standards developed by ASME should not be directly referenced in the rule, but that there should be a framework developed to ensure that the Code Cases are used, and that partial use does not occur. The proposed rule permits, but does not require, use of the Code Cases for purposes of meeting rule requirements. The Commission notes that these Code Cases cover both categorization and treatment requirements in the areas of inservice inspection, inservice testing, and repair/replacement. The Commission expects licensees will utilize the ASME Code Cases as part of their implementation of § 50.69.

Another commenter stated that the rule should be made applicable to applicants as well as license holders, and NRC agreed that this was appropriate and made revisions to the rule language to accommodate this. Another commenter stated that the wording of the requirement to "assure risk is small from changes to treatment" set an impossible standard, and that the rule wording should be revised to allow use of sensitivity studies to provide confidence that the risk is small. The NRC agreed with this comment and revised the rule wording in the manner suggested that the licensee provide reasonable confidence that the increase in risk is small through performance of appropriate evaluations, such as sensitivity studies for SSCs modeled in the PRA.

A commenter thought it was unnecessary to require that a schedule or scope of systems to be categorized be part of the submittal. It was noted that implementation of the rule would of necessity occur over time, and that existing requirements would remain in effect until SSCs were categorized. Thus, the commenter believes that a licensee should not be held to any particular schedule for implementation. The NRC's intent in requesting a schedule and scope was for informational purposes to know what requirements would be in effect, but agrees that a firm commitment to a schedule is not required. This part of the rule was removed, and instead there is a requirement to update the FSAR, in accordance with § 50.71(e), to reflect implementation as it occurs for particular systems.

IV.3.0 Pilot Plants

To aid in the development of the proposed rule and associated implementation guidance, several plants volunteered to conduct pilot activities with the objective of exercising the proposed NEI implementation guidance and using the feedback and lessons-learned to improve both the implementation guidance and the governing regulatory framework. The pilot effort was supported by three of the industry owners groups who identified pilots for their reactor types and participated by piloting sample systems using the draft NEI implementation guidance. Supporting the pilot effort were the Westinghouse Owners Group with lead plants Wolf Creek and Surry, the BWR Owners Group with lead plant Quad Cities, and the CE Owners Group with lead plant Palo Verde. The B&W Owners Group did not participate, but did follow the pilot activities.

The NRC staff's participation and principal point of interaction in the pilot effort was primarily in observation of the deliberations of the integrated decision-making panel (IDP). By observing the IDP, the NRC staff was able to view the culmination of the categorization effort and gain good insights regarding both the robustness of the categorization process in general, and the IDP decision-making process specifically. Following each of the pilot IDPs, the staff developed and issued a trip report containing the staff's observations.

The following points set forth the principal lessons learned and key feedback from the NRC staff's observations of the pilot activities.

- Potential treatment changes and their potential effects need to be understood by the IDP as part of the deliberations on categorization.
- The pilots showed the importance of documentation of the IDP decisions and the basis. The rule contains a requirement for the categorization basis to be documented (and records retained) in § 50.69(f).
- The pilots experienced difficulty in explicit consideration about safety margins, especially in view of the fact that functionality must be retained. In the first draft rule language posted, requirements were included for the IDP to consider safety margins in its deliberations. Based upon the pilot experience, NRC adjusted its approach to margins to include this in the section of the rule that requires consideration of effects of changes in treatment and the use of evaluations as the means of providing reasonable confidence safety margins are maintained.
- The need for a number of improvements to the implementation guidance in NEI 00–04 were noted, for instance, improvement in a defense-in-depth matrix presented therein, and the need for more specific guidance on making decisions where quantitative information is not available. These lessons-learned were factored into the revised version of NEI 00–04.
- During the pilot activity, pressure boundary ("passive") functions were also categorized using the draft version of an ASME Code Case on categorization available at that time. A separate categorization process was used for these passive functions because it was recognized by pilot participants that the approach for these SSCs must be somewhat different than for "active" functions because of such considerations as spatial interaction. Specifically, if a pressure boundary SSC failed, the resulting high-energy release or flooding might impact other equipment in physical proximity, so the process needed to account for those effects in addition to the significance of the SSC that initially failed. Improvements to the ASME Code Case for categorization of piping (and related components) were identified and fed back into the code development process.
- The pilot experiences also revealed the intricacies of the relationship between "functions" (which play a role in decisions on safety significance) and "components" (importance measures are associated with components and treatment is also generally applied on a component basis). Because a particular component may support more than one function, the categorization of the component needs to correspond with the most significant function and means must be provided for a licensee to "map" the components to the functions they support.
- At each pilot, the NRC noted that the IDP needed to include consideration of long term containment heat removal in characterizing SSCs. The NRC considers retention of long term containment heat removal capability important to defense-in-depth for light water reactors.
- Finally, a number of lessons were learned about how to conduct the IDP process, such as training needs, materials to be provided to the panel, etc. As a result of this feedback, NEI revised NEI 00–04 and developed draft revision C of the implementation guidance (discussed in Section VI).

IV.4.0 South Texas Exemption as Proof-of-Concept

A major element of the rulemaking plan described in SECY–99–256 was the review of the South Texas Project Nuclear Operating Company (STPNOC) exemption request. The review of the STPNOC exemption request was viewed as a proof-of-concept prototype for this rulemaking rather than a pilot because it preceded development of draft rule

language or related implementation guidance.

By letter dated July 13, 1999, STPNOC requested approval of exemption requests to enable implementation of processes for categorizing the safety significance of SSCs and treatment of those SSCs consistent with its categorization process. The STPNOC process included many similar elements to that described in this rulemaking, but with some differences. Their process identified SSCs as being either high, medium, low or not risk-significant. The scope of the exemptions requested included only those safety-related SSCs that have been categorized as low safety-significant or as nonrisk significant using STPNOC's categorization process. The licensee indicated that the categorization and treatment processes would be implemented over the remaining licensed period of the facility. Thus, the basis for the exemptions granted was the staff's approval of the licensee's categorization process and alternative treatment elements, rather than a comprehensive review of the final categorization and treatment of each SSC (review of the process rather than the results is also the approach planned under the rulemaking). As a result of discussions with the NRC staff on a number of topics, STPNOC submitted a revised exemption request on August 31, 2000.

On November 15, 2000, the NRC staff issued a draft safety evaluation (SE), based on the revised exemption requests. Following the licensee's response to the draft SE, the staff prepared SECY–01–0103 dated June 12, 2001, to inform the Commission of the staff's finding regarding the STPNOC exemption review. The staff approved the STPNOC exemption requests by letter dated August 3, 2001 (ADAMS accession number ML011990368).

The NRC has applied lessons learned from the review of the STPNOC exemption request in developing proposed § 50.69 and the description of intended implementation of the rule in this SOC. For example, in the STPNOC review, the NRC staff reviewed the categorization process proposed by the licensee in detail. With respect to proposed § 50.69, the NRC continues to require a robust categorization with a detailed staff review.

The proposed rule specifies the requirement that the licensee provide reasonable confidence in functionality and further specifies some high-level requirements for SSC treatment. Under proposed § 50.69, the NRC does not plan to review each licensee's plan for SSC treatment in detail. Licensees will have to establish appropriate performance-based SSC treatment processes to maintain the validity of the categorization process and its results. The proposed rule would require that licensees adjust the categorization or treatment processes, as appropriate, in response to the SSC performance information obtained as part of the treatment process.

V. Section by Section Analysis

V.1.0 Section 50.8 Information Collection

This proposed rule includes a revision to § 50.8(b). This section pertains to approval by the Office of Management and Budget (OMB) of information collection requirements associated with particular NRC requirements. Because the new § 50.69 includes information collection requirements, a conforming change to § 50.8(b) is necessary to list § 50.69 as one of these rules. See also Section XIII of the SOC for discussion about information collection requirements of § 50.69.

V.2.0 Section 50.69(a) Definitions

Section 50.69(a) provides the definition for the four RISC categories and the definition of the term "safety-significant function." As discussed in Section II of the SOC, RISC–1 SSCs are those SSCs that are safety-related (as defined in § 50.2) and that are found to be safety-significant (using the risk-informed categorization process being established by this rule). RISC–2 SSCs are SSCs that do not meet the safety-related definition, but which are safety-significant. RISC–3 SSCs are safety-related but are low safety-significant. Finally, RISC–4 SSCs are not safety-related and are low safety-significant. The NRC selected the terms "safety-significant" and "low safety-significant" as the best representations of their meaning. Every component (if categorized) is either safety-significant or low safety-significant. The "low" category could include those SSCs that have no safety significance, as well as some SSCs that individually are not safety-significant, but collectively can have a significant impact on plant safety (and hence the need for maintaining the design basis capability of these SSCs). Similarly, within the category of "safety-significant," some SSCs are of more importance than others; so it did not appear appropriate to call them all "high safety-significant." The RISC definitions of paragraph (a) are used in subsequent paragraphs of § 50.69 where the treatment requirements are applied to SSCs as a function of RISC category.

The definitions provided in paragraph (a) are written in terms of SSCs that perform functions. In the categorization process, it is the various functions performed by systems that are assessed to determine their safety significance. For those functions of significance, the structures and components that support that function are then designated as being of that RISC category. Then, the treatment requirements are specified for the SSCs that perform those functions. Where an SSC performs functions that fall in more than one category, the treatment requirements derive from the more safety-significant function (*i.e.*, if a component has both a RISC–1 and a RISC–3 function, it is treated as RISC–1).

The rule also contains a definition of "safety-significant" function. NRC selected the term "safety-significant" instead of "risk-significant" because the categorization process employed in § 50.69 considers both probabilistic and deterministic information in the decision process. Thus, it is more accurate to represent the outcome as a determination of overall safety significance, including risk significance, and not just "risk-significant."

Those functions that are not determined to be safety-significant are considered to be low safety-significant. The determination as to which functions are safety-significant is done by following the categorization process outlined in paragraph (c), as implemented following the guidance in DG–1121, "Guidelines for Categorizing Structures, Systems, and Components in Nuclear Power Plants According to their Safety Significance."

V.3.0 Section 50.69(b) Applicability

Section § 50.69(b) provides that the rule may be voluntarily implemented by:

(1) Holders of § 50.21(b) or § 50.22 light water reactor (LWR) operating licenses;

(2) Holders of Part 54 renewed LWR licenses;

(3) A person seeking a design certification under Part 52 of this chapter; or

(4) Applicants for a LWR license under § 50.22 or under Part 52.

For current licensees, implementation will be through a license amendment as set forth in § 50.90. Until the request is approved, a licensee would continue to follow existing requirements. Upon approval of the categorization process (and review of the supporting PRA), the licensee can begin implementation by performing categorization of SSCs and revising treatment requirements accordingly.

Applicants would be permitted to implement the treatment requirements, although the process involved for them would likely be different, depending upon the stage at which they seek approval. An applicant would have to categorize its SSCs into the four RISC categories, which would first require the applicant to design the facility to meet the Part 50 requirements including classifying SSCs according to the safety-related definition of Part 50. The applicant could then use the provisions of § 50.69 (upon NRC approval) to categorize SSCs into the four RISC categories, and this in turn would enable the applicant to initially procure these SSCs to meet the applicable § 50.69 requirements.

For Part 54 license holders, implementation is the same as that for a holder of an operating license under Part 50, that is, to apply for an amendment to the (renewed) license. In the development of § 50.69, questions have been received regarding what would be the impact to licensees that implement the proposed § 50.69 and then apply to renew their license. Because Part 54 includes scoping criteria that bring safety-related components within its scope, these components could not be exempted without amending Part 54 to allow for their exclusion. However, there are still options available to applicants for renewal that have implemented § 50.69 first. Because § 50.69 includes alternative treatment requirements for RISC–3 components, an applicant may be able to provide an evaluation that justifies why these alternative treatment criteria (§ 50.69(d)(2)) provide a sufficient demonstration that aging management of the components will be achieved during the renewal period to ensure the functionality of the structure, system, or component. In addition, in the 1995 amendment to Part 54, the Commission recognized that risk insights could be used in evaluating the robustness of an aging management program. The NRC staff has already received and accepted one proposal (Arkansas Unit 1) for a risk-informed program for small-bore piping which demonstrates that risk arguments can be used to a degree.

For the case where a licensee renewed its license first and then implemented § 50.69, a licensee might revise some aging management programs for RISC–3 SSCs, consistent with the requirements of § 50.69. The Commission considers that there should be little or no impediment for doing so because the categorization process that allows for the reduction in the special treatment requirements for RISC–3 components is expected to provide an appropriate level of safety for the respective structures, systems and components.

Adopting the proposed § 50.69 requirements for an applicant that has not obtained a § 50.21(b) or § 50.22 operating license (*e.g.* for a construction permit holder), is not as straightforward, and requires that the applicant first design the facility to meet the current Part 50 requirements. Specifically, to use the proposed § 50.69 requirements requires that SSCs first be classified into the traditional safety-related and nonsafety-related classifications. This establishes the design basis for the facility, which as previously stated, the proposed § 50.69 is not changing. Once the SSC categorization has been done consistent with the safety-related definition in § 50.2, then proposed § 50.69 can be used to re-categorize SSCs into RISC–1, RISC–2, RISC–3, and RISC–4, and the alternative treatment requirements of proposed § 50.69 implemented. A new applicant who chooses to adopt these proposed § 50.69 requirements, must seek approval of the categorization process as part of its license application, and following NRC approval, would be able to procure RISC–3 SSCs to proposed § 50.69 requirements before initial plant operation. An applicant who references a certified design and wishes to implement § 50.69 would include the specified information as part of its application for a license. This does not mean that an applicant would actually construct the facility per all Part 50, and 100 requirements first, before applying § 50.69. Instead, the facility needs to be designed per these requirements, but following approval of application of § 50.69, RISC–3 SSCs could be procured per the requirements of § 50.69(d).

The rule provisions were devised to provide means for licensees and applicants for light water reactors to implement § 50.69. In view of some of the specific provisions of the rule, for example, "safety-related" definition and use of CDF/LERF metrics, the Commission is making this rule only applicable to light-water reactor designs.

An applicant for a design certification could request to implement § 50.69 with respect to categorizing SSCs. Because the rule requirements in § 50.69 include elements of procurement and installation, as well as inservice activities, implementation of the rule by a holder of a manufacturing license or by a design certification applicant would have implications for the eventual operator of the facility. The entity that actually constructs and operates the facility would also have to implement § 50.69 to maintain consistency with the categorization process and feedback requirements. Otherwise, the operator would be required to meet other Part 50 requirements, such as Appendix B or § 50.55a, which may not be compatible with the facility as manufactured by the manufacturing licensee. However, applicability of this proposed rule is not excluded for manufacturing licenses or design certificate applicants.

V.3.1 Section 50.69(b)(1) Removal of RISC–3 and RISC–4 SSCs From the Scope of Treatment Requirements

Section 50.69 (b)(1) of the proposed rule lists the specific special treatment requirements from whose scope the RISC–3 and RISC–4 SSCs are being removed through the application of § 50.69. In this paragraph, each of the rule requirements (or portions thereof) that are being removed by this rulemaking are listed in a separate item, numbered from § 50.69(b)(1)(i) through (ix). The basis for removal of these requirements was discussed earlier. These requirements are being removed due to the low safety significance of RISC–3 and RISC–4 SSCs as determined by an approved risk-informed categorization process meeting the requirements of § 50.69(c). The special treatment requirements for RISC–3 SSCs are replaced with the high level requirements in § 50.69(d)(2), which when effectively implemented by licensees to provide a sufficient level of confidence that RISC–3 SSCs continue to be capable of performing their safety-related functions under design basis conditions. Note that special treatment requirements are not removed from any SSCs until a licensee (or applicant) has categorized those SSCs using the requirements of § 50.69(c) to provide the documented basis for the decision that they are of low safety significance.

V.3.2 Section 50.69 (b)(2) Application Process

Proposed § 50.69(b)(2) would require a licensee who voluntarily seeks to implement § 50.69 to submit an application for a license amendment pursuant to § 50.90 that contains the following information:

(i) A description of the categorization process that meets the requirements of § 50.69(c).

(ii) A description of the measures taken to assure that the quality and level of detail of the systematic processes that evaluate the plant for internal and external events during normal operation, low power, and shutdown (including the plant-specific PRA, margins-type approaches, or other systematic evaluation techniques used

to evaluate severe accident vulnerabilities) are adequate for the categorization of SSCs.

(iii) Results of the PRA review process to be conducted to meet § 50.69(c)(1)(i).

(iv) A description of, and basis for acceptability of, the evaluations to be conducted to satisfy § 50.69(c)(1)(iv). The evaluations shall include the effects of common cause interaction susceptibility, and the potential impacts from known degradation mechanisms for both active and passive functions, and address internally and externally initiated events and plant operating modes (*e.g.*, full power and shutdown conditions).

Regarding the categorization process description, the NRC expects that most licensees and applicants will commit to draft regulatory guide DG–1121 which endorses NEI 00–04, with some conditions and exceptions. If a licensee or applicant wishes to use a different approach, the submittal would need to provide sufficient description of how the categorization would be conducted. As part of the submittal, a licensee or applicant is to describe the measures they have taken to assure that the plant-specific PRA, as well as other methods used, are adequate for application to proposed § 50.69. The measures described would include such items as any peer reviews performed, any actions taken to address peer review findings that are important to categorization, and any efforts to compare the plant-specific PRA to the ASME PRA standard. The NRC has developed reviewer guidance applicable to these submittals and this is described below in Section VI.2. The licensee/applicant would also describe what measures they have used for the methods other than a PRA to determine their adequacy for this application.

Further, the licensee (or applicant) would be required to include information about the evaluations they intend to conduct to provide reasonable confidence that the increase in risk would be small. This would include any sensitivity studies for RISC–3 SSCs, including the basis for whatever change in reliability being assumed for these analyses. A licensee would need to provide sufficient information for the NRC describing the sensitivity studies and other evaluations, and the basis for their acceptability as appropriately representing the potential increase in risk from implementation of the revised requirements in this proposed rule.

As discussed elsewhere, the RISC–3 SSCs have low safety significance under § 50.69. The Commission expects licensees and applicants to implement effective treatment processes to maintain RISC–3 functionality that comply with § 50.69(d). Those processes do not need to be described to the NRC as part of the proposed § 50.69 submittal under § 50.69(b)(2).

V.3.3 Section 50.69(b)(3) Approval for Licensees

Section 50.69(b)(3) would further provide that the Commission will approve a licensee's implementation of this section by license amendment if it determines that the proposed process for categorization of RISC–1, RISC–2, RISC–3, and RISC–4 SSCs satisfies the requirements of § 50.69(c).

The NRC will review the description of the categorization process set forth in the application to confirm that it contains the elements required by the rule. The NRC will also review the information provided about the plant-specific PRA, including the peer review process to which it was subjected, and methods other than a PRA relied upon in the categorization process. The NRC intends to use review guidance (discussed in more detail in Section VI) for this purpose. The NRC will approve the licensee's use of § 50.69 by issuing a license amendment.

V.3.4 Section 50.69(b)(4) Process for Applicants

Section 50.69(b)(4) would require that an applicant for a license (or for a design certification) that chooses to implement proposed § 50.69 must submit the information listed in § 50.69(b)(2) as part of its application for a license. As previously discussed, the rule is structured to transition from the "safety-related" classification (and related treatment requirements) to a safety-significant classification. Thus, an applicant would first need to design the facility to meet applicable Part 50 design requirements, and then apply the requirements of § 50.69. The above-cited information must be submitted in addition to other technical information necessary to meet § 50.34. The NRC will provide its approval of implementation of § 50.69, if it concludes that the rule requirements would be met, as part of its action on the application for a license or the design certification rule. As noted in Section V.3.0, an applicant referencing a certified design that implemented § 50.69 would need to adopt the remaining provisions of § 50.69 or apply the other requirements in Part 50 to its processes.

V.4.0 Section 50.69(c) Categorization Process Requirements

Section 50.69(c) would establish the requirements for the risk-informed categorization process including requirements for the supporting PRA. Licensees or applicants who wish to adopt the requirements of § 50.69 will need to make a submittal (per § 50.69(b)(2) or § 50.69(b)(4)) that discusses how their proposed categorization process, supporting PRA, and evaluations meet the § 50.69(c) requirements. As described above in Section III.2.0, these requirements are intended to ensure that the risk-informed § 50.69 categorization process determines the safety significance of SSCs with a high level of confidence. The introductory paragraph states that SSCs must be categorized as RISC–1, 2, 3, or 4 by a process that determines whether the SSC performs one or more safety-significant functions and identifies those functions.

V.4.1 Section 50.69(c)(1)(i) Results and Insights From a Plant-Specific Probabilistic Risk Assessment

Section 50.69(c)(1)(i) contains the requirements for the PRA itself, and how it is to be used in the categorization process. The PRA must have sufficient capability and quality to support the categorization of the SSCs. How this is to be accomplished is discussed in Section V.4.1.1. The PRA and associated sensitivity studies are used primarily in the categorization of the SSCs as to their safety significance as discussed in Section V.4.1.2, and the PRA is also used to perform evaluations to assess the potential risk impact of the proposed change in treatment of the RISC–3 SSCs as discussed in Section V.4.4.

V.4.1.1 Scope, Capability, and Quality of the PRA to Support the Categorization Process

As required in § 50.69(c)(1)(ii), initiating events from sources both internal and external to the plant, and for all modes of operation, which would include low power and shutdown modes, must be considered when performing the categorization of SSCs. It is recognized that few licensees have fully developed PRA models that cover such a scope. However, as a minimum, the PRA to be used to support categorization under § 50.69(c)(1) must model internal initiating events occurring at full power operations. The PRA will have to be able to calculate both core damage frequency and large early release frequency in order to meet the requirement in § 50.69(c)(iv). The PRA must reasonably represent the current configuration and operating practices at the plant to meet § 50.69(c)(1)(ii). The PRA model should be of sufficient technical quality and level of detail to support the categorization process. This means that

it represents a coherent, integrated model, and have sufficient detail to support the initial categorization of SSCs into the safety-significant, and low safety-significant categories.

The quality and scope of the plant-specific PRA will be assessed by the NRC taking into account appropriate standards and peer review results. The NRC has also prepared a draft regulatory guide (DG–1122) on determining the technical adequacy of PRA results for risk-informed activities. As one step in the assurance of technical quality, the PRA must have been subjected to a peer review process assessed against a standard or set of acceptance criteria that is endorsed by the NRC. Thus, the NRC staff would use the NEI Peer Review Process as modified in the NRC's approval, or the ASME/ANS Peer Review Process, as modified in the NRC's approval. As discussed in Section VI, NRC has developed review guidelines for considering the sufficiency of a PRA that was subjected to the NEI peer review process, as it would be used in implementation of § 50.69. The submittal requirements listed in § 50.69(b)(2) include a requirement to provide information about the quality of the PRA analysis and about the peer review results.

V.4.1.2 Risk Categorization Process Based on PRA Information

For SSCs modeled in the PRA, the categorization process relies on the use of importance measures as a screening method to assign the preliminary safety significance of SSCs. (Other methodologies such as success path identification methodologies can also be used, however, this discussion will focus on the use of importance measures because these are the most commonly used tools to identify safety significance of SSCs, for example, in the implementation of § 50.65.) In addition to being a useful tool to help prioritize NRC staff and licensee resources, use of importance measures can provide a systematic means to identify improvements to current plant practices. The determination of the safety significance of SSCs by importance measures is also important because it can identify potential risk outliers and therefore, changes that exacerbate these outliers can be avoided; and it can facilitate IDP deliberations of SSCs that are not modeled in the PRA, for example, events from the ranked list can be used as surrogates for those SSCs that are not modeled or are only implicitly modeled in the PRA.

For SSCs modeled in the PRA, SSC importance must be determined based on both CDF and LERF. Importance measures should be chosen so that results can provide the IDP with information on the relative contribution of an SSC to total risk. Examples of importance measures that can accomplish this are the Fussell-Vesely (F–V) importance and the Risk Reduction Worth (RRW) importance. Importance measures should also be used to provide the IDP with information on the margin available should an SSC fail to function. The Risk Achievement Worth (RAW) importance and the Birnbaum importance are example measures that are suitable for this purpose.

In choosing screening criteria to be used with the PRA importance measures, it should be noted that importance measures do not directly relate to changes in the absolute value of risk. Therefore, the final criteria for categorizing SSCs into the safety-significant and the low safety-significant categories must be based on an assessment of the potential overall impact of SSC categorization and a comparison of this potential impact to the acceptance criteria for changes in CDF and LERF. However, typically in the initial screening stages, an SSC with F–V < 0.005 based on CDF and LERF, and RAW < 2 based on CDF and LERF can be considered as potentially low safety-significant. IDP consideration of §§ 50.69(c)(1)(ii), (c)(1)(iii), and (c)(1)(iv) should be carried out to confirm the low safety significance of these SSCs.

In determining the importance of SSCs, consideration should be given to the potential for the multiple failure modes for the SSC. PRA basic events represent specific failure events and failure modes of SSCs. The calculation of SSC importance should take into account the combined effects of all associated basic PRA events (such as failure to start and failure to run), including indirect contributions through associated common cause failure (CCF) event probabilities.

Another concern that arises because importance measures are typically evaluated on the basis of individual events is that single-event importance measures have the potential to dismiss all elements of a system or group, despite the system or group having a high importance when taken as a whole. (Conversely, there may be grounds for screening out groups of SSCs, owing to the unimportance of the systems of which they are elements.) One approach around this problem is to first determine the importance of system functions performed by the selected plant systems. If necessary, each component in a system is then evaluated to identify the system function(s) supported by that component. SSCs may be initially assigned the same category as the most limiting system function they support. System operating configuration, reliability history, recovery time available, and other factors can then be considered when evaluating the effect on categorization from an SSC's redundancy or diversity. The primary consideration in the process is whether the failure of an SSC will fail or severely degrade the safety function. If the answer is no, then a licensee may factor into the categorization the SSC's redundancy, as long as the SSC's reliability assumed in the categorization process and that of its redundant counterpart(s) have been taken into account.

When the PRA used in the importance analyses includes models for external initiating events and/or plant operating modes other than full power, caution should be used when considering the results of the importance calculations. The PRA models for external initiating events (*e.g.*, events initiated by fires or earthquakes), and for low power and shutdown plant operating modes may be more conservative and have a greater degree of uncertainty than for internal initiating events. Use of conservative models can influence the calculation of importance measures by moving more SSCs into the low safety significance category. Therefore, when PRA models for external event initiators and for the low power and shutdown modes of operation are available, the importance measures should be evaluated for each analysis separately, and the results of the analyses should be provided to the IDP.

As part of the demonstration of PRA adequacy, the sensitivity of SSC importance to uncertainties in the parameter values for component availability/reliability, human error probabilities, and CCF probabilities should be evaluated. Results of these sensitivity analyses should be provided to the IDP. In IDP deliberations on the sensitivity study results, the following should be considered:

(1) The change in event importance when the parameter value is varied over its uncertainty range for the event probability can in some cases provide SSC categorization results that are different. Therefore, in considering the sensitivity of component categorization to uncertainties in the parameter values, the IDP should ensure that SSC categorization is not affected by data uncertainties.

(2) PRAs typically model recovery actions, especially for dominant accident sequences. Estimating the

success probability for the recovery actions involves a certain degree of subjectivity. The concerns in this case stem from situations where very high success probabilities are assigned to a sequence, resulting in related components being ranked as low risk contributors. Furthermore, it is not desirable for the categorization of SSCs to be impacted by recovery actions that sometimes are only modeled for the dominant scenarios. Sensitivity analyses should be used to show how the SSC categorization would change if recovery actions were removed. The IDP should ensure that the categorization is not unduly impacted by the modeling of recovery actions.

(3) CCFs are modeled in PRAs to account for dependent failures of redundant components within a system. CCF probabilities can impact PRA results by enhancing or obscuring the importance of components. A component may be ranked as a high risk contributor mainly because of its contribution to CCFs, or a component may be ranked as a low risk contributor mainly because it has negligible or no contribution to CCFs. The IDP should ensure that the categorization is not unduly impacted by the modeling of CCFs. The IDP should also be aware that removing or relaxing requirements may increase the CCF contribution, thereby changing the risk impact of an SSC.

V.4.2 Section 50.69(c)(1)(ii) Integrated Assessment of SSC Function Importance

Section 50.69(c)(1)(ii) contains requirements for an integrated, systematic process to address events including those not modeled in the PRA, including both design basis and severe accident functions. For various reasons, many SSCs in the plant will not be modeled explicitly in the PRA. Therefore, the categorization process must determine the safety significance of these SSCs by other means, as discussed below. Because importance measures are not available for use as screening, other criteria or considerations must be used by the IDP to determine the significance. To provide the necessary structure, the Commission is setting forth guidance on how these deliberations should be conducted; this information will also be included in the regulatory guidance for this proposed rule. These considerations were selected based upon NRC experience about what functions are important to prevention of core damage or large early release.

The proposed rule would also include requirements that all aspects of the processes used to categorize SSC must reasonably reflect the current plant configuration, operating practices and applicable operating experience. The terminology of "reasonably reflect" was selected to allow for appropriate PRA modeling and also to make clear that the PRA and processes do not need to be instantaneously revised when a plant change occurs (see also requirements in § 50.69(e)(1) on PRA updating).

V.4.2.1 Initiating Events and Plant Operating Modes Not Modeled in the PRA

When initiating events with frequencies of greater than 10^{-6} per year are not modeled in the PRA, or when the low power and shutdown plant operating modes are not modeled in the PRA, other means are needed to determine the safety significance to meet § 50.69(c)(1). The proposed implementation guidance contains information about how this can be accomplished by the IDP assessments. The licensee should demonstrate that the relaxation of regulatory requirements will not unacceptably degrade plant response capability and will not introduce risk vulnerabilities for the unmodeled initiating events or plant operating modes. For these unmodeled events, the IDP assessment should consider whether an SSC has an impact on the plant's capability to:

(1) Prevent or mitigate accident conditions,

(2) Reach and/or maintain safe shutdown conditions,

(3) Preserve the reactor coolant system pressure boundary integrity,

(4) Maintain containment integrity, or

(5) Allow monitoring of post-accident conditions.

In determining the importance of SSCs for each of these functions, the following factors should be considered:

- Safety function being satisfied by SSC operation
- Level of redundancy existing at the plant to fulfill the SSC's function
- Ability to recover from a failure of the SSC
- Performance history of the SSC
- Use of the SSC in the Emergency Operating Procedures or Severe Accident Management Guidelines

The licensee or applicant (through the IDP) must document the basis for the assignment of an SSC as RISC–3 based on the above considerations. Insights and results from risk assessment and risk management methodologies (for example the fire and external events screening methodologies, the seismic margins analyses, or the shutdown safety management models) may be used to help form this basis.

V.4.2.2 SSCs Not Modeled in the PRA

In addition to being safety-significant in terms of their contribution to CDF or LERF, SSCs can also be safety-significant in terms of other risk metrics or conditions. Therefore, for SSCs not modeled explicitly in the PRA, the IDP should verify low safety significance based on traditional engineering analyses and insights, operational experience, and information from licensing basis documents and design basis accident analyses. The IDP should assess the safety significance of these SSCs by determining if:

(1) Failure of the SSC will significantly increase the frequency of an initiating event, including those initiating events originally screened out in the PRA.

(2) Failure of the SSC will compromise the integrity of the reactor coolant pressure boundary. It is expected that a sufficiently robust categorization process would result in the reactor coolant pressure boundary being categorized as RISC–1.

(3) Failure of the SSC will fail a safety-significant function, including SSCs that are assumed to be inherently reliable in the PRA (*e.g.*, piping and tanks) and those that may not be explicitly modeled (*e.g.*, room cooling systems, and instrumentation and control systems). For example, it is expected for PWRs that a sufficiently robust categorization process would categorize high energy ASME Section III Class 2 piping of the main steam and feedwater systems as RISC–1.

(4) The SSC supports important operator actions required to mitigate an accident, including the operator actions taken credit for in the PRA.

(5) Failure of the SSC will result in failure of safety-significant SSCs (*e.g.*, through spatial interactions or through functional reliance on another SSC).

(6) Failure of the SSC will impact the plant's capability to reach and/or maintain safe shutdown conditions.

(7) The SSC is one of a redundant set that can be justifiably identified as a common cause failure group.

(8) The SSC is a part of a system that acts as a barrier to fission product release during severe accidents. It is expected that a sufficiently robust categorization process would result in fission product barriers (*e.g.*, the containment shell or liner) being categorized as RISC–1.

(9) The SSC is depended upon in the Emergency Operating Procedures or the Severe Accident Management Guidelines.

(10) Failure of the SSC will result in unintentional releases of radioactive

material in excess of 10 CFR part 100 guidelines even in the absence of severe accident conditions.

(11) The SSC is relied upon to control or to mitigate the consequences of transients and accidents.

If any of these conditions is true, the IDP should use a qualitative evaluation process to determine the impact of relaxing requirements on SSC reliability and performance. This evaluation should include identifying the functions being supported by SSC operation, the relationship between the SSC's failure modes and the functions being supported, the SSC failure modes for which the failure rate may increase, and the SSC failure modes for which detection could become or are more difficult. The IDP can then justify low safety significance of the SSC by demonstrating the following:

- The categorization is consistent with the defense-in-depth philosophy (per Section V.4.3 below).
- Operating experience indicates that degradation mechanisms (*e.g.*, for piping flow accelerated corrosion or microbiologically-induced corrosion), for passive and active SSCs are not present, relaxing the requirements will have minimal impact on the failure rate increase, and degradation in the ability of the SSC to perform its safety function can be detected in a timely fashion.
- Relaxing the requirements will have a minimal impact on the expected onsite occupational or offsite doses from transients and accidents that do not contribute to CDF or LERF.

V.4.3 Section 50.69(c)(1)(iii) Maintaining Defense-in-Depth Philosophy

Section 50.69(c)(1)(iii) requires that the categorization process maintain the defense-in-depth philosophy. To satisfy this requirement, when categorizing SSCs as low safety-significant, the IDP must demonstrate that the defense-in-depth philosophy is maintained. Defense-in-depth is considered adequate if the overall redundancy and diversity among the plant's systems and barriers is sufficient to ensure the risk acceptance guidelines discussed below in Section V.4.4 are met, and that:

- Reasonable balance is preserved among prevention of core damage, prevention of containment failure or bypass, and mitigation of consequences of an offsite release.
- System redundancy, independence, and diversity is preserved commensurate with the expected frequency of challenges, consequences of failure of the system, and associated uncertainties in determining these parameters.
- There is no over-reliance on programmatic activities and operator actions to compensate for weaknesses in the plant design, and
- Potential for common cause failures is taken into account.

The Commission's position is that the containment and its systems are important in the preservation of the defense-in-depth philosophy (in terms of both large early and large late releases). Therefore, as part of meeting the defense-in-depth principle, a licensee should demonstrate that the function of the containment as a barrier (including fission product retention and removal) is not significantly degraded when SSCs that support the functions are moved to RISC–3 (*e.g.*, containment isolation or containment heat removal systems). The concepts used to address defense-in-depth for functions required to prevent core damage may also be useful in addressing issues related to those SSCs that are required to preserve long-term containment integrity. One way to do this would be to show that these SSCs are not relied on to prevent late containment failure during core damage accidents. An alternative method would be to demonstrate that a potential decrease in reliability of RISC–3 SSCs that support the containment function does not have significant impact on the estimate of late containment failure probability. In essence, what the NRC expects is for a plant-specific understanding of the effects of containment systems on large late releases and an understanding of the credit given to these systems in maintaining the conditional probability for these releases. A licensee or applicant can qualitatively argue that an SSC is not relied upon to prevent large late containment failure and is thus low safety-significant from this standpoint. If an SSC plays a role in supporting the containment function in terms of large late releases, and if the licensee wants to categorize these SSCs as low safety-significant (for example, because of available redundant systems or trains or because failure is dominated by factors not related to the SSC), NRC would find acceptable the use of sensitivity studies to show that the effects on (*i.e.*, change in) the late containment failure probability is small (*i.e.*, less than a 10 percent increase from the base value) and that factors such as common cause failures or other dependencies are not important. Where a licensee categorizes containment isolation valves or penetrations as RISC–3, the licensee will need to address the impact of the proposed change in treatment on a case-by-case basis to ensure that the defense-in-depth principle continues to be satisfied.

V.4.4 Section 50.69(c)(1)(iv) Include Evaluations To Provide Reasonable Confidence That Sufficient Safety Margins Are Maintained and That Any Potential Increases in CDF and LERF Resulting From Changes in Treatment Permitted by Implementation of § 50.69(b)(1) and § 50.69(d)(2) Are Small

Section 50.69(c)(1)(iv) specifies that the categorization process include evaluations to provide reasonable confidence that as a result of implementation of revised treatment permitted for RISC–3 SSC, sufficient safety margins are maintained and any potential increases in CDF and LERF are small. Safety margins can be maintained if the licensee maintains the functionality of the SSCs following implementation of the revised requirements and if periodic maintenance, inspection, tests, and surveillance activities are adequate to prevent, detect and correct significant SSC performance and reliability degradation. Later sections of this SOC provide discussion on the proposed treatment processes the licensee will implement to provide reasonable confidence that RISC–3 SSCs remain capable of performing their safety functions under design basis conditions. The requirements of the rule to show that sufficient safety margins are maintained and that potential increases in risk are small are discussed below.

As part of their submittal, a licensee (or applicant) is to describe the evaluations to be conducted for purposes of meeting the requirement that there would be no more than a small (potential) increase in risk. For SSCs included in the PRA, the Commission expects that sensitivity studies (evaluations) would be done to provide a basis for concluding that even if reliability of these SSC should degrade because of the changes in treatment, the potential risk increase would be small. Satisfying the rule requirement that the risk increase is small presumes that the increase in failure rates assumed in the PRA sensitivity study bounds any reasonable estimate of the increase that may be expected as a result of the proposed changes in treatment.

The categorization process encompasses both active and passive functions of SSCs. Section 50.69(b)(2)(iv) includes the requirement that the change-in-risk evaluations performed to satisfy § 50.69(c)(1)(iv) must include potential impacts from known degradation mechanisms on both active and passive functions. It is

necessary for a licensee to consider the impact that a change in treatment (as a result of removal of special treatment requirements) might have on the ability of the SSC to perform its design basis function and on reliability of SSCs. The purpose is to provide an understanding of the new treatment requirements and their effects on RISC–3 SSCs due to removal of special treatment requirements. This will help form the basis for the change-in-risk evaluations and will support developing a technical basis for concluding that SSC performance is consistent with the categorization process and its results and with those evaluations performed to show that there is a no more than a small increase in risk associated with implementation of § 50.69. The basis supporting the evaluations that examine potential SSC reliability changes due to treatment changes may be either qualitative or quantitative.

One mechanism that could lead to large increases in CDF/LERF is extensive, across system common cause failures. However, for such extensive CCFs to occur would require that the mechanisms that lead to failure, in the absence of special treatment, were sufficiently rapidly developing or are not self-revealing that there would be few opportunities for early detection and corrective action. Thus, when deciding how much to assume that SSC reliability might change, the applicant or licensee is expected to consider potential effects of common-cause interaction susceptibility, including cross-system interactions and potential impacts from known degradation mechanisms.

Those aspects of treatment that are necessary to prevent SSC degradation or failure from known degradation mechanisms, to the extent that the results of the evaluations are invalidated, must be retained. Identifying those aspects will involve an understanding of what the degradation mechanisms are and what elements of treatment are sufficient to prevent the degradation. As an example of how this would be implemented, the known existence of certain degradation mechanisms affecting pressure boundary SSC integrity might support retaining the current requirements on inspections or examinations or use of the risk-informed ASME Code Cases, as accepted by the NRC regulatory process. An alternative might be to relax certain elements of treatment, but retain those that were assessed to be the most effective in negating the degradation mechanisms. As another example, changing levels of treatment on several similar components that might be sensitive to CCF potential would require consideration as to whether the planned monitoring and corrective action program, or other aspects of treatment, would be effective in sufficiently minimizing CCF potential such that the evaluations remain bounding.

The treatment for all RISC–3 SSCs may not need to be the same. As an example, motor operated valves (MOVs) operating in a severe environment (*e.g.*, in the steam tunnel) would be more susceptible to failure because of grease degradation if they were not regularly maintained and tested. However, not all MOVs, even if they have the same design and are identical in other respects, will be exposed to the same environment. Therefore the other MOVs may not be as susceptible to failure as those in the steam tunnel and less frequent maintenance and testing would be acceptable. While it may be simpler to increase the unreliability or unavailability of all the RISC–3 SSCs by a certain bounding factor to demonstrate that the change in risk is small and acceptable, the above example suggests that it may also be appropriate to use different factors for different groups of SSCs depending on the impact of reducing treatment on those SSCs.

Section 50.69(c)(1)(iv) requires that the increase in the overall plant CDF and LERF resulting from potential decreases in the reliability of RISC–3 SSCs as a result of the changes in treatment be small. The rule further requires the licensee (or applicant) to describe the evaluations to be performed to meet this requirement. The Commission regards "small" changes for plants with total baseline CDF of 10^{-4} per year or less to be CDF increases of up to 10^{-5} per year, and plants with total baseline CDF greater than 10^{-4} per year to be CDF increases of up to 10^{-6} per year. However, if there is an indication that the CDF may be considerably higher than 10^{-4} per year, the focus of the licensee should be on finding ways to decrease rather than increase CDF and the licensee may be required to present arguments as to why steps should not be taken to reduce CDF in order for the reduction in special treatment requirements to be considered. For plants with total baseline LERFs of 10^{-5} per year or less, small LERF increases are considered to be up to 10^{-6} per year, and for plants with total baseline LERFs greater than 10^{-5} per year, LERF increases of up to 10^{-7} per year. Similarly, if there is an indication that the LERF may be considerably higher than 10^{-5} per year, the focus of the licensee should be on finding ways to decrease rather than increase LERF and the licensee may be required to present arguments as to why steps should not be taken to reduce LERF in order for the reduction in special treatment requirements to be considered. This is consistent with the guidance in Section 2.2.4 of RG 1.174. It should be noted that this allowed increase shall be applied to the overall categorization process, even for those licensees that will implement § 50.69 in a phased manner.

The licensee can choose a factor for the increase on unreliability such that the corrective action and feedback processes discussed in §§ 50.69(d)(2) and 50.69(e)(3) would provide sufficient data to substantiate that the increased unreliability used in the evaluations is not exceeded.

If a PRA model does not exist for the external initiating events or the low power and shutdown operating modes, justification should be provided, on the basis of bounding analyses or qualitative considerations, that the effect on risk (from the unmodeled events or modes of operation) is not significant and that the total effect on risk from modeled and unmodeled events and modes of operation is small, consistent with Section 2.2.4 of RG 1.174.

V.4.5 Section 50.69(c)(1)(v) System or Structure Level Review

Section 50.69(c)(1)(v) specifies that the categorization be done at the system or structure level, not for selected components within a system. A licensee or applicant is allowed to implement § 50.69 for a subset of the plant systems and structures (*i.e.*, partial implementation) and to phase in implementation over a period of time. However, the implementation, including the categorization process, must address entire systems or structures; not selected components within a system or structure.

V.4.6 Section 50.69(c)(2) Use of Integrated Decision-Making Panel (IDP)

Section 50.69(c)(2) sets forth the requirements for using an IDP to make the determination of safety significance, and for the composition of the IDP. The fundamental requirement for the categorization process (as stated in § 50.69 (c)(1)(ii)) is that it include use of an integrated systematic process. The determination of safety significance of SSCs is to be performed as part of an integrated decision-making process, which uses both risk insights and traditional engineering insights. In categorizing SSCs as low safety-significant, it should be demonstrated that the defense-in-depth philosophy is maintained, that sufficient safety margin is maintained, and that increases in risk

(if any) are small. To account for each of these factors and to account for risk insights not found in the plant-specific PRA, § 50.69(c)(2) requires that the final categorization of each SSC be performed using an integrated decision-making panel (IDP). A structured and systematic process using documented criteria shall be used to guide the decision-making process. Categorization is an iterative process based on expert judgment to integrate the qualitative and quantitative elements that impact SSC safety significance. The insights and varied experience of IDP members are relied on to ensure that the final result reflects a comprehensive and justifiable judgment.

The panel must be composed of experienced personnel who possess diverse knowledge and insights in plant design and operation and who are capable in the use of deterministic knowledge and risk insights in making SSC classifications. The NRC places significant reliance on the capability of a licensee to implement a robust categorization process that relies heavily on the skills, knowledge, and experience of the people that implement the process, in particular on the qualification of members of the IDP. The IDP should be composed of a group of at least five experts who collectively have expertise in plant operation, design (mechanical and electrical) engineering, system engineering, safety analysis, and probabilistic risk assessment. At least three members of the IDP should have a minimum of five years experience at the plant, and there should be at least one member of the IDP who has worked on the modeling and updating of the plant-specific PRA for a minimum of three years.

The IDP should be trained in the specific technical aspects and requirements related to the categorization process. Training should address at a minimum the purpose of the categorization; present treatment requirements for SSCs including requirements for design basis events; PRA fundamentals; details of the plant-specific PRA including the modeling, scope, and assumptions, the interpretation of risk importance measures, and the role of sensitivity studies and the change-in-risk-evaluations; and the defense-in-depth philosophy and requirements to maintain this philosophy.

The licensee or applicant (through the IDP) shall document its decision criteria for categorizing SSCs as safety-significant or low safety-significant pursuant to § 50.69(f)(1). Decisions of the IDP should be arrived at by consensus. Differing opinions should be documented and resolved, if possible. If a resolution cannot be achieved concerning the safety significance of an SSC, then the SSC should be classified as safety-significant. SSC categorization shall be revisited by the licensee or applicant (through the IDP) when the PRA is updated or when the other criteria used by the IDP are affected by changes in plant operational data or changes in plant design or plant procedures. Requirements for PRA updating are contained in § 50.69(e)(1).

V.5.0 Section 50.69(d) Requirements for Structures, Systems, and Components

After SSCs are categorized as either RISC–1, RISC–2, RISC–3, or RISC–4, then the § 50.69(d) requirements, which provide the treatment requirements applicable to each RISC category, are applied. Until a structure or system is categorized using this process, the existing requirements on SSCs in that structure or system are retained. Section 50.69(d) contains two sub-items. The first contains the requirements being imposed on RISC–1 and RISC–2 SSCs. The second section contains the "high-level" requirements that are being added for RISC–3 SSCs to provide necessary confidence that design basis capability will be retained for these SSCs. The list of existing special treatment requirements that are being removed through this rulemaking for RISC–3 and RISC–4 SSCs is contained in § 50.69(b)(1).

V.5.1 Section 50.69(d)(1) RISC–1 and RISC–2 Treatment

Section 50.69 (d)(1) requires that a licensee or applicant ensure that RISC–1 and RISC–2 SSCs perform their functions consistent with categorization process assumptions by evaluating treatment being applied to these SSCs to ensure that it supports the key assumptions in the categorization process that relate to their assumed performance. To meet this, a licensee should first evaluate the treatment being applied in light of the credit being taken in the categorization process, with appropriate adjustment of treatment or categorization to achieve consistency as necessary. For SSCs categorized as RISC–1 or RISC–2, all existing applicable requirements continue to apply. This includes any applicable special treatment requirements. The rule language notes that this evaluation is to focus upon those key assumptions in the PRA that relate to performance of particular SSCs. For example, if a relief valve was being credited with capability to relieve water (as opposed to its design condition of steam), such an evaluation would look at whether the component has been designed or otherwise determined to be able to perform as assumed. Other examples might be for the failure rates used in the PRA model. As a general matter, for those SSCs modeled in the PRA, conformance with industry standards on PRAs would also result in such evaluation steps being accomplished in order to help assure the PRA represents the facility.

If a § 50.69 licensee chooses to categorize a selective set of SSCs as RISC–3, and the categorization of SSCs as RISC–3 is based on credit taken for the performance of other plant SSCs (that would be RISC–1 or RISC–2, whether or not these SSCs are within the selective implementation set), then the licensee must ensure that consistency of performance with what was credited in the categorization. As discussed in Section V.4.5, selective implementation of components within a system is not permitted. This applies to credit taken in: 1) PRA models, inputs and assumptions; 2) screening and margin analyses; and 3) IDP deliberations. This implies that the licensee must ensure that the credited (RISC–2) SSCs perform their functions per § 50.69(d)(1), and the performance of these SSCs must be monitored per § 50.69(e)(2).

V.5.2 Section 50.69(d)(2) RISC–3 Treatment

Section 50.69(d)(2) contains, as an overall requirement for the treatment of RISC–3 SSCs, that licensees shall have processes to control the design; procurement; inspection, maintenance, testing, and surveillance; and corrective action, for RISC–3 SSCs to provide reasonable confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design basis conditions throughout their service life. In other words, the Commission expects licensees to have sufficient treatment controls in place to have reasonable confidence that RISC–3 SSCs will be capable of performing their safety functions if they were called upon to perform those functions. Licensees may decide to apply current practices at their facilities or may establish new practices for the treatment of RISC–3 SSCs, provided the requirements of § 50.69 are satisfied.

During its review of the South Texas exemption request, the NRC staff identified several instances where the licensee's interpretation of the extent to which treatment could be relaxed for low-risk safety-related SSCs was not consistent with the staff's expectations under Option 2 of the NRC's risk-informed rulemaking initiative (*i.e.*, that

design basis functions be maintained). To ensure more consistent implementation of § 50.69, the SOC discusses some of these areas for the implementation of proposed § 50.69 about how the treatment processes for low-risk safety-related SSCs should be conducted. The Commission is also giving examples of what it considers good practice to achieve confidence of functionality. The Commission does not believe that it is necessary to include these "expectations" as specific requirements because there may be other means of achieving the specified outcome and failure to implement a particular expectation would not, by itself, be a regulatory concern. The Commission's intent is to place on the licensee the responsibility to determine the necessary treatment to maintain functionality without the Commission having to establish prescriptive requirements.

The categorization process assumes that the functionality of SSCs in performing their safety functions will be retained, although the treatment applied to RISC–3 SSCs may be reduced under proposed § 50.69. Further, the categorization process may include specific reliability assumptions for plant SSCs in performing their intended functions. Therefore, when establishing the performance-based treatment process for RISC–3 SSCs, the licensee should take these assumptions into account to support the evaluations of small increase in risk resulting from implementation of the changes in treatment. It is important to obtain sufficient information on SSC performance to allow the results of the categorization process to remain valid. The Commission considers the risk-informed, performance-based ASME Code Cases (as endorsed in § 50.55a) to be one acceptable method of establishing treatment processes that are consistent with the categorization process.

Proposed § 50.69 identifies four processes that must be controlled and accomplished for RISC–3 SSCs: Design Control; Procurement; Maintenance, Inspection, Testing, and Surveillance; and Corrective Action. The high level RISC–3 requirements are structured to address the various key elements of SSC functionality by focusing in several areas. When SSCs are replaced, RISC–3 SSCs must remain capable of performing design basis functions; hence, the high level requirements focus on maintaining this capability through design control and procurement requirements. During the operating life of a RISC–3 SSC, a sufficient level of confidence is necessary that the SSC continues to be able to perform its design basis functions; hence, the inclusion of high level requirements for maintenance, inspection, test, and surveillance. Finally, when data is collected, it must be fed back into the categorization and treatment processes, and when important deficiencies are found, they must be corrected; hence, requirements are also provided in these areas.

The Commission notes that use of voluntary consensus standards is an effective means of establishing treatment requirements to achieve functionality. As an example, ASME risk-informed Code Cases have been developed with the purpose of determining appropriate treatment requirements for low safety-significant SSCs in their specific functional areas. Further, the Commission expects that related standards (such as ASME Code Cases N–658 and N–660 on SSC categorization and treatment for purposes of repair and replacement) be used in conjunction with each other as intended by the accredited standards writing body. Where suitable standards do not exist or available standards are not sufficient, the Commission expects the licensee to establish sufficient controls to provide reasonable confidence in the functionality of RISC–3 SSCs, based upon such factors as operating experience and vendor recommendations. However, the Commission also notes that use of a voluntary consensus standard in and of itself might not be sufficient to maintain functionality for particular SSCs under certain service conditions, and that the licensee might need to supplement its processes to achieve the desired results.

The proposed rule would require the treatment processes for RISC–3 SSCs be implemented to provide reasonable confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design basis conditions. That is to say, the pertinent requirements identified in § 50.69 for each process must be satisfied for RISC–3 SSCs unless the requirements are clearly not applicable or are not necessary in the particular circumstance to achieve functionality of the SSC. As an example, a licensee might determine that it is more efficient and effective to replace a particular component before the end of its design life rather than conducting maintenance to repair the component. Further, a licensee might determine that some maintenance activities are within the skill of the craft (such as replacing missing bolts on motor-operated valve switch compartments), such that detailed work orders would not be necessary. On the other hand, an activity to procure a replacement component with active functions that is not the same as the one being replaced would necessitate use of most of the specified processes, with a greater need for documentation and independent review to achieve the expected result.

As part of the high level requirement that RISC–3 SSCs be capable of performing their safety-related functions under design basis conditions, the Commission emphasizes that implementation of the processes must provide reasonable confidence of the future capability of the SSC (*i.e.*, not just confidence that the SSC works at a certain point in time but rather provides confidence that the component will work when called upon). The level of confidence can be less than was provided by the special treatment requirements listed in § 50.69(b)(1). As an example, exercising of a valve or simply starting a pump does not provide reasonable confidence in design basis capability, will not detect service-induced aging or degradation that could prevent the component from performing its design basis functions in the future, and is insufficient by itself to satisfy the intent of the rule.

A licensee implementing § 50.69 is responsible for implementing the treatment requirements for RISC–3 SSCs in an effective manner to maintain the capability to perform the safety functions under design basis conditions. A licensee should address the potential impact on the functionality of RISC–3 SSCs as a result of the changes to testing programs, such that the categorization process assumptions and results remain valid. To provide a basis to conclude that the potential increase in risk would be small, a licensee is required to conduct evaluations that assume failure rates that might occur as a result of the revisions to treatment. These evaluations would need to consider, for instance, any planned alteration in a licensee's program for diagnostic testing of motor-operated valves. If a likely result of a contemplated change in treatment is an increase in failure rate, outside the bounds of the evaluations, that change in treatment would not be acceptable under proposed § 50.69 because the criterion in § 50.69(c)(i)(iv) about providing reasonable confidence of a small increase in risk would not be met.

V.5.2.1 Section 50.69(d)(2)(i) Design Control Process

Section 50.69(d)(2)(i) specifies that the functional requirements and bases for RISC–3 SSCs be maintained and controlled. The functional requirements

and bases continue to apply unless they are specifically changed in accordance with the appropriate regulatory change control process (*e.g.*, § 50.59). The rule further states that RISC–3 SSCs must be capable of performing their safety-related functions under design basis conditions including (any applicable) design requirements for environmental conditions (temperature, pressure, humidity, chemical effects, radiation, and submergence), effects (aging and synergisms), and seismic conditions (design load combinations of normal and accident conditions with earthquake motions).

It is recognized that the level of confidence in the design basis capability of RISC–3 SSCs may be less than the confidence provided in the capability of RISC–1 SSCs to perform their safety functions. The proposed treatment requirements for the control of the design of RISC–3 SSCs are included, in part, to provide a basis for the assumption in the categorization process that these SSCs will continue to be capable of performing their safety-related functions under design basis conditions throughout their service life. The implementation of an effective design control process is crucial to the maintenance of the functionality of safety-related SSCs because many SSCs cannot be monitored or tested to demonstrate design basis capability or to identify potential degradation as part of normal plant operations. For instance, if the SSC were modified or replaced, the design control processes are important means by which the required capability is installed and maintained over the life of the component. Further, because it is not possible to test or monitor some SSCs under the conditions that they might experience in service, other means, such as control of design and procurement of SSCs, and condition monitoring, are used such that the SSCs are capable of performing their functions. The proposed rule would require that licensees have a design control process that maintains and applies design requirements to ensure that RISC–3 SSCs will be capable of performing their safety-related functions under design basis conditions. To meet this performance objective, the licensee's design control process would be expected to specify appropriate quality standards; select suitable materials, parts, and equipment; control design interfaces; coordinate participation of design organizations; verify design adequacy; and control design changes. The manner in which the design control requirements for RISC–3 SSCs are accomplished would be the responsibility of the licensees adopting § 50.69. The proposed rule would allow flexibility for licensees to focus their resources on the SSCs that are most safety-significant while implementing an effective design control process for RISC–3 SSCs. For example, licensees might provide design control for RISC–3 SSCs through application of (1) the process established under Criterion III of 10 CFR Part 50, Appendix B; (2) an augmented quality assurance program such as might have been established in response to regulatory guidance issued in conjunction with § 50.62 (for SSCs used to comply with anticipated transients without a plant scram; or (3) a plant-specific process currently in place or established to satisfy the treatment requirements of § 50.69.

The design control process under § 50.69 is intended to provide assurance that the proposed rule is satisfying the principle that the design requirements of RISC–3 SSCs would not be changed under § 50.69. For example, the design provisions of Section III of the ASME Boiler and Pressure Vessel Code (BPV Code) required by § 50.55a(c), (d), and (e) for RISC–3 SSCs are not affected by the proposed rule. Another example is a requirement for fracture toughness of particular materials that is part of a licensee's design requirements; such a requirement would continue to apply when repair or replacement of affected components is undertaken. Licensees would continue to be required by § 50.59 to evaluate proposed modifications to design requirements for safety-related SSCs, including those categorized as RISC–3.

For RISC–3 SSCs, the proposed rule would remove the requirements for a program for environmental qualification of electric equipment specified in § 50.49, "Environmental Qualification of Electric Equipment Important to Safety for Nuclear Power Plants." However, the proposed rule would not eliminate the requirements in 10 CFR part 50, Appendix A, "General Design Criteria for Nuclear Power Plants," that electric equipment important to safety be capable of performing their intended functions under the applicable environmental conditions. For example, Criterion 4 of 10 CFR part 50, Appendix A, "General Design Criteria for Nuclear Power Plants," requires that SSCs important to safety be designed to accommodate the effects of and to be compatible with the environmental conditions associated with normal operation, maintenance, testing, and postulated accidents. In accordance with § 50.69(d)(2), the licensee is required to design, procure, install, maintain, and monitor electric equipment important to safety such that they are capable of performing their intended functions under the environmental conditions listed in § 50.69(d)(2)(i) throughout their service life. Further, if RISC–3 electrical equipment is relied on to perform its safety-related function beyond its design life, licensees should have a basis justifying the continued capability of the equipment under adverse environmental conditions.

RISC–3 and RISC–4 SSCs would continue to be required to function under design basis seismic conditions, but would not be required to be qualified by testing or specific engineering methods in accordance with the requirements stated in 10 CFR part 100, Appendix A. A licensee who adopts the proposed rule would no longer be required to meet certain requirements in Appendix A to part 100, Sections VI(a)(1) and VI(a)(2), to the extent that those requirements have been interpreted as mandating qualification testing and specific engineering methods to demonstrate that RISC–3 SSCs are designed to withstand the Safe Shutdown Earthquake and Operating Basis Earthquake. The proposed rule does not remove the design requirements related to the capability of RISC–3 SSCs to remain functional considering Safe Shutdown Earthquake and Operating Basis Earthquake seismic loads, including applicable concurrent loads. These continue to be part of the design basis requirements or procurement requirement for replacement SSCs. The proposed rule would not change the design input earthquake loads (magnitude of the loads and number of events) or the required load combinations used in the design of RISC–3 SSCs. For example, for the replacement of an existing safety-related SSC that is subsequently categorized as RISC–3, the same seismic design loads and load combinations would still apply. The proposed rule would permit licensees to select a technically defensible method to show that RISC–3 SSCs will remain functional when subject to design earthquake loads. The level of confidence for the design basis capability of RISC–3 SSCs, including seismic capability, may be less than the confidence in the design basis capability of RISC–1 SSCs. The use of earthquake experience data has been mentioned as a potential method to demonstrate SSCs will remain functional during earthquakes. However, it would be difficult to rely on earthquake experience alone to demonstrate

functionality of SSCs if the design basis includes multiple earthquake events or combinations of loadings unless these specific conditions were enveloped by the experience data. Additionally, if the SSC is required to function during or after the earthquake, the experience data would need to contain explicit information that the SSC actually functioned during or after the design basis earthquake events as required by the SSC design basis. The successful performance of an SSC after the earthquake event does not demonstrate it would have functioned during the event. Qualification testing of an SSC would be necessary if no suitable alternative method is available for showing that the SSC will perform its design basis function during an earthquake.

Licensees are responsible for proper installation and post-installation testing of RISC–3 SSCs as part of design control and other treatment processes to provide reasonable confidence in the capability of SSCs to perform their functions. The Commission also expects licensees to control special processes associated with installation, such as welding, to provide reasonable confidence in the design basis capability of RISC–3 SSCs. Licensees would be expected to perform sufficient post-installation testing to verify that the installed SSC is operating within expected parameters and is capable of performing its safety functions under design basis conditions. In performing post-installation testing, licensees may apply engineering analyses to extrapolate the test data to demonstrate design basis capability.

V.5.2.2 Section 50.69(d)(2)(ii) Procurement Process

Section 50.69(d)(2)(ii) specifies that procured RISC–3 SSCs satisfy their design requirements. In order to obtain components that meet the requirements, the licensee would be expected to specify the technical requirements (including applicable design basis environmental and seismic conditions) for items to be procured. Further, the Commission expects licensees to use established methods (*e.g.*, vendor documentation, equivalency evaluation, technical evaluation, technical analysis, or testing) to develop a technical basis for the determination that the procured item can perform its safety-related function under design basis conditions, including applicable design basis environmental conditions (temperature, pressure, humidity, chemical effects, radiation, and submergence), and effects (aging and synergisms), and seismic conditions (design load combinations of normal and accident conditions with earthquake motions). In addition to appropriately specifying in the procurement the desired component, the licensee/applicant would also be expected to conduct activities upon receipt to confirm that the received component is what was ordered.

The proposed rule would allow more flexibility in the implementation of the procurement process for RISC–3 SSCs than currently provided by 10 CFR part 50, Appendix B. Nevertheless, licensees will continue to be responsible for implementing an effective procurement process for RISC–3 SSCs. Differences constituting a design change are expected to be documented and addressed under the licensee's design control process. As an example of one acceptable procurement process, a licensee might use an approach similar to that described below:

Vendor Documentation—Vendor documentation could be used when the performance characteristics for the SSC, as specified in vendor documentation (*e.g.*, catalog information, certificate of conformance), satisfy the SSC's design requirements. If the vendor documentation does not contain this level of detail, the design requirements could be provided in the procurement specifications. The vendor's acceptance of the stated design specifications provides sufficient confidence that the RISC–3 SSC would be capable of performing its safety-related functions under design basis conditions.

Equivalency Evaluation—An equivalency evaluation could be used when it is sufficient to determine that the procured SSC is equivalent to the SSC being replaced (*e.g.*, a like-for-like replacement).

Engineering Evaluation—For minor differences, a technical evaluation could be performed to compare the differences between the procured SSC and the design requirements of the SSC being replaced and determines that differences in areas such as material, size, shape, stressors, aging mechanisms, and functional capabilities would not adversely affect the ability to perform the safety-related functions of the SSC under design basis conditions.

Engineering Analysis—In cases involving substantial differences between the procured SSC and the design requirements of the SSC being replaced, a technical analysis could be conducted to determine that the procured SSC can perform its safety-related function under design basis conditions. The technical analysis would be based on one or more engineering methods that include, as necessary, calculations, analyses and evaluations by multiple disciplines, test data, or operating experience to support functionality of the SSC over its expected life.

Testing—Testing under simulated design basis conditions could be performed on the SSC.

V.5.2.3 Section 50.69(d)(2)(iii) Maintenance, Inspection, Test, and Surveillance Process

Section 50.69(d)(2)(iii) specifies that periodic maintenance, inspections, tests, and surveillance activities be established and conducted, and their results evaluated using prescribed acceptance criteria to determine that the RISC–3 SSCs will remain capable of performing their safety-related functions under design basis conditions until their next scheduled activity.

To meet this requirement, licensees are expected to establish the scope, frequency, and detail of predictive, preventive, and corrective maintenance activities (including post-maintenance testing) to support the determination that RISC–3 SSCs will remain capable of performing their safety-related functions under design basis conditions throughout their service life. For a RISC–3 SSC in service beyond its design life, the Commission expects licensees to have a basis to determine that the SSC will remain capable of performing its safety-related function. Following maintenance activities that affect the capability of an SSC to perform its safety-related function, licensees would be expected to perform post-maintenance testing to verify that the SSC is performing within expected parameters and is capable of performing its safety function under design basis conditions. Licensees may apply engineering analyses to extrapolate the test data to demonstrate design basis capability as part of post-maintenance testing. The Commission expects licensees to identify the preventive maintenance needed to preserve the capability of RISC–3 SSCs to perform their safety-related functions under applicable design basis environmental and seismic conditions for their expected service life.

To have reasonable confidence that SSCs can perform their functions, licensees must implement effective processes for inspection, testing, and surveillance of RISC–3 SSCs; they may apply their own individual approaches such that the requirements of § 50.69 are satisfied. As an example, the provisions for risk-informed inspection and testing in applicable ASME Code Cases would constitute one effective approach in satisfying the § 50.69 requirements. To prevent the occurrence of common-

cause problems that might invalidate the categorization process assumptions and results, effective implementation would include a determination of the functionality of safety-related SSCs checked using measuring and test equipment that was later found to be in error or defective.

With respect to RISC–3 pumps and valves, the Commission expects licensees to implement periodic testing or inspection, and evaluation of performance data, sufficient to provide reasonable confidence that these pumps and valves will be capable of performing their safety function under design basis conditions. To determine that SSC will remain capable until the next scheduled activity, a licensee would have to obtain sufficient operational information or performance data to provide reasonable confidence that the RISC–3 pumps and valves will be capable of performing their safety function if called upon to function under operational or design basis conditions over the interval between periodic testing or inspections. A licensee may develop the type and frequency of the test or inspection for RISC–3 pumps and valves where sufficient to conclude that the pump or valve will perform its safety function. These tests or inspections may be less rigorous and less frequent than those performed on RISC–1 pumps and valves. For example, a licensee might establish more relaxed criteria for grouping of similar RISC–3 components, or might apply less stringent test acceptance criteria for RISC–3 pumps and valves, than specified for RISC–1 components. The licensee could apply staggered test intervals for the RISC–3 components to provide confidence that the relaxed grouping or acceptance criteria had not resulted in SSC performance that is inconsistent with the categorization process or its assumptions. Licensees should note that performance data obtained for pumps and valves operating under normal conditions may not be capable of predicting their capability to perform safety functions under design basis conditions without additional evaluation or analysis. This does not mean that pumps and valves must be tested or inspected under design basis conditions. Methods exist for collecting performance data at conditions different than design basis conditions that can be used to reach conclusions regarding the design basis capability of components. Examples of such methods are described in Regulatory Guide 1.175, An Approach for Plant-Specific, Risk-Informed Decision making: Inservice Testing, and applicable risk-informed ASME Code Cases (*e.g.*, OMN–1, OMN–4, OMN–7, OMN–12) as accepted by 10 CFR 50.55a.

V.5.2.4 Section 50.69(d)(2)(iv) Corrective Action Process

Section 50.69(d)(2)(iv) would specify that conditions that could prevent a RISC–3 SSC from performing its safety-related functions under design basis conditions be identified, documented, and corrected in a timely manner. A licensee may obtain information from the inspection, test and surveillance activities discussed above, or from other sources, such as operating experience, that indicates that an SSC is not capable of performing its required functions and thus identifies that corrective action is needed.

In meeting proposed § 50.69, licensees may implement a corrective action process for RISC–3 SSCs that is different than the process established to satisfy 10 CFR Part 50, Appendix B. This more general requirement would allow a graded approach, as well as less stringent timeliness requirements. The Commission believes an effective corrective action process is crucial to maintaining the capability of RISC–3 SSCs to perform their safety-related functions because of the reduction in requirements for other processes for design control; procurement; and maintenance, inspection, test, and surveillance. For example, effective implementation of the corrective action process would include timely response to information from plant SSCs, overall plant operations, and industry generic activities that might reveal performance concerns for RISC–3 SSCs on both an individual and common-cause basis.

V.6.0 Section 50.69(e) Feedback and Process Adjustment

Section 50.69(e)(1) requires the updating of the PRA. The PRA configuration control program must incorporate a feedback process to update the PRA model. The program must require that plant data, design, and procedure changes that affect the PRA models or input parameters be incorporated into the model. This update is to account for plant-specific operating experience as well as general industry experience. In particular, the proposed rule would require the licensee to review changes to the plant, operational practices, applicable industry operational experience, and, as appropriate, update the PRA and SSC categorization in a timely manner but no longer than every 36 months for RISC–1, RISC–2, RISC–3 and RISC–4 SSCs. Changes must be evaluated with respect to the impact on CDF and LERF. If the change would result in a significant increase in the CDF or LERF or might change the categorization of SSCs, the PRA must be updated in a timely manner; in this context it would clearly not be timely to wait to update the PRA if there would be a significant change in risk. Other changes are to be incorporated within 36 months. The results of the updated PRA and the associated risk categorizations based on the updated PRA information should be used as part of the feedback and corrective action process, and SSCs must be re-categorized as needed.

Section 50.69(e)(2) and (e)(3) contains the requirements for feeding back into the categorization process SSC performance information and data, and for adjusting the categorization and treatment processes as appropriate, with the goal that the validity of the categorization process and its results are maintained. Further, the proposed rule would require the licensee to monitor the performance of RISC–1 and RISC–2 SSCs and make adjustments as necessary to either the categorization or treatment processes. To meet this requirement, the Commission expects licensees to monitor all functional failures (*i.e.*, not just maintenance preventable unavailabilities and failures as is currently required by § 50.65) so that they can determine when adjustments are needed. Licensee monitoring programs will also need to include the monitoring of SSCs that support beyond design basis functions (if applicable) that are not necessarily included in the scope of an existing maintenance rule monitoring program.

If a licensee chooses to categorize a selective set of SSCs as RISC–3, and the categorization of SSCs as RISC–3 is based on credit taken for the performance of other plant SSCs (whether or not these SSCs are within the selective implementation set), then the licensee must maintain the credited performance. This applies to credit taken in: (1) PRA models, inputs and assumptions; (2) screening and margin analyses; and (3) IDP deliberations. This implies that the licensee must ensure that the credited SSCs perform their functions per § 50.69(d)(1), and the performance of these SSCs must be monitored per § 50.69(e)(2).

For RISC–3 SSCs, the proposed rule would require the licensee to consider the performance data required by § 50.69(d)(2)(iii) to determine whether there are any adverse changes in performance such that the SSC unreliability values approach or exceed the values used in the evaluations conducted to meet § 50.69(c)(iv) and make adjustments as necessary to either

the categorization or treatment processes, to maintain categorization process results valid. Section 50.69(d)2)(iii) requires periodic maintenance, testing and surveillance activities for RISC–3 SSCs. Based upon review of this information, if SSC reliability degrades to the point that the evaluations done to show that the potential risk was small are no longer bounding, action is necessary to either adjust the treatment (to improve reliability) or to perform the categorization process again (to determine if any changes in categorization of SSC are necessary).

V.7.0 Section 50.69(f) Program Documentation and Change Control and Records

Section 50.69(f) contains administrative requirements for keeping information current, for handling planned changes to programs and processes and for records. Each subparagraph is discussed below.

Section 50.69(f)(1) states that the licensee or applicant shall document the basis for categorization of SSCs in accordance with this section before removing any requirements. The documentation is expected to address why a component was determined to be either safety-significant or low safety-significant based upon the requirements in § 50.69(c).

The Commission is not, except in limited instances, specifying particular records to retain. Since the licensee is responsible for compliance with the requirements, subject to NRC oversight and inspection, the licensee (or applicant) would need to be able to show that they have established the processes required by the rules and conducted activities sufficient to provide reasonable confidence in functionality of SSCs under design basis conditions.

Section 50.69(f)(2) specifies that the licensee must update its FSAR to reflect which systems have been categorized using the provisions of § 50.69, and thus, may have revised treatment applied to the structures and components within that system. This provision is included to maintain clear information, at a minimum level of detail, about which requirements a licensee is satisfying; detailed information about particular SSCs is not required to be submitted. For an applicant, this updating would be expected to be either part of the original application or as a supplement to the FSAR under § 50.34. For licensees, the updating must be in accordance with the provisions of § 50.71(e) for licensees.

Once the NRC has completed its review of a licensee's § 50.69 submittal as it relates to categorization, the licensee or applicant would be able to adjust its treatment processes provided that the rule requirements are met. NRC does not plan to perform a pre-implementation review of the revised treatment requirements under § 50.69(d). However, the Commission recognizes that existing information in the quality assurance (QA) plan or in the FSAR may need to be revised to reflect the changes to treatment that would be made as a result of implementation of § 50.69. Any revisions to these documents are to be submitted in accordance with the existing requirements of § 50.54(a)(2) and § 50.71(e) respectively. For instance, § 50.71(e) states that the FSAR is to contain the latest information developed and is to reflect information submitted to the Commission since the last update. The regulations further state in the cited sections how a licensee is to submit to the NRC revisions to the QA plan or to the FSAR. Information in these documents that would no longer be accurate upon implementation of § 50.69 must be updated. Details of the processes would be expected to be contained in plant procedures, procurement documents, surveillance records, etc.

Section 50.69(f)(3) specifies that for initial implementation of the rule, changes to the FSAR for implementation of this proposed rule need not include a supporting § 50.59 evaluation of changes directly related to implementation. Future changes to the treatment processes and procedures for § 50.69 implementation may be made, provided the requirements of the rule and § 50.59 continue to be met. While the licensee is to update its programs to reflect implementation of § 50.69, the Commission concluded that no additional review under § 50.59 is necessary for such changes, to these parts of the FSAR that might occur.

Section 50.69(f)(4) specifies that for initial implementation of the rule, changes to the quality assurance plan for implementation of this proposed rule need not include a supporting § 50.54(a) review of changes directly related to implementation. Future changes to the treatment processes and procedures for § 50.69 implementation may also be made, provided the requirements of the rule and § 50.54(a) continue to be met. While the licensee is to update its programs to reflect implementation of § 50.69, the Commission concluded that no additional review under § 50.54(a) is necessary for changes to these parts of the QA plan.

No specific change control process is being established for the categorization process outlined by § 50.69(c). Because the NRC is reviewing and approving a submittal containing the licensee or applicant's commitments for categorization, changes that would invalidate their submittal would also invalidate the approval. However, provided any revised process continues to conform with what was submitted or committed to (such as through a commitment to follow a particular RG), NRC review would not be needed of lower-tier changes (such as to implementing procedures) that might arise.

No explicit requirements are included in § 50.69 for the period for retention of records. The proposed rule would specify only a few specific types of records that must be prepared, *e.g.*, those for the basis for categorization in § 50.69(f)(1). In accordance with § 50.71(c), these records are to be maintained until the Commission terminates the facility license.

V.8.0 Section 50.69(g) Reporting

Section 50.69(g) provides a new reporting requirement applicable to events or conditions that would have prevented a RISC–1 or RISC–2 SSCs from performing a safety-significant function. Most events involving these SSCs will meet existing § 50.72 and § 50.73 reporting criteria. However, it is possible for events and conditions to arise that impact whether RISC–1 or RISC–2 SSCs would perform beyond design basis functions consistent with the assumptions made in the categorization process. This reporting requirement is intended to capture these situations. The reporting requirement is contained in § 50.69, rather than as a revision of § 50.73 so that its applicability only to those facilities that have implemented § 50.69 is clear. The existing reporting requirements in § 50.72 and § 50.73 would no longer apply to RISC–3 (and RISC–4) SSCs under the proposed rule.

VI. Other Topics for Public Comment

VI.1.0 Additional Potential Requirements for Public Comment

The cornerstone of proposed § 50.69 is a robust, risk-informed categorization process that provides high confidence that the safety significance of SSCs is correctly determined considering all relevant information. The categorization requirements incorporated into the proposed rule achieve this objective. The Commission proposes to remove

the RISC–3 and RISC–4 SSCs from the scope of special treatment requirements delineated in § 50.69(b)(1), and instead require the licensee to comply with more general, high level requirements for maintaining functionality. The proposed rule would allow appropriate flexibility for implementation while continuing to provide reasonable confidence that the SSCs will remain functional. As discussed elsewhere in this notice, the Commission concludes that the requirements in proposed § 50.69 would maintain adequate protection of public health and safety. Previous drafts of this proposed rule posted to the NRC web site, contained more detailed requirements in § 50.69(d)(2) for RISC–3 SSCs. The Commission believes that this level of detail is beyond what is necessary to provide reasonable confidence in RISC–3 design basis capability in light of the robust categorization requirements incorporated into proposed § 50.69. However, the Commission recognizes that some stakeholders may disagree and invites public comment on this matter. To facilitate public comment, example language is provided below that identifies (in quotations and brackets) those requirements that were considered for inclusion in § 50.69 (as well as where they would have appeared in the rule).

(2) RISC–3 SSCs. The licensee or applicant shall develop and implement processes to control the design; procurement; inspection, maintenance, testing, and surveillance; and corrective action for RISC–3 SSCs to provide reasonable confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design basis conditions throughout their service life. ["These processes must meet voluntary consensus standards which are generally accepted in industrial practice, and address applicable vendor recommendations and operational experience. The implementation of these processes and the assessment of their effectiveness must be controlled and accomplished through documented procedures and guidelines. The treatment processes must be consistent with the assumptions credited in the categorization process."] The processes must meet the following requirements, as applicable: (i)Design Control. Design functional requirements and bases for RISC–3 SSCs must be maintained and controlled, ["including selection of suitable materials, methods, and standards; verification of design adequacy; control of installation and post-installation testing; and control of design changes"]. RISC–3 SSCs must be ["have a documented basis to demonstrate that they are"] capable of performing their safety-related functions including design requirements for environmental conditions (*i.e.*, temperature and pressure, humidity, chemical effects, radiation, and submergence) and effects (*i.e.*, aging and synergism); and seismic conditions (design load combinations of normal and accident conditions with earthquake motions). ["Replacements for ASME Class 2 and Class 3 SSCs or parts must meet either: (1) The requirements of the ASME Boiler & Pressure Vessel (BPV) Code; or (2) the technical and administrative requirements, in their entirety, of a voluntary consensus standard that is generally accepted in industrial practice applicable to replacement. ASME Class 2 and Class 3 SSCs and parts shall meet the fracture toughness requirements of the SSC or part being replaced."]

(ii) Procurement. Procured RISC–3 SSCs must satisfy their design requirements. ["Upon receipt, the licensee shall verify that the item received is the item that was ordered."]

(iii) Maintenance, Inspection, Testing, and Surveillance. Periodic maintenance, inspection, testing, and surveillance activities must be established and conducted using prescribed acceptance criteria, and their results evaluated to determine that RISC–3 SSCs will remain capable of performing their safety-related functions under design basis conditions until the next scheduled activity.

(iv) Corrective Action. Conditions that could prevent a RISC–3 SSC from performing its safety-related functions under design basis conditions must be identified, documented, and corrected in a timely manner. ["In the case of significant conditions adverse to quality, measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition."] The Commission is requesting comment as to whether any of these requirements (or other requirements) are necessary to provide reasonable confidence of SSC functionality commensurate with the safety significance of the RISC–3 SSC, *i.e.*, whether the requirements on categorization are sufficiently robust that the level of detail contained in the proposed rule on treatment is appropriate.

VI.2.0 Questions for Public Input

In addition to seeking comment on the proposed rule and its supporting documents, the Commission is also specifically seeking public comment on the following questions. Comments should be submitted as noted in the **ADDRESSES** section of this notice.

VI.2.1 PRA Requirements

The proposed rule requires as a minimum, a PRA that includes internal events, at power, which has been subjected to a peer review process. The PRA (for that scope) must be capable of determining both CDF and LERF (*i.e.*, provide level 2-type results). Proposed § 50.69 allows licensees to use non-PRA methods to address other modes and hazards in the categorization process (see in particular NEI 00–04 and DG–1121). The proposed rule requires the licensee to submit information about its PRA and these other methods, including information about the quality and level of detail about all of the methods to be used.

The Commission is seeking comment as to whether the NRC should amend the requirements in § 50.69(c) to require a level 2 internal and external initiating events, all-mode, peer-reviewed PRA that must be submitted to, and reviewed by, the NRC. Thus, instead of employing other methods to account for the contribution from modes and events not modeled in the PRA, this more comprehensive PRA would allow for quantification of the contribution from these scenarios. This approach would involve substantive changes in the implementing guidance as well. The Commission is interested in both the benefits of this approach as well as any implications for this specific application of risk insights. The Commission is also seeking comment on whether a different set of PRA requirements, from either of the alternatives described above, should be required for this application.

VI.2.2 Review and Approval of Treatment for RISC–3 SSCs

In the proposed rule, the Commission is proposing to review and approve the categorization process to be used by the licensee. For treatment requirements, the proposed rule sets forth high-level requirements, and does not require NRC review and approval of specific processes a licensee would implement to meet these requirements. Another way to structure the rule would be to require NRC review and approval of the licensee's proposed treatment program for RISC–3 SSCs. The Commission is interested in any benefits of this approach as well as any implications for this rulemaking and its associated guidance.

VI.2.3 Inspection and Enforcement

As discussed above, the Commission recognizes that the final rule may have implications with respect to NRC's

reactor oversight process including the inspection program, and enforcement. In its final decision on this rulemaking, the Commission proposes to document its conclusions as to whether or not new or revised inspection or enforcement guidance is necessary. Public comment is requested on whether or not changes are needed in our inspection and enforcement programs to enable NRC to exercise the appropriate degree of regulatory oversight of these aspects of the facility operation.

VI.2.4 Operating Experience

One of the areas of uncertainty associated with this rulemaking has been the potential effects of changes in treatment on SSC reliability and common-cause failure potential. This is reflected in the requirement for evaluations (sensitivity studies) to provide reasonable confidence that any potential increase in risk would be small, with a basis provided for the factors to be assumed in these evaluations. Further, the rule requires the licensee to consider performance information to determine whether there are any adverse changes such that SSC unreliability values approach the values used in these evaluations, and to make necessary adjustments to the categorization and treatment processes. As discussed in Section VII.2, below, draft RG (DG–1121) provides some discussion about techniques that might be used in determining the factors for these evaluations. The Commission is interested in the role that relevant operational experience could play in reducing the uncertainty associated with the effects of treatment on performance and specifically seeks public comment as to what information might be available and how it could be used to support implementation of this rulemaking.

VII. Guidance

VII.1 Regulatory Guide and Implementation Guidance for § 50.69

The Nuclear Energy Institute (NEI) submitted a proposed implementation guide for this rulemaking in the form of NEI 00–04, "10 CFR 50.69 SSC Categorization Guideline." As part of the effort to develop the proposed rule, the NRC staff reviewed drafts of this document and in addition, NEI 00–04 was used in the pilot program discussed earlier. The objective of the staff's review was to determine the acceptability of the proposed implementing guidance with the intent that the NEI guidance could be endorsed in an NRC regulatory guide. The version of NEI 00–04, dated June 28, 2002, forms the basis for the draft regulatory guide.

The NRC staff's review of NEI 00–04 resulted in several areas where the staff would find it necessary to identify exceptions to NEI guidance or to include further guidance to supplement the document, as it is currently written. These areas are discussed in an attachment to the draft regulatory guide, DG–1121, "Guidelines for Categorizing Structures, Systems and Components in Nuclear Power Plants According to Their Safety Significance." Through this document, the Commission is also seeking public comment on the DG and the identified issues. Comments should be submitted as discussed under the **ADDRESSES** section. Availability of this document is noted in Section X.

VII.2 Review Guidance Concerning PRA Quality and Peer Review

The NRC has prepared a draft regulatory guide DG–1122, "An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities." This guide provides guidance on the NRC position on voluntary consensus standards for PRA (in particular on the ASME standard for internal events PRAs) and industry PRA documents (*e.g.*, NEI 00–02, "Probabilistic Risk Assessment Peer Review Process Guideline"). Further, this guide will be modified to address PRA standards on fire, external events, and low power and shutdown modes, as they become available. The NRC has also developed a draft supporting Standard Review Plan, SRP 19.1, to provide guidance to the staff on how to determine whether a PRA providing results being used in a decision is technically adequate.

In a letter dated April 24, 2000, NEI requested the NRC staff review the suitability of the peer review process described in NEI 00–02 to address PRA quality issues for this application. NRC issued a request for additional information on September 19, 2000, to which NEI responded by letter dated January 18, 2001. By letter dated April 2, 2002 (ADAMS accession number ML020930632), the NRC staff sent to NEI, draft staff review guidance that was developed as a result of its review of NEI 00–02, for intended use for § 50.69 applications.

The staff review guidance is for a focused review of the plant-specific PRA based on a review of NEI 00–02 and NEI 00–04. In order to reach the conclusion that the PRA results support the proposed categorization, the review guidance is structured to lead the staff reviewer to either look for evidence that the impact of a given peer review issue on PRA results has been adequately addressed in the peer review report and, when necessary, has been identified for consideration by the IDP, or to request further information from the licensee.

VIII. Criminal Penalties

For the purposes of Section 223 of the Atomic Energy Act, as amended, the Commission is issuing the proposed rule to add § 50.69 under one or more of sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement. Criminal penalties, as they apply to regulations in Part 50 are discussed in § 50.111.

IX. Compatibility of Agreement State Regulations

Under the "Policy Statement on Adequacy and Compatibility of Agreement States Programs," approved by the Commission on June 20, 1997, and published in the **Federal Register** (62 FR 46517, September 3, 1997), this rule is classified as compatibility "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of Title 10 of the Code of Federal Regulations, and although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but does not confer regulatory authority on the State.

X. Availability of Documents

The NRC is making the documents identified below available to interested persons through one or more of the following methods as indicated.

Public Document Room (PDR). The NRC Public Document Room is located at 11555 Rockville Pike, Rockville, Maryland.

Rulemaking Website (Web). The NRC's interactive rulemaking Website is located at *http://ruleforum.llnl.gov.* These documents may be viewed and downloaded electronically via this Website.

NRC's Public Electronic Reading Room (PERR). The NRC's public electronic reading room is located at *www.nrc.gov/reading-rm.html.*

Document	PDR	Web	PERR
Comments on the ANPR	X	X	Available.
Comments on the draft rule language	X	X	Available.
ANPR Comment Resolution	X	X	ML022630030.
Environmental Assessment	X	X	ML022630050.
Regulatory Analysis	X	X	ML022630028.
OMB Supporting Statement	X	X	ML031000685.
Industry Implementation Guidance	X	X	ML021910534.
Draft Regulatory Guide	X	X	ML022630041.

XI. Plain Language

The Presidential memorandum dated June 1, 1998, entitled "Plain Language in Government Writing" directed that the Government's writing be in plain language. This memorandum was published on June 10, 1998 (63 FR 31883). The NRC requests comments on the proposed rule specifically with respect to the clarity and reflectiveness of the language used. Comments should be sent to the address listed under the **ADDRESSES** caption of the preamble.

XII. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this proposed rule, the NRC proposes to use the following Government-unique standard (Draft NRC Regulatory Guide DG–1121, August 2002). The Commission notes the development of voluntary consensus standards on PRAs, such as an ASME Standard on Probabilistic Risk Assessment for Nuclear Power Plant Applications. DG–1121 and DG–1122 (PRA Technical Adequacy) discuss how this standard could be used for the purpose of the internal events, full-power PRA. In addition, the Commission acknowledges development of risk-informed Code cases by the ASME on categorization of certain components, particularly with respect to pressure boundary considerations. DG–1121 explicitly notes such Code cases and that they could be proposed by a licensee or applicant as part of the means for satisfying the rule requirements. The government standards would allow use of these voluntary consensus standards, but would not require their use. The Commission does not believe that these other standards are sufficient to provide the overall construct for the alternative approach to categorization and treatment of SSCs that is the goal of this rulemaking. For example, the current standards do not address all types of components that might be recategorized. PRA requirements for all initiating events and modes of operation, nor other parts of the approach laid out such as determining the basis for the evaluations to show a small increase in risk. The NRC is not aware of any voluntary consensus standard that could be used instead of the proposed Government-unique standards. The NRC will consider using a voluntary consensus standard if an appropriate standard is identified. If a voluntary consensus standard is identified for consideration, the submittal should explain how the voluntary consensus standard is comparable and why it should be used instead of the proposed standard.

XIII. Finding of No Significant Environmental Impact: Environmental Assessment: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR part 51, that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The determination of this environmental assessment is that there will be no significant offsite impact to the public from this action. However, the general public should note that the NRC is seeking public participation; availability of the environmental assessment is provided in Section X. Comments on any aspect of the environmental assessment may be submitted to the NRC as indicated under the **ADDRESSES** heading.

The NRC has sent a copy of the environmental assessment and this proposed rule to every State Liaison Officer and requested their comments on the environmental assessment.

XIV. 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 the Office of Management and Budget for review and approval of the information collection requirements.

The burden to the public for these information collections is estimated to average 1032 hours per response, 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 submitted?
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 Management Branch (T–6 E6), 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, (3150–0011), Office of Management and Budget, Washington DC 20503.

Comments to OMB on the information collections or on the above issues should be submitted by June 16, 2003. 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

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an

information collection requirement unless the requesting document displays a currently valid OMB control number.

XV. Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The Commission requests public comment on the draft regulatory analysis. Availability of the regulatory analysis is provided in Section X. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading.

XVI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

XVII. Backfit Analysis

The NRC has determined that the backfit rule does not apply to this proposed rule; therefore, a backfit analysis is not required for this proposed rule. As a voluntary alternative to existing requirements, these amendments do not impose more stringent safety requirements on 10 CFR Part 50 licensees or applicants and thus do not constitute a backfit pursuant to § 50.109.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plant and reactors, Radiation protection, Reactor siting criteria, 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. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat.1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Sections 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a, and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80, 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. Section 50.8(b) is revised to read as follows:

§ 50.8 Information collection requirements: OMB approval.

(b) The approved information collection requirements contained in this part appear in §§ 50.30, 50.33, 50.33a, 50.34, 50.34a, 50.35, 50.36, 50.36a, 50.36b, 50.44, 50.46, 50.47, 50.48, 50.49, 50.54, 50.55, 50.55a, 50.59, 50.60, 50.61, 50.62, 50.63, 50.64, 50.65, 50.66, 50.68, 50.69, 50.71, 50.72, 50.74, 50.75, 50.80, 50.82, 50.90, 50.91, 50.120, and appendices A, B, E, G, H, I, J, K, M, N,O, Q, R, and S to this part.

3. Part 50 is amended by adding a new § 50.69 to read as follows:

§ 50.69 Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors

(a) Definitions.

"Risk-Informed Safety Class (RISC)–1 structures, systems, and components (SSCs)" means safety-related SSCs that perform safety-significant functions.

"Risk-Informed Safety Class (RISC)–2 structures, systems and components (SSCs)" means nonsafety-related SSCs that perform safety-significant functions.

"Risk-Informed Safety Class (RISC)–3 structures, systems and components (SSCs)" means safety-related SSCs that perform low safety-significant functions.

"Risk-Informed Safety Class (RISC)–4 structures, systems and components (SSCs)" means nonsafety-related SSCs that perform low safety-significant functions.

"Safety-significant function" means a function whose degradation or loss could result in a significant adverse effect on defense-in-depth, safety margin, or risk.

(b) Applicability and scope of risk-informed treatment of SSCs and submittal/approval process.

(1) A holder of a license to operate a light water reactor (LWR) nuclear power plant under §§ 50.21(b) or 50.22, a holder of a renewed LWR license under Part 54 of this chapter; a person seeking a design certification under Part 52 of this chapter, or an applicant for a LWR license under § 50.22 or under Part 52, may voluntarily comply with the requirements in this section as an alternative to compliance with the following requirements for RISC–3 and RISC–4 SSCs:

(i) 10 CFR part 21.

(ii) 10 CFR 50.49.

(iii) 10 CFR 50.55(e).

(iv) The inservice testing requirements in 10 CFR 50.55a(f); the inservice inspection, and repair and replacement, requirements for ASME Class 2 and Class 3 SSCs in 10 CFR 50.55a(g); and the electrical component quality and qualification requirements in Section 4.3 and 4.4 of IEEE 279, and sections 5.3 and 5.4 of IEEE 603–1991, as incorporated by reference in 10 CFR 50.55a(h).

(v) 10 CFR 50.65, except for paragraph (a)(4).

(vi) 10 CFR 50.72.

(vii) 10 CFR 50.73.

(viii) Appendix B to 10 CFR part 50.

(ix) The Type B and Type C leakage testing requirements in both Options A and B of Appendix J to 10 CFR Part 50, for penetrations and valves meeting the following criteria:

(A) Containment penetrations that are either 1-inch nominal size or less, or continuously pressurized.

(B) Containment isolation valves that meet one or more of the following criteria:

(*1*) The valve is required to be open under accident conditions to prevent or mitigate core damage events;

(*2*) The valve is normally closed and in a physically closed, water-filled system;

(*3*) The valve is in a physically closed system whose piping pressure rating exceeds the containment design pressure rating and that is not connected to the reactor coolant pressure boundary; or

(4) The valve is 1-inch nominal size or less.

(x) Appendix A to Part 100, sections VI(a)(1) and VI(a)(2), to the extent that these regulations require qualification testing and specific engineering methods to demonstrate that SSCs are designed to withstand the Safe

Shutdown Earthquake and Operating Basis Earthquake.

(2) A licensee voluntarily choosing to implement this section shall submit an application for license amendment pursuant to § 50.90 that contains the following information:

(i) A description of the process for categorization of RISC–1, RISC–2, RISC–3 and RISC–4 SSCs.

(ii) A description of the measures taken to assure that the quality and level of detail of the systematic processes that evaluate the plant for internal and external events during normal operation, low power, and shutdown (including the plant-specific probabilistic risk assessment (PRA), margins-type approaches, or other systematic evaluation techniques used to evaluate severe accident vulnerabilities) are adequate for the categorization of SSCs.

(iii) Results of the PRA review process conducted to meet § 50.69 (c)(1)(i).

(iv) A description of, and basis for acceptability of, the evaluations to be conducted to satisfy § 50.69(c)(1)(iv). The evaluations shall include the effects of common cause interaction susceptibility, and the potential impacts from known degradation mechanisms for both active and passive functions, and address internally and externally initiated events and plant operating modes (*e.g.*, full power and shutdown conditions).

(3) The Commission will approve a licensee's implementation of this section if it determines that the process for categorization of RISC–1, RISC–2, RISC–3, and RISC–4 SSCs satisfies the requirements of § 50.69(c) by issuing a license amendment approving the licensee's use of this section.

(4) An applicant for a license voluntarily choosing to implement this section shall include the information in § 50.69(b)(2) as part of application for a license. The Commission will approve an applicant's implementation of this section if it determines that the process for categorization of RISC–1, RISC–2, RISC–3, and RISC–4 SSCs satisfies the requirements of § 50.69(c).

(c) SSC Categorization Process. (1) SSCs must be categorized as RISC–1, RISC–2, RISC–3, or RISC–4 SSCs using a categorization process that determines whether an SSC performs one or more safety-significant functions and identifies those functions. The process must:

(i) Consider results and insights from the plant-specific PRA. This PRA must at a minimum model severe accident scenarios resulting from internal initiating events occurring at full power operation. The PRA must be of sufficient quality and level of detail to support the categorization process, and must be subjected to a peer review process assessed against a standard or set of acceptance criteria that is endorsed by the NRC.

(ii) Determine SSC functional importance using an integrated, systematic process for addressing initiating events (internal and external), SSCs, and plant operating modes, including those not modeled in the plant-specific PRA. The functions to be identified and considered include design bases functions and functions credited for mitigation and prevention of severe accidents. All aspects of the integrated, systematic process used to characterize SSC importance must reasonably reflect the current plant configuration and operating practices, and applicable plant and industry operational experience.

(iii) Maintain the defense-in-depth philosophy.

(iv) Include evaluations that provide reasonable confidence that for SSCs categorized as RISC–3, sufficient safety margins are maintained and that any potential increases in core damage frequency (CDF) and large early release frequency (LERF) resulting from changes in treatment permitted by implementation of § 50.69(b)(1) and § 50.69(d)(2) are small.

(v) Be performed for entire systems and structures, not for selected components within a system or structure.

(2) The SSCs must be categorized by an Integrated Decision-making Panel (IDP) staffed with expert, plant-knowledgeable members whose expertise includes, at a minimum, PRA, safety analysis, plant operation, design engineering, and system engineering.

(d) *Alternative treatment requirements.* (1) *RISC–1 and RISC 2 SSCs.* The licensee or applicant shall ensure that RISC–1 and RISC–2 SSCs perform their functions consistent with the categorization process assumptions by evaluating treatment being applied to these SSCs to ensure that it supports the key assumptions in the categorization process that relate to their assumed performance.

(2) *RISC–3 SSCs.* The licensee or applicant shall develop and implement processes to control the design; procurement; inspection, maintenance, testing, and surveillance; and corrective action for RISC–3 SSCs to provide reasonable confidence in the capability of RISC–3 SSCs to perform their safety-related functions under design basis conditions throughout their service life. The processes must meet the following requirements, as applicable:

(i) *Design control.* Design functional requirements and bases for RISC–3 SSCs must be maintained and controlled. RISC–3 SSCs must be capable of performing their safety-related functions including design requirements for environmental conditions (*i.e.*, temperature and pressure, humidity, chemical effects, radiation and submergence) and effects (*i.e.*, aging and synergism); and seismic conditions (design load combinations of normal and accident conditions with earthquake motions);

(ii) *Procurement.* Procured RISC–3 SSCs must satisfy their design requirements;

(iii) *Maintenance, Inspection, Testing, and Surveillance.* Periodic maintenance, inspection, testing, and surveillance activities must be established and conducted using prescribed acceptance criteria, and their results evaluated to determine that RISC–3 SSCs will remain capable of performing their safety-related functions under design basis conditions until the next scheduled activity; and

(iv) *Corrective Action.* Conditions that could prevent a RISC–3 SSC from performing its safety-related functions under design basis conditions must be identified, documented, and corrected in a timely manner.

(e) *Feedback and process adjustment.* (1) *RISC–1, RISC–2, RISC–3 and RISC–4 SSCs.* In a timely manner but no longer than every 36 months, the licensee shall review changes to the plant, operational practices, applicable industry operational experience, and, as appropriate, update the PRA and SSC categorization.

(2) *RISC–1 and RISC–2 SSCs.* The licensee shall monitor the performance of RISC–1 and RISC–2 SSCs. The licensee shall make adjustments as necessary to either the categorization or treatment processes so that the categorization process and results are maintained valid.

(3) *RISC–3 SSCs.* The licensee shall consider data collected in § 50.69(d)(2)(iii) for RISC–3 SSCs to determine whether there are any adverse changes in performance such that the SSC unreliability values approach or exceed the values used in the evaluations conducted to satisfy § 50.69 (c)(1)(iv). The licensee shall make adjustments as necessary to either the categorization or treatment processes so that the categorization process and results are maintained valid.

(f) *Program documentation, change control and records.* (1) The licensee or applicant shall document the basis for its categorization of any SSC under

paragraph (c) of this section before removing any requirements under § 50.69(b)(1) for those SSCs.

(2) Following implementation of this section, licensees and applicants shall update their final safety analysis report (FSAR) to reflect which systems have been categorized in accordance with § 50.71(e).

(3) When a licensee first implements this section for a SSC, changes to the FSAR for the implementation of the changes in accordance with § 50.69(d) need not include a supporting § 50.59 evaluation of the changes directly related to implementation. Thereafter, changes to the programs and procedures for implementation of § 50.69(d), as described in the FSAR, may be made if the requirements of this section and § 50.59 continue to be met.

(4) When a licensee first implements this section for a SSC, changes to the quality assurance plan for the implementation of the changes in accordance with § 50.69(d) need not include a supporting § 50.54(a) review of the changes directly related to implementation. Thereafter, changes to the programs and procedures for implementation of § 50.69(d), as described in the quality assurance plan may be made if the requirements of this section and § 50.54(a) continue to be met.

(g) *Reporting.* The licensee shall submit a licensee event report under § 50.73(b) for any event or condition that would have prevented RISC–1 or RISC–2 SSCs from performing a safety-significant function.

Dated at Rockville, Maryland this 6th day of May, 2003.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 03–11696 Filed 5–15–03; 8:45 am]

BILLING CODE 7590–01–U

FARM CREDIT ADMINISTRATION

12 CFR Chapter VI

RIN 3052–AC15

Statement on Regulatory Burden

AGENCY: Farm Credit Administration.

ACTION: Notice of intent; request for comment.

SUMMARY: The Farm Credit Administration (FCA, our, or we) is seeking public comment on the appropriateness of the requirements it imposes on the Farm Credit System (System). We ask for comments on our regulations and policies that may duplicate other requirements, are ineffective, or impose burdens that are greater than the benefits received. We are taking this action to improve the regulatory framework within which System institutions operate.

DATES: Please send your comments to the FCA by July 15, 2003.

ADDRESSES: You may send comments by electronic mail to *reg-comm@fca.gov,* through the Pending Regulations section of the FCA's interactive Web site at *http://www.fca.gov,* or through the Government-wide *http://www.regulations.gov* portal. You may also send written comments to Robert E. Donnelly, Acting Director, Regulation and Policy Division, Office of Policy and Analysis, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090 or by facsimile to (703) 734–5784. Copies of all comments we receive can be reviewed at our office in McLean, Virginia.

FOR FURTHER INFORMATION CONTACT: Lori Markowitz, Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or Dale Aultman, Policy Analyst, Office of Policy and Analysis, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434; or Gary K. Van Meter, Senior Counsel, Regulatory Enforcement Division, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Objective

Consistent with law, safety, and soundness, the objective of this notice is to continue our efforts to identify and review FCA regulations and policies that:

- May duplicate other requirements;
- Are ineffective; or
- Impose burdens that are greater than the benefits received.

II. Background

The FCA is the independent Federal agency in the executive branch of the Government responsible for examining and regulating System institutions. As a Government-sponsored enterprise, the System primarily provides loans to farmers, ranchers, aquatic producers and harvesters, agricultural cooperatives, and rural utilities.

From 1988 through 1992, as part of our initial effort to eliminate regulatory burden, we reduced, by more than 70 percent, the number of matters that required "prior approval" by the FCA. In 1993, we took an additional step to provide relief by requesting public comments on regulatory requirements that are no longer necessary, which the FCA may have imposed on the System. *See* 58 FR 34003 (June 23, 1993). After reviewing the comments received, we eliminated or streamlined many regulatory requirements.

The Farm Credit System Reform Act of 1996 (Reform Act) states that we made considerable progress in reducing regulatory burden on System institutions. The Reform Act also requires that we continue our efforts to relieve regulatory burden.[1]

In 1998, we provided the public a summary of the actions we took in response to the 1993 solicitation and again requested public comments on regulatory requirements that are no longer necessary. *See* 63 FR 44176 (August 18, 1998) and 63 FR 64013 (November 18, 1998). After we reviewed and analyzed the comments received, we:

1. Repealed or amended 16 FCA regulations through a direct final rulemaking[2]—*See* 64 FR 43046 (August 9, 1999);

2. Informed the public of the regulations we retained without amendment because they either are required by the Farm Credit Act of 1971, as amended (Act), or protect the safety and soundness of the System—*See* 65 FR 21128 (April 20, 2000); and

3. Addressed other regulatory burden issues in separate regulatory projects and other guidance, including:

- Loan Purchases and Sales Final Regulation—*See* 67 FR 1281 (January 10, 2002);
- Stock Issuance Final Regulation—*See* 66 FR 16841 (March 28, 2001);
- Disclosure to Shareholders Final Regulation—*See* 66 FR 14299 (March 12, 2001);
- Investment Management Final Regulation—See 64 FR 28884 (May 28, 1999); and
- Policy and Reporting Changes for Young, Beginning, and Small Farmers and Ranchers Programs Bookletter—*See* BL–040 (December 11, 1998).

III. Continuing Efforts To Reduce Regulatory Burden

Future regulatory projects, including proposed regulations on Distressed Loan Restructuring (*See* 68 FR 5595, February 4, 2003) and Effective Interest Rates (See 68 FR 5587, February 4, 2003), will address many of the regulatory burden

[1] *See* Pub. L. 104–105, § 212, 110 Stat. 174 (1996).

[2] However, the amended regulation on approval of insider loans was subsequently withdrawn. *See* 64 FR 55621 (October 14, 1999).

comments from the 1998 notice. In addition, we will consider the remaining comments from our 1998 notice in subsequent rulemakings and other guidance.

IV. Requesting Comments

In light of changes in the financial industry and its customers since our 1998 notice, we request comments on any FCA regulations or other guidance[3] that may duplicate other requirements, are ineffective, or impose burdens that are greater than the benefits received.

Your comments are appreciated and will assist us in our continuing efforts to identify and reduce regulatory burden on System institutions. We will also continue our efforts to maintain and adopt regulations and policies that are necessary to implement the Act and ensure the safety and soundness of the System. These actions will enable the System to better serve America's farmers, ranchers, aquatic producers and harvesters, agricultural cooperatives, and rural utilities in changing agricultural credit markets.

Dated: May 13, 2003.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 03–12264 Filed 5–15–03; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–SW–44–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, and AS355N Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes superseding an existing airworthiness directive (AD) for the specified Eurocopter France (ECF) model helicopters. The existing AD requires inspecting the main rotor swashplate bearing (bearing) for play or binding, proper assembly and lubrication, and measuring the swashplate rotational torque. In addition, that AD requires plugging the nonrotating swashplate vent holes and barrel nut orifices. This amendment would eliminate most of those AD actions because they are now incorporated into the Airworthiness Limitations section of the maintenance manual but would retain the requirements for the initial and repetitive inspections and lubrication of the main rotor swashplate and clarify that repetitive maintenance of the main rotor swashplate and bearing is required at intervals not to exceed 100 hours time-in-service (TIS). This proposal is prompted by the need to clarify the AD wording to avoid any misinterpretation of the required interval for inspecting and lubricating the main rotor swashplate and bearing. The actions specified by the proposed AD are intended to prevent failure of the bearing and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before July 15, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2002–SW–44–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jim Grigg, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5490, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 2002–SW–44–AD." The postcard will be date stamped and returned to the commenter.

Discussion

On March 21, 1990, the FAA issued AD 89–21–01, Amendment 39–6562, Docket No. 89–ASW–53 (55 FR 12332, April 3, 1990), to require inspecting the bearing for play or binding, proper assembly and lubrication, and for measuring the swashplate rotational torque. In addition, that AD requires plugging the nonrotating swashplate vent holes and barrel nut orifices at specified hours TIS. The requirements of that AD are intended to prevent failure of the bearing, which could result in loss of helicopter control.

Since issuing that AD, an FAA inspector reports that the repetitive lubrication requirement in paragraph (c) of AD 89–21–01 requiring lubrication "within every 100 hours' additional time-in-service" is being misinterpreted by a certain operator to only require lubrication every 199 hours rather than the intended 100-hour interval. Therefore, the inspector recommends that AD 89–21–01 be rewritten to clearly state that lubrication of the bearings be required at intervals not to exceed 100 hours TIS. To remove any doubt as to the intended lubrication interval, we propose to adopt the suggested language. The additional requirements contained in AD 89–21–01 for inspecting and servicing the main rotor swashplate are omitted from this proposal because they are contained currently in the mandatory Airworthiness Limitations section of the Eurocopter Master Servicing Recommendations (maintenance manual) for the Model AS 350, dated April 26, 2001, and for the Model AS 355, dated May 31, 2001.

This unsafe condition is likely to exist or develop on other helicopters of the same type designs. Therefore, the proposed AD would supersede AD 89–21–01 to clarify that the required inspection and lubrication interval of the main rotor swashplate must be accomplished within 10 hours TIS,

[3] FCA regulations and other guidance may be reviewed through the FCA Handbook section of the FCA's Web site at *http://www.fca.gov.*

unless complied with previously, and thereafter at intervals not to exceed 100 hours TIS.

The FAA estimates that this proposed AD would affect 587 helicopters of U.S. registry, that it would take approximately 2 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $422,640, assuming 6 inspections per year.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–6562 (55 FR 12332, April 3, 1990) and by adding a new airworthiness directive (AD) to read as follows:

Eurocopter France: Docket No. 2002–SW–44–AD. Supersedes AD 89–21–01, Amendment 39–6562, Docket No. 89–ASW–53.

Applicability: Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, and AS355N helicopters, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

Note 2: The current Airworthiness Limitations sections of the Eurocopter AS 350 and AS 355 maintenance manuals contain requirements for inspecting and lubricating the main rotor swashplate at intervals not to exceed 100 hours time-in-service (TIS).

To prevent failure of the main rotor swashplate bearing and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 10 hours time-in-service (TIS) and thereafter at intervals not to exceed 100 hours TIS, inspect and lubricate the main rotor swashplate.

Note 3: Eurocopter Master Servicing Recommendations, Airworthiness Limitations section, AS 350, dated April 26, 2001, and AS 355, dated May 31, 2001, pertain to the subject of this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

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

(c) Special flight permits will not be issued.

Issued in Fort Worth, Texas, on May 9, 2003.

Mark R. Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 03–12209 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NE–26–AD]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. CFM56–2C, –3 Series, and –5 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Aviation Administration (FAA) proposes to adopt a new airworthiness directive (AD) that is applicable to CFM International, S.A. CFM56–2C, –3, and –5 series turbofan engines. This proposal would require removing from service main fuel pumps with bronze bearings and installing main fuel pumps with aluminum/bronze alloy bearings. This proposal is prompted by several reports of indications of wear and failures of main fuel pump bronze bearings. The actions specified by the proposed AD are intended to prevent failures of main fuel pump bearings, resulting in fuel filter clogging, fuel flow degradation, fuel manifold and nozzle clogging resulting in diminished in-flight restart capability, low pressure turbine (LPT) case burn-through, inability to obtain a successful engine start, and damage to the airplane.

DATES: Comments must be received by July 15, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–26–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: *9-ane-adcomment@faa.gov*. Comments sent via the Internet must contain the docket number in the subject line.

FOR FURTHER INFORMATION CONTACT: Glorianne Niebuhr, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7132; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2002–NE–26–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–NE–26–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

The FAA has become aware that since the introduction of main fuel pump bronze bearings into service on CFM56–2C, –3, and –5 series turbofan engines, wear of the backside of the bearings into the main fuel bearing plate has been observed. This can lead to fuel filter clogging, fuel flow degradation, fuel manifold and nozzle clogging resulting in diminished in-flight restart capability, LPT case burn-through, inability to obtain a successful engine start, and damage to the airplane. The main fuel pump manufacturer has determined that this wear is caused by the low coefficient of friction between the bronze bearings and the aluminum bearing plate which allowed relative movement of the bearing during operation. The main fuel pump manufacturer has shown that main fuel pumps with aluminum/bronze alloy bearings have a high coefficient of friction between the bearing and the aluminum bearing plate minimizing relative movement of the bearings and reducing wear. Use of main fuel pumps with aluminum/bronze alloy bearings decreases the risk of bearing failure which could lead to fuel filter clogging, fuel flow degradation, fuel manifold and nozzle clogging resulting in diminished in-flight restart capability, LPT case burn-through, inability to obtain a successful engine start, and damage to the airplane.

FAA's Determination of an Unsafe Condition and Proposed Actions

Since an unsafe condition has been identified that is likely to exist or develop on other CFM International, S.A. CFM56–2C, –3 series, and –5 series turbofan engines of the same type design, the proposed AD would require removal from service of certain part number main fuel pumps and installation of serviceable main fuel pumps. The actions would be required to be done at the next engine removal, engine module removal, or main fuel pump removal after the effective date of this AD, whichever is earlier, but no later than January 1, 2007.

Economic Analysis

There are approximately 6,048 CFM56–2C, –3 series, and –5 series turbofan engines of the affected design in the worldwide fleet. The FAA estimates that 2,249 engines installed on airplanes of U.S. registry would be affected by this proposed AD. A replacement fuel pump would cost approximately $74,000. Using average shop visitation rates, 562 engines are expected to be affected per year. Based on these figures, the total cost to replace fuel pumps for U.S. operators is estimated to be $41,588,000 per year.

Regulatory Analysis

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

CFM International, S.A.: Docket No. 2002–NE–26–AD.

Applicability: This airworthiness directive (AD) is applicable to CFM International, S.A. CFM56–2C, –3, and –5 series turbofan engines. These engines are installed on, but not limited to Airbus Industrie A319, A320, Boeing 737, and McDonnell Douglas DC–8 airplanes.

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

Compliance: Compliance with this AD is required at the next engine removal, engine module removal, or main fuel pump removal after the effective date of this AD, whichever is earlier, but no later than January 1, 2007, unless already done.

To prevent failures of main fuel pump bearings, resulting in fuel filter clogging, fuel flow degradation, fuel manifold and nozzle

clogging resulting in diminished in-flight restart capability, low pressure turbine (LPT) case burn-through, inability to obtain a successful engine start, and damage to the airplane, do the following:

Main Fuel Pumps Installed on CFM56–2C Engines

(a) For CFM56–2C engines, do the following:

(1) Remove from service main fuel pumps part number (P/N) 301–779–002–0.

(2) For all CFM56–2C series engines that have incorporated CFM International (CFMI) Service Bulletin (SB) (CFM56–2C) 73–081, remove from service main fuel pumps P/N 301–776–101–0, P/N 301–776–102–0, P/N 301–776–103–0, P/N 301–776–104–0, P/N 301–776–105–0, P/N 301–776–106–0, P/N 301–776–108–0, P/N 301–776–109–0, P/N 301–776–110–0, P/N 301–776–111–0, P/N 301–776–112–0, P/N 301–776–113–0, P/N 301–778–801–0, P/N 301–778–802–0, P/N 301–778–804–0, and P/N 301–778–805–0.

(3) For all CFM56–2C engines that have incorporated CFMI SB (CFM56–2C) 73–078, remove from service main fuel pumps P/N 301–779–006–0.

(4) Install a serviceable main fuel pump. Information on converting removed pumps into serviceable pumps can be found in CFMI SB (CFM56–2C) 73–0104, Revision 2, dated July 27, 2000.

Main Fuel Pumps Installed on CFM56–3 Series Engines

(b) For CFM56–3 series engines, do the following:

(1) Remove main fuel pumps P/N 301–779–002–0.

(2) For all CFM56–3 series engines that have incorporated CFMI SB (CFM56–3) 73–082, remove from service main fuel pumps P/N 301–779–006–0.

(3) For all CFM56–3 series engines that have incorporated CFMI SB (CFM56–3) 73–087, remove from service main fuel pumps P/N 301–778–801–0, P/N 301–778–802–0, P/N 301–778–804–0, and P/N 301–778–805–0.

(4) Install a serviceable main fuel pump. Information on converting removed pumps into serviceable pumps can be found in CFMI SB (CFM56–3) 73–0120, Revision 4, dated July 27, 2000.

Main Fuel Pumps Installed on CFM56–5 Series Engines

(c) For CFM56–5 series engines, do the following:

(1) Remove main fuel pumps P/N 301–785–502–0.

(2) For all CFM56–5 series engines that have incorporated CFMI SB (CFM56–5A) 73–077, remove from service main fuel pumps P/N 301–785–504–0.

(3) Install a serviceable main fuel pump. Information on converting removed pumps into serviceable pumps can be found in CFMI SB (CFM56–5A) 73–0126, Revision 3, dated September 25, 2000.

Do Not Install Main Fuel Pumps

(d) After the effective date of this AD, do not install the following P/N main fuel pumps onto any engine:

(1) For all engines: (P/N) 301–779–002–0, P/N 301–779–006–0, P/N 301–785–502–0, and P/N 301–785–504–0.

(2) For CFM56–2C engines that have incorporated SB CFMI (CFM56–2C) 73–081 but have not incorporated SB CFMI SB (CFM56–2C) 73–0104: P/N 301–776–101–0, P/N 301–776–102–0, P/N 301–776–103–0, P/N 301–776–104–0, P/N 301–776–105–0, P/N 301–776–106–0, P/N 301–776–108–0, P/N 301–776–109–0, P/N 301–776–110–0, P/N 301–776–111–0, P/N 301–776–112–0, P/N 301–776–113–0, P/N 301–778–801–0, P/N 301–778–802–0, P/N 301–778–804–0, P/N 301–778–805–0.

(3) For CFM56–3 series engines that have incorporated SB CFMI (CFM56–3) 73–087 but have not incorporated CFMI SB (CFM56–3) 73–0120: P/N 301–778–801–0, P/N 301–778–802–0, P/N 301–778–804–0, and P/N 301–778–805–0.

Alternative Methods of Compliance

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office (ECO). Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ECO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the ECO.

Special Flight Permits

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

Issued in Burlington, Massachusetts, on May 12, 2003.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–12241 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR–4676–N–07]

Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee; Meeting

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of Negotiated Rulemaking Committee Meeting.

SUMMARY: This document announces a meeting of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee. The purpose of the Committee is to discuss and negotiate a proposed rule that would change the regulations for the Indian Housing Block Grant (IHBG) program allocation formula, and other regulatory issues that arise out of the allocation or reallocation of IHBG funds.

DATES: The committee meeting will be held on Wednesday, May 28, 2003, Thursday, May 29, 2003, and Friday, May 30, 2003. On May 28, 2003, and May 29, 2003, the meeting will begin at 9 am and end at 5 pm. On May 30, 2003, the meeting will begin at 9 am and end at 4 pm.

ADDRESSES: The meeting will take place at the Adams-Mark Hotel, 1550 Court Place Street, Denver, Colorado 80202; telephone (303) 893–3333 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Room 4126, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone, (202) 401–7914 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

HUD has established the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee for the purposes of discussing and negotiating a proposed rule that would change the regulations for the Indian Housing Block Grant (IHBG) program allocation formula, and other regulatory issues that arise out of the allocation or reallocation of IHBG funds.

The IHBG program was established under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA). NAHASDA reorganized housing assistance to Native Americans by eliminating and consolidating a number of HUD assistance programs in a single block grant program. In addition, NAHASDA provides federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-government. Following the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561–570), HUD and its tribal partners negotiated the March 12, 1998 (63 FR 12349) final rule, which created a new 24 CFR part 1000

containing the IHBG program regulations.

II. Negotiated Rulemaking Committee Meeting

This document announces a meeting of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee. The committee meeting will take place as described in the **DATES** and **ADDRESSES** section of this document. The agenda planned for the meeting includes the discussion of proposed work groups and committee recommendations. The meeting will be open to the public without advance registration. Public attendance may be limited to the space available. Members of the public may be allowed to make statements during the meeting, to the extent time permits, and file written statements with the committee for its consideration. Written statements should be submitted to the address listed in the **FOR FURTHER INFORMATION** section of this document.

Dated: May 12, 2003.

Rodger J. Boyd,

Deputy Assistant Secretary for Native American Programs.

[FR Doc. 03–12206 Filed 5–15–03; 8:45 am]

BILLING CODE 4210–33–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–248–200327(b); FRL–7498–7]

Approval and Promulgation of Implementation Plan: Revisions to Tennessee State Implementation Plan: Transportation Conformity Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Tennessee State Implementation Plan (SIP) submitted on March 19, 2002, that contains transportation conformity rules. If EPA approves this transportation conformity SIP revision, the State will be able to implement and enforce the Federal transportation conformity requirements at the State level per EPA regulations—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. of the Federal Transit Laws. EPA's proposed action would streamline the conformity process and allow direct consultation among agencies at the local levels. EPA's proposed approval is limited to transportation conformity.

In the Final Rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no significant, material, and adverse comments are received in response to this rule, 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 rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before June 16, 2003.

ADDRESSES: All comments should be addressed to: Kelly Sheckler at the EPA, Region 4 Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

Copies of documents relative to this action are available at the following address for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Kelly Sheckler, (404) 562–9042.

Tennessee Department of Environment and Conservation, Air Pollution Control, 9th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243–1531.

FOR FURTHER INFORMATION CONTACT: Kelly Sheckler at (404) 562–9042, e-mail: *Sheckler.Kelly@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: April 29, 2003.

Stanley L. Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 03–12179 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–1534, MB Docket No. 03–116]

Radio Broadcasting Services; Archer City, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comment on a Commission proposal to substitute Channel 248C2 for Channel 248C1 at Archer City, Texas. As a result, the allotment at Archer City, Texas would conform with the outstanding Station KRZB construction permit. The coordinates for the Channel 248C2 allotment of Archer City, Texas, would be 33–51–40 and 98–38–52.

DATES: Comments must be filed on or before June 30, 2003, and reply comments on or before July 15, 2003.

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

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–116, adopted May 7, 2003, and released May 8, 2003. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 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 Texas, is amended by adding Channel 248C2 and removing Channel 248C1 at Archer City.

Federal Communications Commission.

Peter H. Doyle,

Chief, Audio Division, Media Bureau.

[FR Doc. 03–12201 Filed 5–15–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–1533; MM 00–148; RM–9939, RM–10198]

Radio Broadcasting Services; Archer City, TX, Ardmore, OK, Converse, TX, Durant, OK, Elk City, OK, Flatonia, TX, Georgetown, TX, Healdton, OK, Ingram, TX, Keller, TX, Knox City, TX, Lakeway, TX, Lago Vista, TX, Llano, TX, Lawton, OK, McQueeney, TX, Nolanville, TX, Quanah, TX, Purcell, OK, San Antonio, Seymour, Waco and Wellington, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule, dismissal.

SUMMARY: This document dismisses a proposal filed by Nation Wide Radio Stations for the allotment of Channel 233C3 to Quanah, Texas. This document also dismisses a Counterproposal jointly filed by First Broadcasting Company, L.P., Rawhide Radio, L.L.C., Next Media Licensing, Inc., Capstar TX Limited Partnership and Clear Channel Broadcast Licenses, Inc. *See* 65 FR 53689, published September 5, 2000. With this action, the proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MM Docket No. 00–148, adopted May 7, 2003, and released May 8, 2003. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

Federal Communications Commission.

Peter H. Doyle,

Chief, Audio Division, Media Bureau.

[FR Doc. 03–12204 Filed 5–15–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 050703A]

Fisheries off the West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Amending the Notice to Prepare a Programmatic Environmental Impact Statement for Fishing Conducted Under the Pacific Coast Groundfish Fishery Management Plan (FMP)

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

ACTION: Notice of intent to revise the scope of a Programmatic Environmental Impact Statement (PEIS); request for written comments.

SUMMARY: On April 10, 2001, NOAA announced in the **Federal Register** its intention to prepare a PEIS, in accordance with the National Environmental Policy Act (NEPA), to assess the impacts of Federal management of the Pacific Coast groundfish fishery on the human environment. The proposed scope of the PEIS analysis included many issues related to the conduct of the fishery, including the effects of the groundfish fishery on essential fish habitat (EFH). As a result of public comments received during the scoping process, NMFS enhanced the description of the purpose and need for NMFS' action, clearly identified significant issues related to the proposed action, and a distinction between proposed actions related to EFH and the broader management program for Pacific groundfish. To avoid confusion as a result of this distinction, NMFS decided to prepare a separate EIS to address EFH issues. Subsequent to that decision, the Pacific Fishery Management Council (Council) and NMFS have taken a number of management actions to prevent overfishing and to rebuild overfished groundfish stocks. In addition, a number of court cases have affected the fishery regulatory processes and have required additional analysis of environmental impacts of the Federal groundfish fishery management program. NMFS believes these events and activities have influenced the purpose of and need for action and is considering revision to the scope of the alternatives and analysis. The intent of this document is to describe the rationale for revising the purpose and need for action and the scope of the analysis.

DATES: Written comments will be accepted on or before June 13, 2003. A public scoping meeting is scheduled for June 16, 2003 (see **SUPPLEMENTARY INFORMATION**).

ADDRESSES: Written comments on suggested alternatives and potential impacts, and any other issues or concerns related to the proposed action which should be analyzed in detail in the PEIS, as described in this scoping notice, should be sent to Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115 0070. Comments also may be sent via facsimile (fax) to 206 526 6736. Comments will not be accepted if submitted via e-mail or Internet.

FOR FURTHER INFORMATION CONTACT: Jim Glock, Northwest Region, NMFS, 503–231–2178; fax: 503–872–2737 and email: *jim.glock@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** scoping notice is also available on the Government Printing Office's website at: *http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm.*

Background

In June 2001, NMFS concluded the initial scoping process for a PEIS on the Federal management of the Pacific Coast Groundfish Fishery and published a summary report. Scoping was initiated on April 10, 2001, through publication of a Notice of Intent (66 FR 18586). The report was initially published on the NMFS, Northwest Region website in August 2001 to provide a summary of all comments received and key issues identified during the scoping process. In February 2002 NMFS clarified the purpose and need for Federal action and revised the scope of analysis, which resulted in the preparation of two separate EISs. The PEIS was intended to be a broad analysis of the Federal fishery management program, and the additional EIS was specific to the designation of EFH and associated management measures, including measures to reduce effects of fishing on EFH. This separation was intended to improve public understanding and participation in the NEPA process, make

each EIS more useful in future management decisions, and to more clearly distinguish between programmatic groundfish fishery management and specific EFH issues.

NMFS had intended the PEIS to analyze continued management of the Pacific Coast groundfish fishery pursuant to the FMP, and to consider alternative groundfish management programs. The Council prepared the original FMP and an EIS in the late 1970s, and NMFS implemented the FMP in 1982. Since then, the Council has amended the FMP 13 times and has three additional amendments in process. These amendments were in response to development of the commercial and recreational groundfish fisheries, changes in the groundfish resources, and amendments to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS initiated this PEIS to update the original EIS to reflect changes in the fishery and to evaluate the impacts of the Federal groundfish management program on the human environment, including the marine fish resources, the physical ocean environment and ecosystem, and human society.

The Council established an ad hoc Groundfish PEIS Oversight Committee (Committee) shortly after NMFS began preparation of the draft PEIS. The Committee met twice during 2002 to advise the drafting team and help develop a range of alternatives for managing the Pacific Coast groundfish fishery. The Council adopted the alternatives recommended by the Committee in October 2002. The Committee met again on April 22–23, 2003, and reviewed the status of the PEIS and the alternatives under consideration. The Committee reviewed the events leading up to initiation of the PEIS and subsequent to the initial scoping period. The consensus of the Committee was to narrow the scope of the PEIS to deal with bycatch issues. The Committee prepared a revised set of alternatives to encompass the range of approaches to resolve bycatch and incidental catch monitoring, reporting and reduction issues. The following chronology summarizes the basis for the Committee's recommendation to focus this PEIS more narrowly on bycatch.

Immediately before and since the initial scoping period (April-June, 2001), several events and activities have occurred that have substantially affected the groundfish management program. In December 2000, NMFS approved Amendment 13 to the FMP, which was designed to implement bycatch management measures to bring the FMP into compliance with the Magnuson-Stevens Act. In January 2001, NMFS determined that widow and darkblotched rockfishes were overfished, and implemented the Council's recommendations to impose broad harvest reductions to restrict the take of canary rockfish (also designated overfished) and darkblotched rockfish. Soon after the PEIS scoping comment period closed, a group of environmental organizations filed suit on NMFS' approval of Amendment 13, claiming NMFS had not considered all reasonable bycatch management and reduction alternatives. As explained below, the Court ultimately agreed with the plaintiffs.

NMFS prepared a scoping summary report and made it available in August 2001. The agency immediately began working with the Council to develop a range of alternatives for consideration and analysis in the PEIS. In January 2002, yelloweye rockfish and Pacific whiting were determined to be overfished. In February 2002, NMFS determined the analytical requirements for a programmatic EIS were different from those envisioned for EFH, and decided to prepare a separate EIS to deal exclusively with EFH issues. In April, Amendment 13 was declared invalid by Federal District Court and remanded to the agency. In June, initial rebuilding analyses for bocaccio and canary rockfish indicated extensive harvest restrictions were needed immediately in order to meet the rebuilding mandates. In response, the Council delayed adoption of the PEIS alternatives in order to concentrate on preparing an immediate response to the new scientific information. Major groundfish fishery closures were imposed mid-season, and proposals for further restrictions were developed and evaluated as part of the annual management process for the 2003 fishing year. The Council prepared an EIS in conjunction with its management recommendations (referred to as the "annual specifications"), evaluating the impacts of the proposed management measures on the biological resources and the social and economic environment. NMFS approved the Council's recommendations and issued a rule effectively closing much of the outer continental shelf from the border with Canada to the border with Mexico. Vessel catch allowances were developed through the use of a computer model that applies observed catch ratios of various depleted and healthy stocks to the available amounts of overfished stocks. In April 2003, NMFS and the Council became aware that data from the 2001–2002 Federal observer program clearly demonstrated some ratios substantially underestimated the catches of bocaccio and canary rockfish. NMFS implemented additional fishery restrictions on May 1, 2003 (68 FR 23901, May 6, 2003).

NMFS believes the most critical need at this time is improvement of the catch monitoring program and development of a system to enhance individual vessel flexibility and accountability, including opportunities and incentives to improve the selectivity of fishing operations. The current management program provides little opportunity or incentive for individuals to improve their catch selectivity (i.e., avoid overfished species). Changes to the bycatch reduction program may require revisions to the catch and bycatch reporting and monitoring systems. NMFS believes these issues should be the sole focus of the current PEIS. The current need is to focus the analysis on bycatch, incidental catch, and discard issues. A determination will be made after consulting with the Council at its June 2003 meeting.

NMFS invites written public comment on these issues until June 13. On June 16, 2003, at 7:30 p.m., NMFS will hold a public forum in conjunction with the Council meeting in Foster City, CA. Scoping documents which identify the management issues, initial alternatives, and an outline of the proposed analysis are available on request (see FOR FURTHER INFORMATION CONTACT, above) and will also be posted on the NOAA Fisheries Northwest Region website (*http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm*). Additional copies will be available at the scoping meeting.

Special Accommodations

These meetings are accessible to people with physical disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Carolyn Porter, 503–820–2280 (voice) or 503–820–2299 (fax), at least 5 days prior to the scheduled meeting date.

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

Dated: May 12, 2003.

Bruce C. Morehead,

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

[FR Doc. 03–12315 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 68, No. 95
Friday, May 16, 2003

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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Draft Amendment to the Army Alternate Procedures

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of intent to amend the Army Alternate Procedures.

SUMMARY: The Advisory Council on Historic Preservation ("ACHP") proposes to amend the Army Alternate Procedures ("AAP") which were approved by the ACHP on July 13, 2001. The AAP provide the Army with an alternate way to comply with the historic preservation review process mandated by the National Historic Preservation Act. The proposed amendment will allow the Chairman of the ACHP to approve administrative and technical amendments to the AAP.

DATES: Submit comments on or before June 16, 2003.

ADDRESSES: Address all comments concerning this proposed amendment to Mr. David Berwick, Army Program Manager, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Fax (202) 606–8672. You may submit electronic comments to: *dberwick@achp.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. David Berwick, 202–606–8505.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act requires Federal agencies to consider the effects of their undertakings on historic properties and provide the ACHP a reasonable opportunity to comment with regard to such undertakings. The Council has issued the regulations that set forth the process through which Federal Agencies comply with these responsibilities. Those regulations are codified under 36 CFR part 800 ("Section 106 regulations").

The ACHP can allow agencies to streamline the regular Section 106 review process through alternate procedures authorized pursuant to 36 CFR 800.14(a). Instead of going through each of the steps detailed in subpart B of the Section 106 regulations, an agency can meet its Section 106 responsibilities by following an alternate procedure approved for agency implementation by the ACHP.

On July 13, 2001, the ACHP approved the Alternate Procedures proposed by the Department of the Army ("Army") for implementation at its installations. These procedures allow installation commanders to elect to follow the AAP or continue to follow the ACHP's Section 106 regulations. As currently written, neither the AAP nor the Section106 regulations provide a process for amending previously approved alternate procedures without going back to the ACHP membership for approval.

Both the Army and the ACHP have determined that there may be times at which the AAP need to be revised to take into account changes internal to the Army. The proposed amendment would allow administrative and technical changes to be made to the AAP, and approval of these changes would be made by the Chairman of the ACHP. Changes allowed under this amendment would be changes to the AAP of a minor nature that do not have an effect on the roles of consulting parties in the process. The amendment would limit changes to those having an effect solely on the Army. Changes that would affect the role of consulting parties under the AAP would continue to require the approval of the full ACHP membership after consultation with consulting parties and the general public.

You can find a full copy of the present version of the AAP at 67 FR 10138 (March 6, 2002) and on the Internet at *http://www.achp.gov/army.html*.

Amendment to the Army Alternate Procedures

For the reasons stated above, the ACHP proposes to amend the AAP as follows:

Add the following subsection to the end of section 7.1 (Council Review of Army Section 106 Compliance) of the AAP:

(d) Upon request by Headquarters, Department of the Army, the Council may adopt technical and/or administrative amendments to the Army Alternate Procedures. Such amendments will take effect upon approval by the Council's Chairman. The Council shall publish in the **Federal Register** a notice of such amendment within 30 days after their approval. Technical and administrative amendments shall not modify the role of consulting parties in the Army Alternate Procedures.

Authority: 36 CFR 800.14(A).

Dated: May 12, 2003.

Sharon Conway,

Acting Executive Director.

[FR Doc. 03–12200 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–10–M

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 9, 2003.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 *and* to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification.

Copies of the submission(s) may be obtained by calling (202) 720–6746.

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

Economic Research Service

Title: Estimating Consumer Benefits of Improving Food Safety.

OMB Control Number: 0536–NEW.

Summary of Collection: The U.S. Department of Agriculture has the responsibility to ensure that meat and poultry products are safe for human consumption. The Economic Research Service (ERS) has the responsibility to conduct economic research on the economic benefits and costs of policies and program designed to reduce and prevent illnesses caused by microbial pathogens. ERS has estimated the cost of medical treatment and lost productivity and premature death from diseases caused by five microbial pathogens at $6.9 billion annually. These costs understate the true social costs of these illnesses since they do not measure the consumer's willingness to pay to prevent food borne disease. ERS will collect information using two surveys.

Need and Use of the Information: ERS will collect information to determine (1) the extent to which a willingness to pay approach would boost assessments of the economic value of reductions in foodborne illnesses, and (2) to identify factors that influence consumers' valuation of these reductions, including personal and household characteristics, and information the consumer receives about foodborne illness.

Description of Respondents: Individuals or households.

Number of Respondents: 2,900.

Frequency of Responses: Reporting; Other (once and 3 times).

Total Burden Hours: 1,950.

Animal & Plant Health Inspection Service

Title: National Poultry Improvement Plan (NPIP).

OMB Control Number: 0579–0007.

Summary of Collection: The National Poultry Improvement Plan (NPIP) is a voluntary Federal-State-industry mechanism for controlling certain poultry diseases and for improving poultry flocks and products through disease control techniques. The National Turkey Improvement Plan was combined with the NPIP in 1970 to create the NPIP, as it now exists. Emu, rhea, ostrich, and cassowary breeding flocks are also allowed participation in the plan. The effective implementation of the NPIP necessitates the use of several information collection activities, including sentinel bird identification, as well as the creation and submission of flock testing reports, sales reports, breeding flock participation summaries, hatchery participation summaries, salmonella investigation reports, salmonella serotyping requests, and small chick order printouts. Authority for this program is contained in the U.S. Department of Agriculture Organic Act of 1944, as amended (7 U.S.C. 429). The cooperative work is carried out through a Memorandum of Understanding with the participating States.

Need and Use of the Information: Information is collected from various types of poultry breeders and flock owners to determine the number of eggs hatched and sold as well as to report outbreaks of diseases. This information allows APHIS officials to track, control, and prevent many types of poultry diseases.

Description of Respondents: State, Local or Tribal Government; Federal Government; Farms.

Number of Respondents: 19,086.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 37,899.

Animal & Plant Health Inspection Service

Title: Animal Welfare.

OMB Control Number: 0579–0036.

Summary of Collection: The Laboratory Animal Welfare Act (AWA) (Pub. L. 89–544) enacted August 24, 1966, required the U.S. Department of Agriculture, to regulate the humane care and handling of dog, cats, guinea pigs, hamster, rabbits, and nonhuman primates. The legislation was the result of extensive demand by organized animal welfare groups and private citizens requesting a Federal law covering the transportation, care, and handling of laboratory animals. The Animal and Plant Health Inspection Service (APHIS), Regulatory Enforcement and Animal Care (AC) has the responsibility to enforce the Animal Welfare Act (7 U.S.C. 2131–2156) and the provisions of 9 CFR, Subchapter A, which implements the Animal Welfare Act. The purpose of the AWA is to insure that animal use in research facilities or exhibition purposes are provided humane care and treatment. APHIS will collect information using several forms.

Need and Use of the Information: APHIS will collect health certificates, program of veterinary care, application for license and record of acquisition, disposition and transportation of animals. The information is used to ensure those dealers, exhibitors, research facilities, carriers, etc., are in compliance with the Animal Welfare Act and regulations and standards promulgated under this authority of the Act.

Description of Respondents: Business or other for-profit.

Number of Respondents: 7,288.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 98,501.

Food Safety and Inspection Service

Title: Exportation, Transportation, and Importation of Meat and Poultry Products.

OMB Control Number: 0583–0094.

Summary of Collection: The Food Safety and Inspection Service. (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged. FSIS requires that meat and poultry establishments exporting products to foreign countries complete an export certificate. Meat and poultry products not marked with the mark of inspection and shipped from one official establishment to another for further processing must be transported under FSIS seal to prevent such unmarked product from entering into commerce. To track product shipped under seal, FSIS requires shipping establishments to complete a form that identifies the type, amount, and weight of the product. Foreign countries exporting meat and poultry products to the U.S. must establish eligibility for importation of product into the U.S., and annually certify that their inspection systems are "equivalent to" the U.S. inspection system. Meat and poultry products intended for import into the U.S. must be accompanied by a health certificate, signed by an official of the foreign government, stating that the products have been produced by certified foreign establishments.

Need and Use of the Information: FSIS will collect information to identify the type, amount, weight, destination, and originating country of the meat and poultry. FSIS will use the information to

verify that a meat or poultry product intended for import has been prepared in a plant certified to prepare product for export to the U.S. FSIS will use the information from the forms in its annual Report to Congress.

Description of Respondents: Business or other for-profit.

Number of Respondents: 5,533.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 127,838.

Food and Nutrition Service

Title: 7 CFR Part 245 Determining Eligibility for Free and Reduced Price Meals.

OMB Control Number: 0584–0026.

Summary of Collection: Under the National School Lunch Program (NSLP), each school year food authorities distribute applications for free and reduce price meals benefits to households of enrolled children. Households who want to receive free and reduced price meal benefits for their children complete the information required on the application and return the application to the school food authority. As specified in 7 CFR 245.6a, school food authorities must verify the eligibility information on a sample of the free and reduced price meal applications approved in any given school year. Several data sources including the eligibility verification performed by school districts indicate that a significant and increasing number of ineligible children are being certified for free and reduced price meals benefits. The Food and Nutrition Service (FNS) amended the reporting and recordkeeping requirements relating to the verification of applications for free and reduced price meal benefits. School food authorities will be required to report verification activity and results to their respective State agencies. The State agencies will summarize and report school food authority level data to FNS.

Need and Use of the Information: FNS will collect information using various forms to evaluate the results in the context of State and nationwide data. The data collection will result in improvement of FNS understanding of the operations of the eligibility determination and verification process in the targeting of monitoring and technical assistance efforts and resources on areas of households with the likelihood of problems. Without the information NSLP integrity is compromised, Federal and State education funds are being mistreated, and FNS Audit/Financial Statements are jeopardized.

Description of Respondents: Individuals or household; Not-for-profit institutions; State, Local, or Tribal Government.

Number of Respondents: 4,260,544.

Frequency of Responses: Recordkeeping; Reporting: Biennially; Annually; Other (triennially).

Total Burden Hours: 1,048,769.

Food and Nutrition Service

Title: Report of School Program Operations.

OMB Control Number: 0584–0280.

Summary of Collection: The National School Lunch Act, as amended, authorizes the Summer Food Service Program (SFSP) for Children, which is administered by the Food and Nutrition Service (FNS). The purpose of the SFSP is to provide nutrition meals to children from low-income areas during periods when schools are not in session. Information is gathered from state agencies and other organizations wishing to participate in the program to determine eligibility. If selected, additional reporting requirements apply to determine the amount of meals served and other program volume information. FNS uses a variety of forms to collect information.

Need and Use of the Information: FNS uses the information collected to determine an organization's eligibility, to monitor program performance for compliance and reimbursement purposes.

Description of Respondents: Individuals or household; Not-for-profit institutions; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 76,737.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly; Monthly.

Total Burden Hours: 328,068.

National Agricultural Statistics Service

Title: Floriculture Survey.

OMB Control Number: 0535–0093.

Summary of Collection: The primary function of the National Agricultural Statistics (NASS) is to prepare current official State and national estimates of crop and livestock production. Since 1985 Congress has provided funds to conduct an annual Commercial Floriculture Survey that provides basic data on this important and growing industry. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204. This statute specifies that "The Secretary of Agriculture shall procure and preserve all information concerning agriculture which can be obtain by the collection of statistics * * * and shall distribute them among agriculturists". The floriculture industry accounts for about 7 percent of agricultural cash receipts at the U.S. level. A survey is conducted in 36 states, which ensures 97 percent coverage of the U.S. value of production.

Need and Use of the Information: NASS will collect information to assess alternative agriculture opportunities. Data from the survey will provide statistics for Federal and State agencies to monitor the use of agricultural chemicals. If the information is not collected, data users could not keep abreast of changes.

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

Number of Respondents: 13,700.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 6,587.

Rural Utilities Service

Title: Request for Approval to Sell Capital Assets.

OMB Control Number: 0572–0020.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the U.S. Department of Agriculture (USDA). It makes mortgage loans and loan guarantees to finance electric, telecommunications, and water and waste facilities in rural areas. In addition to providing loans and loan guarantees, one of RUS' main objectives is to safeguard loan security until the loan is repaid. RUS manages loan programs in accordance with the Rural Electrification Act of 1936, 7 U.S.C. 901 *et. seq.*, as amended, (RE ACT) and as prescribed by Office of Management and Budget (OMB) Circular A–129, Policies for Federal Credit Programs and Non-Tax Receivables, which states that agencies must, based on a review of a loan application, determine that an applicant complies with statutory, regulatory, and administrative eligibility requirements for loan assistance.

Need and Use of the Information: RUS borrower will use form 369, Request for Approval to sell capital assets, to seek agency permission to sell some of its assets. The form is used to collect detailed information regarding the proposed sale of a portion of the borrower's systems. RUS will collect information to determine whether or not the agency should approve a sale and to keep track of what property exists to secure the loan. If the information in Form 369 is not collected when capital assets are sold, the capital assets securing the Government's loans could be liquidated and the Government's security either eliminated entirely or diluted to an undesirable level.

Description of Respondents: Not-for-profit institutions; Business or other for-profit.

Number of Respondents: 5.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 15.

Rural Utilities Service

Title: Lien Accommodations and Subordinations 7 CFR Part 1717, Subpart R and S.

OMB Control Number: 0572–0100.

Summary of Collection: The Rural Electrification Act (RE Act) of 1936, 7 U.S.C. 901 *et. seq.*, as amended, authorizes and empowers the Administrator of the Rural Utilities Service (RUS) to make loans in the several States and territories of the United States for rural electrification and the furnishing electric energy to persons in rural areas who are not receiving central station service. The RE Act also authorizes and empowers the Administrator of RUS to provide financial assistance to borrowers for purposes provided in the RE Act by accommodating or subordinating loans made by the National Rural Utilities Cooperative Finance Corporation, the Federal Financing Bank, and other lending agencies.

Need and Use of the Information: RUS will used the information to determine an applicant's eligibility for a lien accommodation or lien subordination under the RE Act; monitor the compliance of borrowers with debt covenants and regulatory requirements in order to protect loan security; and subsequently to granting the lien accommodation of lien subordination, administer each so as to minimize its cost to the Government. If the information were not collected, RUS would not be able to accomplish their statutory goals.

Description of Respondents: Not-for-profit institutions; Business or other for-profit.

Number of Respondents: 6.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 19.

Rural Utilities Service

Title: 7 CFR 1717 Subpart D, Mergers and Consolidations of Electric Borrowers.

OMB Control Number: 0572–0114.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the U.S. Department of Agriculture. It makes mortgage loans and loan guarantees to finance electric, telecommunications, water and waste and water facilities in rural areas. Loan programs are managed in accordance with the Rural Electrification Act (RE Act) of 1936, 7 U.S.C. 901 *et seq.*, as amended and as prescribed by the Office of Management and Budget (OMB) Circular A–129, Policies for Federal Credit Programs and Non-tax Receivable, states that agencies must base on a review of a loan application determine that an applicant complies with statutory, regulatory, and administrative eligibility requirements for loan assistance.

Need and Use of the Information: RUS will collect information to streamline procedures and allow borrowers the flexibility to meet new business challenges and opportunities. The information is necessary for RUS to conduct business with successor entity while protecting the security of Government loans and avoiding defaults and to grant merger approval when required.

Description of Respondents: Business or other for-profit.

Number of Respondents: 18.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 184.

Rural Housing Service

Title: 7 CFR 1944–N, "Housing Preservation GrantProgram".

OMB Control Number: 0575–0115.

Summary of Collection: The Rural Housing Service (RHS) is authorized to make grants to eligible applicants to provide repair and rehabilitation assistance so that very low and low-income rural residents can obtain adequate housing. Such assistance is made by grantees to very low and low-income persons, and to co-ops. Grant funds are used by grantees to make loans, grants, or other comparable assistance to eligible homeowners, rental unit owners, and co-ops for repair and rehabilitation of dwellings to bring them up to code or minimum property standards. These grants were established by Public Law 98–181, the Housing Urban Rural Recovery Act of 1983, which amended the Housing Act of 1949 (Pub. L. 93–383).

Need and Use of the Information: RHS will collect information to determine eligibility for a grant to justify its selection of the applicant for funding; to report program accomplishments and to justify and support expenditure of grant funds. RHS uses the information to determine if the grantee is complying with its grant agreement and to make decisions regarding continuing with modifying, or terminating grant assistance. If the information is not collected and presented to RHS, the Agency could not monitor the program or justify disbursement of grant funds.

Description of Respondents: Not-for-profit institutions; Business or other for-profit; Individuals or households; State, Local or Tribal Government

Number of Respondents: 2,050.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly.

Total Burden Hours: 10,814.

Agricultural Marketing Service

Title: Customer Service Survey for USDA—Donated FoodProducts.

OMB Control Number: 0581–0193.

Summary of Collection: The Agricultural Marketing Act of 1946 authorizes the Secretary of Agriculture to provide consumers with voluntary Federal meat grading and certification services that facilitate the marketing of meat and meat products. These services are provided under the authority of 7 CFR part 54—Meats, Prepared Meats, and Meat Products (Grading, Certification, and Standards). An annual customer service survey is used to gather information from its customers to determine the quality of service provided. Once an applicant request services, there is no way to determine the quality of service that is provided.

Need and Use of the Information: Agricultural Marketing Service will collect information to evaluate services and assist in planning and managing the program. The information from the survey is strictly voluntary and will be used to continually improve the services.

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

Number of Respondents: 450.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 32.

Food and Nutrition Service

Title: Food Stamp Program—Store Applications.

OMB Control Number: 0584–0008.

Summary of Collection: Section 9(a) of the Food Stamp Act of 1977 as amended, (7 U.S.C. 2011 *et seq.*) requires retail food stores to submit applications to the Food and Nutrition Service (FNS) for approval prior to participating in the Food Stamp Program. FNS field offices review retailer applications to ensure that the store is eligible and then authorize or deny a store to accept and redeem Food Stamp Program benefits. The need to collect information is established under the Act to determine the eligibility of retail food stores, wholesale food concerns, and food service organizations applying for authorization to accept and

redeem food stamp benefits, to monitor these firms for continued eligibility, to sanction stores for non-compliance with the Act, and for program management. FNS will collect information using forms FNS–252, Food Stamp Program Application for Store, and FNS 252–2, Meal Service Application.

Need and Use of the Information: FNS will collect information to determine a firm's eligibility for participation in the Food Stamp Program, program administration, compliance monitoring, investigations, and for sanctioning stores found to be violating the program. FNS is also responsible for requiring updates to application information and reviewing that information to determine whether or not the retail food store, wholesale food concern, or food service organization continues to meet eligibility requirements. Owners Employer Identification Numbers (EIN) and Social Security Numbers (SSN) may be disclosed to and used by Federal agencies or instrumentalities that otherwise gave access to EINs and SSNs. FNS and other Federal Government agencies examine such information during compliance reviews, audit review, special studies or evaluation efforts.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Farms; Federal Government.

Number of Respondents: 34,888.

Frequency of Responses: Third party disclosure; Reporting: On occasion.

Total Burden Hours: 7,309.

Sondra Blakey,

Departmental Information Collection Clearance Officer.

[FR Doc. 03–12067 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–01–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest, Mystic Ranger District, South Dakota, Prairie Project Area Proposal and Analysis

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: This notice revises an earlier Notice of Intent to prepare an environmental impact statement on a proposal to implement multiple resource management actions within the Prairie Project Area as directed by the Black Hills National Forest Land and Resource Management Plan and National level initiatives and policy such as the National Fire Plan and the Healthy Forest Initiative. The Prairie Project Area covers about 29,000 acres of National Forest System land and about 6,300 acres of interspersed private land within the lower rapid Creek watershed directly west of Rapid City, South Dakota. Proposed actions include: *Promoting natural fuel breaks* (via vegetation treatment) to reduce potential for large-scale intense wildfire; *Reducing fuels* that currently exist and fuel created by vegetation treatment within the wildland-urban interface; *Improving wildlife habitat* to protect critical big game winter range and habitat for a variety of plant and animal species; Supporting the preceding actions using commercial and non-commercial *Vegetation treatments* on an estimated 11,900 acres to reduce the density of pine trees; *Providing a mix of motorized and non-motorized use* opportunities.

DATES: The draft environmental impact statement is expected to be available for public review by May 2003 and the final environmental impact statement is expected to be completed by September 2003.

ADDRESSES: Send written comments on the DEIS to Robert J. Thompson, District Ranger, Black Hills National Forest, Mystic Ranger District, 803 Soo San Drive, Rapid City, South Dakota 57702. Telephone Number (605) 343–1567. Email: *mailroom__r2__blackhills@fs.fed.us.* With "Prairie" as subject.

FOR FURTHER INFORMATION CONTACT: Phill Grumstrup, Project Coordinator, Black Hills National Forest, Mystic Ranger District, at above address, phone (605) 343–1567.

SUPPLEMENTARY INFORMATION:

This revised Notice of Intent updates the original NOI which appeared Friday, July 12, 2002, in the **Federal Register** (67 FR pg. 46165). The actions proposed are in response to management direction provided by the Black Hills National Forest Land and Resource Management Plan (Forest Plan) and National-level initiatives and policy cited in the summary above. The site specific actions are proposed to reduce the potential for catastrophic wildfire in this ponderosa pine-dominated urban-interface setting. The project area lies along the east side of the Black Hills National Forest and directly west of Rapid City, South Dakota. Issues include: Fire and fuels hazard in the wildland-urban interface; support and opposition to vegetation treatment such as timber harvest; impacts of vegetation treatment and multiple forest uses on wildlife habitat; conflicting motorized and non-motorized use and travel management issues; maintaining and improving developed and dispersed recreation opportunities.

Purpose and Need for Action

The purpose of and need for the actions proposed in the Prairie Project is to: Reduce the potential for large-scale intense wildfire, reduce fuel loads and assure access for fire protection; protect big game winter range and provide habitat for a variety of plant and animal species; and provide for a variety of recreation opportunities including motorized and non-motorized uses while moving toward or meeting related Forest Plan Goals and Objectives, consistent with Forest Plan Standards and Guidelines.

Proposed Action

This revised NOI identifies the changes made to the proposed action since the original NOI was published. Adjustments to the proposed acres are the result of strong public feedback asking the agency to be aggressive with fuels reduction and requesting that vegetative treatments be expanded to areas not initially covered in the proposal. Expanding the treatments is necessary to efficiently reduce the potential for catastrophic wildfire to communities at risk in this wildland-urban interface area. Specific adjustments to the proposed action are described below. Proposed actions include the following:

- There is no change in the range of activities and treatments proposed. The treatment acres relative to fuel breaks and thinning of ponderosa pine, and prescribed burning have increased.
- Reduce the potential for large-scale, intense wildfire by expanding the area treated to reduce the density of pine from the initially proposed 8,000 acres to about 11,900 acres. This may be done by using commercial timber harvest to thin out commercial size trees and using other methods to thin small, non-commercial size trees, removing conifers from hardwood stands such as aspen, bur oak and birch and by expanding and/or creating meadows. Thinning trees will reduce the potential for spreading crown fires by providing fuels breaks, lessening the risk from insects and disease, and by improving stand growth and vigor. Wood fiber will be provided to the local economy as a by-product of these actions.
- Reduce the amount of fuel that currently exists and fuel created by vegetation treatment activities. Treatment could include lopping, chipping, crushing, piling and burning; construction of up to 30 miles of

constructed fuel breaks adjacent to private property, particularly those properties with houses and subdivisions; and increased prescribed burning of 4,000 acres to about 7,500 acres in order to have a greater impact on reducing fuels and the threat of wildfire.

- Manage big game winter range by providing openings for forage and protecting game animals during the critical winter period over a large portion of the area by expanding area closures to off-road motorized use seasonally or year-round.
- Provide a mix of motorized and non-motorized opportunities in the area by designating some areas for off-road ATV/4-wheeler use and other areas for non-motorized uses such as hiking, mountain biking and walk-in hunting.
- It is anticipated that one or more Forest Plan Amendments may be necessary to implement the proposed action or action alternatives.

Responsible Official

The Responsible Official for this decision will be John C. Twiss, Forest Supervisor, Black Hills National Forest, 25041 North Hwy. 16, Custer, SD 57730.

Nature of Decision To Be Made

The decision to be made is whether or not to implement the proposed action or alternatives at this time.

Scoping Process

Comments and input regarding the proposal have been received from the public and other groups and agencies during the 30-day (plus) public comment period that took place in July and August 2002. Response to the draft EIS will be sought from the interested public beginning in May 2003.

Comment Requested

This revised notice of intent simply identifies the adjustment and refinement of the original proposed action in response to public comment and feedback. There will be no additional scoping on this revised NOI. The next opportunity to comment will be on the Draft EIS. Comments on the DEIS will be requested during the 45 day comment period following the Notice of Availability, anticipated to be published in the **Federal Register** in May 2003 (*See* discussion below).

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement is being prepared for comment. The comment period on the draft environmental impact statement will be for 45 days from the date the Environmental Protection Agency publishes the Notice of Availability in the **Federal Register** in May 2003. The Forest Service believes, at this stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: May 12, 2003.

William G. Schleining,

Acting Forest Supervisor.

[FR Doc. 03–12235 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Sunken Moose Project; Chequamegon-Nicolet National Forest, Bayfield County, WI

AGENCY: Forest Service, USDA.

ACTION: Revised notice, intent to prepare an environmental impact statement.

SUMMARY: The Forest Service proposes to implement land management activities consistent with direction in the 1986 Chequamegon National Forest Land and Resource Management Plan. Activities are proposed on National Forest in an area called "Sunken Moose." This notice revises the "responsible official" and updates expected statement dates.

DATES: The draft environmental impact statement is expected May 2003 and the final environmental impact statement is expected September 2003.

Responsible Official: This Notice revises the responsible official from Washburn District Ranger to: Anne F. Archie, Forest Supervisor, Chequamegon-Nicolet National Forest, Park Falls, Wisconsin.

ADDRESSES: Send written comments to Anne F. Archie, Forest Supervisor, Chequamegon-Nicolet National Forest, 1170 4th Avenue S, Park Falls, WI 54552.

FOR FURTHER INFORMATION CONTACT: Ray Kiewit, Project Leader, Washburn Ranger District, P.O. Box 578, Washburn, WI 54891 (phone 715/373–2667; or visit Sunken Moose Web site at *www.fs.fed.us/r9,cnnf/natres/eis/wash/sunken_moose/index.html*).

SUPPLEMENTARY INFORMATION: The original notice of intent to prepare the Sunken Moose environmental impact statement was published in the **Federal Register** on April 24, 2001 (Vol. 66, No. 79, page 20625, Tuesday, April 24, 2001/Notices). A revised notice of intent was published in the **Federal Register** on April 16, 2002 (Vol. 67, No. 73, Tuesday, April 16, 2002/Notices). The April 16, 2002 revision modified the purpose and need of the proposal.

Dated: May 8, 2003.

Anne F. Archie,

Forest Supervisor, Chequamegon-Nicolet National Forest; Park Falls, WI 54552.

[FR Doc. 03–12233 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

McCaslin Project; Chequamegon-Nicolet National Forest, Oconto and Forest Counties, WI

AGENCY: Forest Service, USDA.

ACTION: Revised notice, intent to prepare an environmental impact statement.

SUMMARY: The Forest Service proposes to implement land management activities consistent with direction in the 1986 Nicolet National Forest Land and Resource Management Plan. Activities are proposed on National Forest in an area called "McCaslin ". This notice revises the "responsible official" and updates expected statement dates.

DATES: The final environmental impact statement is expected June 2003.

Responsible Official: This Notice revises the responsible official from Lakewood/Laona District Ranger to: Anne F. Archie, Forest Supervisor, Chequamegon-Nicolet National Forest, Park Falls, Wisconsin.

ADDRESSES: Send written comments to Anne F. Archie, Forest Supervisor, Chequamegon-Nicloet National Forest, 1170 4th Avenue S, Park Falls, WI 54552.

FOR FURTHER INFORMATION CONTACT: John Lampereur, Project Leader, Lakewood District Office, 15085 State Road 32, Lakewood, WI, 54138 (phone (715) 276–6333; or visit the McCaslin Web site at *http://www.fs.fed.us/r9/cnnf/natres/eis/wash/mccaslin/index.html*).

SUPPLEMENTARY INFORMATION: The original notice of intent to prepare the McCaslin environmental impact statement was published in the **Federal Register** on April 5, 2001 (Vol 66, No 66 page 18070, Thursday, April 5, 2001/ Notices).

Dated: May 8, 2003.

Anne F. Archie,

Forest Supervisor, Chequamegon-Nicolet National Forest.

[FR Doc. 03–12234 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Siuslaw Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Siuslaw Resource Advisory Committee will meet in Corvallis, OR. The purpose of the meeting is to determine how to spend Title II Payments to Counties Funds. The agenda includes: Review overhead assessments, FY02 and FY03 Projects, FY04 project review and selection; and a public forum.

DATES: The meeting will be held June 5, 2003 beginning at 10 a.m.

ADDRESSES: The meeting will be held at the Florence Convention & Performing Arts Center, 715 Quince Street, Florence, OR.

FOR FURTHER INFORMATION CONTACT: Linda Stanley, Community Development Specialist, Siuslaw National Forest, 541/750–7210 or write to Forest Supervisor, Siuslaw National Forest, PO Box 1148, Corvallis, OR 97339.

SUPPLEMENTARY INFORMATION: A public input period will begin at 3:15 p.m. The meeting is expected to adjourn at 4 p.m.

Dated: May 9, 2003.

Mary Zuschlag,

Natural Resource Staff Officer.

[FR Doc. 03–12232 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Del Norte County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Del Norte County Resource Advisory Committee (RAC) will meet on June 3, 2003 in Crescent City, California. The purpose of the meeting is to discuss the selection of Title II projects under Public Law 106–393, H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000, also called the "Payments to States" Act.

DATES: The meeting will be held on June 3, 2003 from 6 to 8:30 p.m.

ADDRESSES: The meeting will be held at the Del Norte County Unified School District Board Room, 301 West Washington, Crescent City, California.

FOR FURTHER INFORMATION CONTACT: Laura Chapman, Committee Coordinator, USDA, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501. Phone: (707) 441–3549. Email: *lchapman@fs.fed.us.*

SUPPLEMENTARY INFORMATION: RAC members will discuss and vote on potential Title II projects for fiscal year 2004. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: May 9, 2003.

S.E. 'Lou' Woltering,

Forest Supervisor.

[FR Doc. 03–12236 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Trinity County Resource Advisory Committee

AGENCY: USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: The Trinity County Resource Advisory Committee (RAC) will meet on June 30, 2003 in Weaverville, California. The purpose of the meeting is to discuss the selection of Title II projects under Public Law 106–393, H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000, also called the "Payments to States" Act.

DATES: The meeting will be held on June 30, 2003 from 6:30 to 8:30 p.m.

ADDRESSES: The meeting will be held at the Trinity County Office of Education, 201 Memorial Drive, Weaverville, California.

FOR FURTHER INFORMATION CONTACT: Laura Chapman, Committee Coordinator, USDA, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501. Phone: (707) 441–3549. Email: *1chapman@fs.fed.us.*

SUPPLEMENTARY INFORMATION: RAC members will discuss projects proposed for Title II funding in fiscal year 2004. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: May 9, 2003.

S.E. "Lou" Woltering,

Forest Supervisor.

[FR Doc. 03–12237 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and Deletions from Procurement List.

SUMMARY: This action adds to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List products previously furnished by such agencies.

EFFECTIVE DATE: June 15, 2003.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

Additions

On December 27, 2002, and March 21, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (67 FR 79045, and 68 FR 13895) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Accordingly, the following services are added to the Procurement List:

Services

Service Type/Location: Document Destruction, Aberdeen Proving Ground, Northeast Civilian Personnel Operation Center, Aberdeen Proving Ground, Maryland.
NPA: The Arc Northern Chesapeake Region, Incorporated, Aberdeen, Maryland.
Contract Activity: Northeast Civilian Personnel Operation Center, Aberdeen Proving Ground.

Service Type/Location: Janitorial/Custodial, U.S. Army Corps of Engineers, Saylorville Lake Project, Johnston, Iowa.
NPA: Goodwill Solutions, Inc., Des Moines, Iowa.
Contract Activity: U.S. Army Corps of Engineers—Contracting Div, Rock Island, Illinois.

Deletions

On March 14, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 F.R. 12340) of proposed deletions to the Procurement List. After consideration of the relevant matter presented, the committee has determined that the products listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may not result in any additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products deleted from the Procurement List.

Accordingly, the following products are deleted from the Procurement List:

Products

Product/NSN: Case, Plotting Board, 1220–01–055–6137.
NPA: North Bay Rehabilitation Services, Inc., Rohnert Park, California.
Contract Activity: Department of the Army, Rock Island, Illinois.
Product/NSN: Patient Utility Kit 6530–01–166–3499.
NPA: CCI Enterprises, Inc., Milwaukie, Oregon.
Contract Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–12288 Filed 5–15–03; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee is proposing to add to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received On or Before: June 15, 2003.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments of the proposed actions. If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Product/NSN: Supply Cup 7510–00–161–6211
NPA: The Lighthouse for the Blind in New

Orleans, New Orleans, Louisiana
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York
Product/NSN: Tape Refill w/American Flag on the core 7520–00–NIB–1579
NPA: The Lighthouse for the Blind in New Orleans, New Orleans, Louisiana
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York

Services

Service Type/Location: Custodial Service GSA Leased Space for the Internal Revenue Service, Bronx, New York
NPA: Goodwill Industries of Greater New York and Northern New Jersey, Inc. Astoria, New York
Contract Activity: GSA, Property Management Center, New York, New York
Service Type/Location: Janitorial/Custodial U.S. Army Reserve Center, Calle Lee, Los Alamitos, California
NPA: Lincoln Training Center and Rehabilitation Workshop, South El Monte, California
Contract Activity: 63rd Regional Support Command, Los Alamitos, California
Service Type/Location: Janitorial/Custodial U.S. Army Reserve Center, Garden Grove, Garden Grove, California
NPA: Lincoln Training Center and Rehabilitation Workshop, South El Monte, California
Contract Activity: 63rd Regional Support Command, Los Alamitos, California
Service Type/Location: Janitorial/Custodial U.S. Army Reserve Center, Eau Claire, Wisconsin
NPA: L.E. Phillips Career Development Center, Inc., Eau Claire, Wisconsin
Contract Activity: Headquarters, 88th Regional Support Command, Fort Snelling, Minnesota
Service Type/Location: Janitorial/Custodial U.S. Army Reserve Center, Fairmont, West Virginia
U.S. Army Reserve Center, Grafton, West Virginia
U.S. Army Reserve Center, New Martinsville, West Virginia
NPA: PACE Training and Evaluation Center, Inc., Star City, West Virginia
Contract Activity: 99th Regional Support Command, Coraopolis, Pennsylvania
Service Type/Location: Janitorial/Custodial U.S. Army Reserve Center, Walker, Michigan
NPA: Hope Network Services Corporation, Grand Rapids, Michigan
Contract Activity: Headquarters, 88th Regional Support Command, Fort Snelling, Minnesota
Service Type/Location: Receiving, Shipping, Handling & Custodial Service Brunswick Naval Air Station, Topsham, Maine
NPA: Pathways, Inc., Auburn, Maine
Contract Activity: Defense Commissary Agency (DeCA), Ft. Lee, Virginia

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–12289 Filed 5–15–03; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

[I.D. 051303A]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).
Title: Groundfish Tagging Program.
Form Number(s): None.
OMB Approval Number: 0648–0276.
Type of Request: Regular submission.
Burden Hours: 98.
Number of Respondents: 420.
Average Hours Per Response: 5 minutes for a regular tag and 20 minutes for an electronic tag.
Needs and Uses: The Groundfish Tagging Program provides scientists with information necessary for the effective conservation, management, and scientific understanding of the groundfish fishery off Alaska and the Pacific Northwest. Persons recovering tagged fish are requested to supply certain information about the recovery - date of catch, location, tag number, etc. Scientists use such information to analyze distribution of fish, their movements, and other important parameters, and use results in population assessment models and to develop allocation systems.
Affected Public: Business or other for-profit organizations, individuals or households.
Frequency: On occasion.
Respondent's Obligation: Voluntary.
OMB Desk Officer: David Rostker, (202) 395–3897.Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: May 8, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 03–12316 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 030505114–3114–01]

Best Practices for Exporters/Re-Exporters and Trade Facilitation/ Freight Forwarding Companies Regarding the Transit, Transshipment, and Reexport of Dual-Use Items

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of Inquiry.

SUMMARY: The Bureau of Industry and Security (BIS) is seeking public comments on the following proposed "Best Practices for Exporters/Re-exporters and Trade Facilitation/Freight Forwarding Companies Regarding the Transit, Transshipment, and Reexport of Dual-Use Items." BIS will consider all comments timely submitted before finalizing these Best Practices.

DATES: Comments must be received before June 16, 2003.

ADDRESSES: Comments may be submitted by e-mail to *rcupitt@bis.doc.gov*, by fax at (202) 482–2387, or on paper to Rick Cupitt, Office of the Under Secretary for Industry and Security, Bureau of Industry and Security, Room H3898, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Rick Cupitt, Office of the Under Secretary for Industry and Security at *rcupitt@bis.doc.gov* or (202) 482–1459.

SUPPLEMENTARY INFORMATION:

Background

This document sets forth "best practices" for exporters/re-exporters and trade facilitation/freight forwarding companies regarding the transit, transshipment, and re-export of dual-use items. The best practices identified herein represent the types of practices that many companies already observe, which is consistent with the broader view of the Department of Commerce (DOC) that implementing effective export compliance programs is an important component of responsible corporate citizenship and good business practices generally.

Overview

Dual-use export control laws are predicated on the security and reliability of supply chains. Both the licensing of export transactions in dual-use items and the allowance of license-excepted transactions in such items are premised on the assurance that such

items: (i) Will not be used for a prohibited end-use, (ii) will be in the possession of the person or organization contemplated as the end-user at the time of export, and (iii) will be utilized in the country contemplated as the country of end-use when the item is exported. The diversion of controlled goods or technologies—even inadvertently—from such contemplated end-use, end-user, or destination constitutes a serious threat to the efficacy of export control regimes. Such diversion undermines efforts to counter the proliferation of weapons of mass destruction, terrorism, and other threats to national and international security.

Global "transshipment hubs"—*i.e.*, countries or areas that function as major hubs for the trading and shipment of cargo—pose special risks of diversion. The concentrated presence of commercial infrastructure (*e.g.*, trading companies, brokerages, and free trade zones) that facilitates large volumes of transit, transshipment, import and re-export traffic through such points make transshipment hubs particularly vulnerable to the diversion of sensitive items to illicit purposes.

To combat this risk, the United States Government has implemented a number of initiatives to work with industry and foreign governments. DOC, for example, has launched the Transshipment Country Export Control Initiative (TECI). TECI seeks to channel existing and new export control practices toward countering the diversion of controlled items through global transshipment hubs. TECI has two principal prongs. Under the first prong, DOC seeks to improve cooperation and communication with relevant agencies in key transshipment hubs charged with administering export and trade control laws.[1] Such efforts are already underway with respect to a number of key transshipment countries and will be launched with respect to others in the near future.

Under TECI's second prong, DOC seeks to work with the private sector businesses and individuals involved in the transshipment of goods to enhance their ability to prevent the diversion of controlled items. In the course of this dialogue, a number of organizations have noted the absence of a clearly stated set of export control "best practices" tailored to the particular activities and circumstances of entities that facilitate the export or re-export of dual-use items to, from, or through transshipment hubs (such "Trade Facilitators/Freight Forwarders" include freight forwarders, brokers, air and marine cargo carriers, express shipment carriers, port operators, and port authorities) as well as entities that export dual-use items to transhipment hubs or that re-export such items from such hubs ("Exporters/Re-exporters"). The absence of a single organization or forum representing these many diverse businesses involved in transshipment makes it unlikely that such a set of best practices would be developed without DOC coordination.

Set forth below, for public comment, is a draft set of best practices for use by Trade Facilitators/Freight Forwarders and Exporters/Re-Exporters in guiding the export control compliance activities of companies involved in the transshipment, transit, and re-export of dual-use items. They are based on input provided at DOC-sponsored export control compliance seminars and other events, and on the observations of best practices by DOC staff and export control practitioners involved in both the administration and enforcement of export controls.

The publication of these best practices creates no legal obligation to comply with such practices on the part of any person. Compliance with these best practices creates no defense to liability for the violation of export control laws. However, demonstrated compliance with these best practices by a company will be considered an important mitigating factor in administrative prosecutions arising out of violations of the Export Administration Regulations by that company.

Best Practices for Exporters/Re-Exporters and Trade Facilitation/ Freight Forwarding Companies Regarding the Transit, Transshipment, and Reexport of Dual-Use Items

Purpose

To help industry, and in particular Trade Facilitators/Freight Forwarders and Exporters/Re-Exporters, contribute to a reduction in the illicit transshipment, transit, or re-export of dual-use items subject to U.S. and foreign export controls, and to facilitate legitimate global commerce by improving the capacity to distinguish between licit and illicit transactions.

Principles

1. Industry and government should work together to foster secure trade that reduces the risk of diversion of items subject to export controls.

2. Secure trade will reduce the diversion of dual-use items to prohibited end-uses, end-users, and destinations.

3. Secure trade will encourage the more expeditious movement of legitimate trade through borders and ports.

4. Industry can achieve secure trade objectives through appropriate export management practices.

Scope

The best practices identified herein:

1. Are designed Trade Facilitators/ Freight Forwarders and Exporters/Re-Exporters. The terms "Company" and "Companies", when used herein, refer to all of these types of entities;

2. Are designed to apply to transactions subject to the jurisdiction of the Department of Commerce; and

3. Complement the set of Best Practices for Exporters/Shippers found in the U.S. Department of Commerce Export Management System. Additional information on the Export Management System resides on the BIS Web site at *http://www.bis.doc.gov/ExportManagementSystems/Default.htm.*

Company Policy and Company Management

1. Each Company should develop a written policy against allowing its exports or services to contribute to terrorism or programs of proliferation concern.

2. Each Company should identify one person, who reports to the Company's Chief Executive Officer, General Counsel, or other senior management official (but not to a sales or marketing official), as the ultimate party responsible for oversight of the Company's export control compliance program.

3. Each Company should create an export control compliance program. Companies should integrate this compliance program into its overall regulatory compliance, security, and ethics programs.

4. Each Company should ensure that relevant Company personnel receive regular training in export control compliance responsibilities, and should consider offering to its employees incentives for compliance (and disincentives for noncompliance) with their export control responsibilities.

5. Exporters/Re-Exporters should seek to utilize only those Trade Facilitators/ Freight Forwarders that also observe these best practices.

Compliance Activities: General

6. An Exporter/Re-Exporter should classify each of its products according

[1] A number of U.S. Government agencies, including the DOC, also work with the governments of those hubs to strengthen their indigenous export control regimes, including conducting technical assistance activities as part of the Export Control and Related Border Security Assistance (EXBS) Program managed by the U.S. Department of State.

the requirements of the Export Administration Regulations (EAR), 15 CFR Parts 730–774 (2003), and should communicate the appropriate Export Control Classification Number (ECCN) or other classification information for each export to the Trade Facilitator/ Freight Forwarder and the end-user involved in that export (even if the shipment is made under an EAR License Exception). Each Company involved in the transaction should also maintain a record of such classification for every export.

7. A Company should screen all parties to the transaction against all relevant lists (such as the Denied Persons List, Unverified List, Entities List, and lists of U.S. Government-sanctioned parties), and should maintain a record of such screening.

8. A Company should screen all exports/re-exports against a list of embargoed destinations, and should maintain a record of such screening.

Compliance Activities: Transshipment Hub [2]-Specific

9. With respect to transactions to, from, or through transshipment hubs, Exporters/Re-Exporters should take appropriate steps to know who the end-user is and to determine whether the item will be re-exported or incorporated in an item to be re-exported. An Exporter/Re-Exporter of a dual-use item under license should inform the end-user, distributor, or other appropriate recipient of the item of the license terms and conditions for such export.

10. With respect to transactions to, from, or through transshipment hubs, Companies should have in place compliance and/or business procedures to be immediately responsive to theft or unauthorized delivery. This include procedures—including documented confirmation—to ensure that the item exported has reached the proper end-user.

11. With respect to transactions to, from, or through transshipment hubs, Companies should pay heightened attention to the Red Flag Indicators on the BIS Web site (*see http://www.bis.doc.gov/Enforcement/redflags.htm*) and in the "Know Your Customer Guidance" set forth in Supplement 3 to part 732 of the EAR.

Responding to Suspicious Transactions

12. When a Company encounters a suspicious transaction, it should halt the shipment and consult with its export control compliance specialist. If the transaction is determined to involve a potential or actual violation of the EAR, the Company should contact BIS or another U.S. law enforcement agency immediately and maintain all relevant records.

Request for Comments

Parties submitting comments are asked to be as specific as possible. BIS encourages interested persons who wish to comment to do so at the earliest possible time. The period for submission of comments will close June 16, 2003. BIS will consider comments on any aspect or consequence of any part or all of this proposal. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. BIS will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting them and will not consider them in developing any final "Best Practices" document that it may publish. All comments on this proposal will be a matter of public record and will be available for public inspection and copying. All comments must be submitted in writing (including facsimile or e-mail).

The public record concerning these comments will be maintained in the Bureau of Industry and Security, Office of Administration, U.S. Department of Commerce, Room 6883, 14th and Constitution Avenue, NW., Washington, DC 20230; (202) 482–0637. This component does not maintain a separate public inspection facility. Requesters should first view BIS's FOIA website (which can be reached through *http://www.bis.doc.gov/foia*). If the records sought cannot be located at this site, or if the requester does not have access to a computer, please call the phone number above for assistance.

Kenneth I. Juster,

Under Secretary for Industry and Security.

[FR Doc. 03–12265 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–33–P

[2] DOC's TECI has focused its efforts on the following transshipment hubs: Cyprus, Hong Kong, Malaysia, Malta, Panama, Singapore, Taiwan, Thailand, and the United Arab Emirates.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 030509121–3121–01]

Addition of Persons to Unverified List—Guidance as to "Red Flags" Under Supplement No. 3 to 15 CFR Part 732

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice.

SUMMARY: On June 14, 2002, the Bureau of Industry and Security ("BIS") published a notice in the **Federal Register** that set forth a list of persons in foreign countries who were parties to past export transactions where pre-license checks ("PLC") or post-shipment verifications ("PSV") could not be conducted for reasons outside the control of the U.S. Government ("Unverified List"). This notice also advised exporters that the involvement of a listed person as a party to a proposed transaction constitutes a "red flag" as described in the guidance set forth in Supplement No. 3 to 15 CFR part 732, requiring heightened scrutiny by the exporter before proceeding with such a transaction. The notice also stated that, when warranted, BIS would add persons to the Unverified List. This notice adds Lucktrade International PTE Ltd. and Peluang Teguh which are located in Singapore, and Lucktrade International which is located in Hong Kong to the Unverified List.

DATES: This notice is effective May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Thomas W. Andrukonis, Office of Enforcement Analysis, Bureau of Industry and Security, Telephone: (202) 482–4255.

SUPPLEMENTARY INFORMATION: In administering export controls under the Export Administration Regulations (15 CFR parts 730 to 774) ("EAR"), BIS carries out a number of preventive enforcement activities with respect to individual export transactions. Such activities are intended to assess diversion risks, identify potential violations, verify end-uses, and determine the suitability of end-users to receive U.S. commodities or technology. In carrying out these activities, BIS officials, or officials of other federal agencies acting on BIS's behalf, selectively conduct PLCs to verify the bona fides of the transaction and the suitability of the end-user or ultimate consignee. In addition, such officials sometimes carry out PSVs to ensure that U.S. exports have actually been

delivered to the authorized end-user, are being used in a manner consistent with the terms of a license or license exception, and are otherwise consistent with the EAR.

In certain instances BIS officials, or other federal officials acting on BIS's behalf, have been unable to perform a PLC or PSV with respect to certain export control transactions for reasons outside the control of the U.S. Government (including a lack of cooperation by the host government authority, the end-user, or the ultimate consignee). In a notice issued on June 14, 2002 (67 FR 40910), BIS set forth an Unverified List of certain foreign end-users and consignees involved in such transactions.

The June 14 notice also advised exporters that participation of a person on the Unverified List in a proposed transaction will be considered by BIS to raise a "red flag" under the "Know Your Customer" guidance set forth in Supplement No. 3 to 15 CFR part 732 of the EAR. Under that guidance, whenever there is a "red flag," exporters have an affirmative duty to inquire, verify, or otherwise substantiate the proposed transaction to satisfy themselves that the transaction does not involve a proliferation activity prohibited in 15 CFR part 744, and does not violate the EAR.

The **Federal Register** notice further stated that BIS may periodically add persons to the Unverified List based on the criteria set forth above, and remove names of persons from the Unverified List when warranted. BIS has attempted, and was unable to conduct, a PSV in transactions involving the following persons:

Lucktrade International PTE Ltd., 35 Tannery Road #01–07 Tannery Block, Ruby Industrial Complex, Singapore 347740.

Peluag Teguh, 203 Henderson Road #09–05H, Henderson Industrial Park, Singapore.

Lucktrade International, P.O. Box 91150, Tsim Sha Tsui, Hong Kong.

This notice advises exporters that Lucktrade International PTE Ltd.; Pelaug Teguh; and Lucktrade International are added to the Unverified List, and a "red flag" now exists for transactions involving these persons due to their inclusion on the Unverified List. As a result, exporters have an affirmative duty to inquire, verify, or otherwise substantiate the proposed transaction to satisfy themselves that the transaction does not involve a proliferation activity prohibited in 15 CFR part 744, and does not violate the EAR.

The Unverified List, as modified by this notice, is set forth below.

Dated: May 12, 2003.

Thomas W. Andrukonis,

Acting Assistant Secretary for Export Enforcement.

Unverified List

(as of May 16, 2003)

The Unverified List includes names and countries of foreign persons who in the past were parties to a transaction with respect to which BIS could not conduct a pre-license check ("PLC") or a post-shipment verification ("PSV") for reasons outside of the U.S. Government's control. Any transaction to which a listed person is a party will be deemed by BIS to raise a "red flag" with respect to such transaction within the meaning of the guidance set forth in Supplement No. 3 to 15 CFR part 732. The "red flag" applies to the person on the Unverified List regardless of where the person is located in the country included on the list.

Name	Country	Last known address
Lucktrade International	Hong Kong Special Administrative Region.	P.O. Box 91150, Tsim Sha Tsui, Hong Kong.
Brilliant Intervest	Malaysia	14–1, Persian 65C, Jalan Pahang Barat, Kuala Lumpur, 53000.
Dee Communications M SDN, BHD	Malaysia	G5/G6, Ground Floor, Jin Gereja, Johor Bahru.
Shaanxi Telecom Measuring Station.	People's Republic of China	39 Jixiang Road, Yanta District Xian, Shaanxi.
Yunma Aircraft Mfg.	People's Republic of China	Yaopu Anshun, Guizhou.
Civil Airport Construction Corporation.	People's Republic of China	111 Bei Sihuan Str. East Chao Yang District, Beijing.
Power Test & Research Institute of Guangzhou..	People's Republic of China	No. 38 East Huangshi Road, Guangzhou.
Beijing San Zhong Electronic Equipment Engineer Co., Ltd.	People's Republic of China	Hai Dian Fu Yuau Men Hao 1 Hao, Beijing.
Huabei Petroleum Administration Bureau Logging Company.	People's Republic of China	South Yanshan Road Ren Qiu City, Hebei.
Daqing Production Logging Institute	People's Republic of China	No. 3 Fengshou Village Sartu District Daqing City, Heilongjiang.
Peluang Teguh	Singapore	203 Henderson Road, #09–05H, Henderson Industrial Park, Singapore.
Lucktrade International PTE Ltd	Singapore	35 Tannery Road, #01–07 Tannery Block, Ruby Industrial Complex, Singapore 347740.
Arrow Electronics Industries	United Arab Emirates	204 Arbift Tower, Benyas Road, Dubai.

[FR Doc. 03–12266 Filed 5–15–03; 8:45 am]
BILLING CODE 3510–33–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–829]

Stainless Steel Wire Rod from South Korea: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Karine Gziryan, Jeffrey Pedersen or Crystal Scherr Crittenden, AD/CVD Enforcement, Office 4, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–4081, (202) 482–2747, or (202) 482–0989, respectively.

SUPPLEMENTARY INFORMATION:

TIME LIMITS:

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department of Commerce (the Department) to make a preliminary determination within 245 days after the last day of the anniversary month of an order or finding for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published. However, if it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the 245–day time limit for the preliminary determination to a maximum of 365 days and the time limit for the final determination to 180 days (or 300 days if the Department does not extend the time limit for the preliminary determination) from the date of publication of the preliminary determination.

Background

On October 24, 2002, the Department published a notice of initiation of administrative review of the antidumping duty order on stainless steel wire rod from South Korea, covering the period September 1, 2001, through August 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 FR 65336 (October 24, 2002). The preliminary results are currently due no later than June 2, 2003.

Extension of Time Limit for Preliminary Results of Review

We determine that it is not practicable to complete the preliminary results of this review within the original time limit. Therefore, the Department is extending the time limit for completion of the preliminary results until no later than September 30, 2003. *See* Decision Memorandum from Thomas F. Futtner to Holly A. Kuga, dated concurrently with this notice, which is on file in the Central Records Unit, Room B–099 of the Department's main building. We intend to issue the final results no later than 120 days after the publication of the preliminary results notice.

This extension is in accordance with section 751(a)(3)(A) of the Act.

Dated: May 9, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration, Group II.

[FR Doc. 03–12312 Filed 5–15–03; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Applications for Duty-Free Entry of Scientific Instruments

Pursuant to section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 03–021.

Applicant: University of Colorado, JILA, UCB 440, JILA Building, Room S/175, Boulder, CO 80309.

Instrument: YAG Laser and Intensity Noise Eater.

Manufacturer: InnoLight GmbH, Germany.

Intended Use: The instrument is intended to be used to study gases of the alkalis potassium and rubidium. Experiments to be conducted will involve optically trapping and manipulating the ultracold gases using light from the laser for understanding metals, insulators, and superconductors and the phase transitions between them.

Application accepted by Commissioner of Customs: April 23, 2003.

Docket Number: 03–022.

Applicant: University of California, Berkeley, Physics Department, 366 Le Conte Hall, #7300, Berkeley, CA 94720–7300.

Instrument: Low Temperature UHV Scanning Tunneling Microscope.

Manufacturer: Omicron Vakuumphysik GmbH, Germany.

Intended Use: The instrument is intended to be used to study magnetic nanostructures at metal and semiconductor surfaces. One of the main goals is to determine if magnetic nanostructures are suitable for use as "quantum bits" in a quantum computer (qubits) and if it is possible to detect and control the quantum states of a single spin center, and determine its level of quantum decoherence.

Application accepted by Commissioner of Customs: April 29, 2003.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 03–12310 Filed 5–15–03; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Wisconsin—Eau Claire; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 03–016.

Applicant: University of Wisconsin—Eau Claire, Eau Claire, WI 54701.

Instrument: Automatic Fusion Machine, Model AutoFluxer 4.

Manufacturer: Breitlander Eichproben und Labormaterial GmbH, Germany.

Intended Use: See notice at 68 FR 16472, April 4, 2003.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign

instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument provides fused glass beads which presents a homogeneous smooth surface to an x-ray fluorescence spectrometer by melting whole rock powder samples under computer control at temperatures to 1600° C. The Los Alamos National Laboratory advised May 2, 2003 that (1) this capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 03–12311 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–357–815]

Notice of Intent to Rescind Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Argentina

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

ACTION: Notice of Intent to Rescind Countervailing Duty Administrative Review.

SUMMARY: On October 24, 2002, the Department of Commerce (the Department) initiated an administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products from Argentina (hot-rolled products), covering the period January 1, 2001 through December 31, 2001, and one manufacturer/exporter of the subject merchandise, Siderar Sociedad Anomina Industrial & Commercial (Siderar). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 FR 65336 (October 24, 2002). The Department intends to rescind this review due to Siderar's lack of shipments during the period of review.

EFFECTIVE DATE: May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Cindy Robinson, AD/CVD Enforcement, Office 6, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–3692 or (202) 482–3797, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 2002, the Department received a letter from Siderar requesting an administrative review of the countervailing order on hot-rolled products from Argentina. On October 24, 2002, the Department initiated an administrative review of this order for the period January 1, 2001 through December 31, 2001 (period of review). On November 19, 2002, the Department held an *ex parte* meeting with representatives of the Government of Argentina and Siderar. *See* Memorandum to the File from Melissa G. Skinner, Director dated November 20, 2002, which is on file in the Central Records Unit (CRU), Room B-099, Main Building of the Department of Commerce. At that meeting, Siderar informed the Department that it did not have any shipments of the subject merchandise to the United States during the period of review (POR). On January 22, 2003, the Department conducted a customs query to ascertain whether there were any entries, exports, or sales of the subject merchandise from Siderar during the POR; the query showed that there were none. *See* Memorandum to The File from Team regarding Customs Query dated May 8, 2003, the public version of which is on file in the CRU.

On February 11, 2003, petitioners requested that the Department rescind the initiation and terminate the administrative review based on Siderar's statement that it had no shipments. *See* letter from Dewey Ballantine LLP on behalf of domestic producers Bethlehem Steel Corporation, United States Steel Corporation and National Steel Corp., on file in the CRU. On March 7, 2003, Siderar submitted a letter responding to petitioners' comments and acknowledging that it had no shipments of subject merchandise to the United States during the POR. *See* letter from White & Case on behalf of Siderar, on file in the CRU.

Scope of the Review

Imports covered by this review are shipments of certain hot-rolled carbon-quality steel from Argentina: (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a nominal or actual thickness of not less than 4 mm, which are cut-to-length (not in coils) and without patterns in relief), of iron or non-alloy-quality steel; and (2) flat-rolled products, hot-rolled, of a nominal or actual thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are cut-to-length (not in coils). Steel products included in the scope are of rectangular, square, circular or other shape and of rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been "worked after rolling")--for example, products which have been beveled or rounded at the edges. Steel products that meet the noted physical characteristics that are painted, varnished or coated with plastic or other non-metallic substances are included within this scope. Also, specifically included in the scope are high strength, low alloy (HSLA) steels. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Steel products included in this scope, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is two percent or less, by weight; and (3) none of the elements listed below is equal to or exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent zirconium. All products that meet the written physical description, and in which the chemistry quantities do not equal or exceed any one of the levels listed above, are within the scope unless otherwise specifically excluded. The following products are specifically excluded from the scope: (1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances; (2) SAE grades (formerly AISI grades) of series 2300 and above; (3) products made to ASTM A710 and A736 or their proprietary equivalents; (4) abrasion-resistant steels (*i.e.*, USS AR 400, USS AR 500); (5) products made to ASTM A202, A225, A514 grade S, A517 grade S, or their proprietary equivalents; (6) ball bearing

steels; (7) tool steels; and (8) silicon manganese steel or silicon electric steel.

The products covered by this review are provided for under the following HTSUS item numbers: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, 7226.99.0000.

Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this proceeding is dispositive.

Rescission of Review

In their February 11, 2003, request that the Department rescind the review, petitioners asserted that the Department's consistent practice has been to rescind an administrative review upon learning that no shipments of subject merchandise occurred during the relevant POR. They cited to several notices in which the Department rescinded antidumping administrative reviews on the basis of lack of shipments. Petitioners also cited to the preliminary results of *Carbon Steel Wire Rod from New Zealand*, 56 FR 33253 (July 19, 1991) and the preliminary results of *Brass Sheet and Strip from Brazil*, 56 FR 33252 (July 19, 1991) as the only two instances they could locate where the Department decided to complete administrative reviews of countervailing duty (CVD) orders for a POR during which no shipments of the subject merchandise occurred. However, they asserted that both of these reviews preceded the Uruguay Round Agreements Act (URAA) and involved a program-wide change in which the subsidy programs to be reviewed had been terminated. Given the post-URAA regulations and practice and the lack of a program-wide change, petitioners argued that the Department should promptly rescind the instant review.

On March 7, 2003, Siderar confirmed that it did not have any shipments of subject merchandise to the United States during the POR. However, Siderar submitted that the Department has the discretion to conduct an administrative review in this case for the purpose of adjusting Siderar's deposit rate. Siderar stated that it requested this administrative review for the sole purpose of having the Department's determination in the recently completed investigation of cold rolled products from Argentina[1] extended to this case and having the CVD deposit adjusted accordingly. Siderar stated that the factual circumstances of this case are clear and not in dispute.

In support of its position that the Department has the discretion to conduct a CVD administrative review for the purpose of adjusting the cash deposit rate even in the absence of shipments during the review period, Siderar pointed out that the Department has done so in the past. Siderar cited *Carbon Steel Wire Rod From New Zealand*,[2] where a program-wide change involving the termination of two government programs took place, and to precedent.[3] Siderar asserted that, in that case, the Department concluded that Section 751 of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. § 1675 (a)(1)) authorizes it to conduct annual administrative reviews to determine the amount of any net countervailing subsidy and estimated duty to be deposited, even in the absence of entries, shipments, or exports. Siderar acknowledged that the issue in this review does not involve a "program-wide change." However, it argued that the Department's determination in Cold Rolled has the same effect as a program-wide change in that it removes the legal and factual basis for the collection of deposits at the rate previously established. See the letter from Siderar to the Department dated March 7, 2003, which is on file in the CRU.

We agree with petitioners that it has been the Department's practice to rescind administrative reviews when we find a lack of exports. *See Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From Germany: Notice of Termination of Countervailing Duty Administrative Review*, 64 FR 44489 (August 16, 1999), and *Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip From the Republic of Korea*, 68 FR 13267 (March 19, 2003).

In accordance with the Department's regulations, and consistent with its practice, the Department intends to rescind the administrative review of hot-rolled products from Argentina for the period January 1, 2001 to December 31, 2001 due to no shipments during the POR. *See* 19 CFR section 351.213(d)(3), which states in pertinent part: "The Secretary may rescind an administrative review under this section, in whole or only with respect to a particular exporter or producer, if during the POR, there were no entries, exports, or sales of the subject merchandise."

This notice is in accordance with section 751(a)(1) of the Act, and section 351.213(d) of the Department's regulations.

Dated: May 9, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 03–12313 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–DS–S

[1] *See Final Negative Countervoiling Duty Determinotion: Certoin Cold-Rolled Corbon Steel Flat Products From Argentino*, 67 FR 62106 (October 3, 2002) (*Cold Rolled*); Issues and Decision Memorandum of September 23, 2002 from Richard W. Moreland to Faryar Shirzad.

[2] *Carbon Steel Wire Rod From New Zealond: Finol Results of Countervoiling Duty Administrative Review (Carbon Steel Wire from New Zeolond)*, 56 FR 28863 (June 25, 1991).

[3] *See Certain Electrical Aluminum Redraw Rod from Venezuelo: Finol Results of Countervoiling Duty Administrative Review*, 56 FR at 14232 (April 8, 1991) ("where the Department Conducted a review and changed the case deposit rate as a result of a program-wide change despite no entries or exports") 56 FR at 28864.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 030429105–3105–01]

Announcing Draft Federal Information Processing Standard (FIPS) 199 on Standards for Security Categorization of Federal Information and Information Systems; and Request for Comments

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice; request for comments.

SUMMARY: Draft FIPS 199 defines requirements to be used by Federal agencies to categorize information and information systems, and to provide appropriate levels of information security according to a range of risk levels. This draft standard establishes three potential levels of risk (low, moderate, and high) for each of the security objectives of confidentiality, integrity, and availability. The levels of risk are based on what is known about the potential impact or harm. Harmful events can impact agency operations (including mission, functions, image or reputation), agency assets, or individuals (including privacy). The levels of risk consider both impact and threat, but are more heavily weighted toward impact. Federal information systems, which are often interconnected and interdependent, are vulnerable to a variety of threats (both malicious and unintentional) that could compromise the security of information and information systems.

NIST invites public comments on the Draft FIPS on Standards for Security Categorization of Federal Information

and Information Systems. After the comment period closes, NIST will analyze the comments, make appropriate changes to the document, and then propose the draft standard to the Secretary of Commerce for approval as FIPS PUB 199.

DATES: Comments on the Draft FIPS on Standards for Security Categorization of Federal Information and Information Systems must be received on or before August 14, 2003.

ADDRESSES: Written comments concerning the Draft FIPS on Standards for Security Categorization of Federal Information and Information Systems may be sent by regular mail to: Information Technology Laboratory, ATTN: Draft FIPS 199, Mail Stop 8930, 100 Bureau Drive, Stop 8930, National Institute of Standards and Technology, Gaithersburg, MD 20899–8930. Electronic comments should be sent to: *fips.comments@nist.gov*.

Comments received in response to this notice will be published electronically at: *http://csrc.nist.gov/publications/*.

Specifications: Specifications for the Draft FIPS on Standards for Security Categorization of Federal Information and Information Systems are available through the Computer Security Resource Center: *http://csrc.nist.gov/publications/*.

FOR FURTHER INFORMATION CONTACT: Dr. Ron S. Ross (301) 975–5390, National Institute of Standards and Technology, Attn: Computer Security Division 100 Bureau Drive (Mail Stop 8930), Gaithersburg, MD 20899–8930, Email: *rross@nist.gov*.

SUPPLEMENTARY INFORMATION: Under section 5131 of the Information Technology Management Reform Act of 1996 and sections 302–3 of the Federal Information Security Management Act of 2002 (Pub. L. 107–347), the Secretary of Commerce is authorized to approve standards and guidelines for Federal information systems and to make standards compulsory and binding for Federal agencies as necessary to improve the efficiency or security of Federal information systems. The National Institute of Standards and Technology is authorized to develop standards, guidelines, and associated methods and techniques for information systems, other than national security systems, to provide for adequate information security for agency operations and assets.

The Federal Information Security Management Act (FISMA) requires each Federal agency to develop, document, and implement an agency-wide information security program that will provide information security for the information and information systems supporting the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source.

To enable agencies to carry out this responsibility, the FISMA specifically tasked NIST to develop a standard to categorize information and information systems. In addition, NIST was tasked to develop guidelines recommending the types of information to be included in each category, and to develop minimum information security requirements (*i.e.*, management, operational, and technical security controls) for the information and information systems in each category.

In response to the mandate, NIST developed FIPS 199. Draft FIPS 199 defines requirements to be used by Federal agencies to categorize information and information systems, and to provide appropriate levels of information security according to a range of risk levels. This draft standard establishes three potential levels of risk (low, moderate, and high) for each of the security objectives of confidentiality, integrity, and availability. The levels of risk are based on what is known about the potential impact or harm. Harmful events can impact agency operations (including mission, functions, image or reputation), agency assets, or individuals (including privacy). The levels of risk consider both impact and threat, but are more heavily weighted toward impact. Federal information systems, which are often interconnected and interdependent, are vulnerable to a variety of threats (both malicious and unintentional) that could compromise the security of information and information systems.

This standard for categorizing information and information systems supports the implementation of a common framework that will promote the effective government-wide management and oversight of Federal agency information security programs. The common framework will facilitate the coordination of information security efforts throughout the civilian, national, security, and law enforcement communities, and will enable consistent reporting by agencies to the Office of Management and Budget (OMB) and Congress on the adequacy and effectiveness of information security policies, procedures, and practices.

NIST is in the process of developing guidance documents for the second and third tasks mandated by the FISMA and will make these documents available for public comment when they are finalized. For the second assigned task, NIST plans guidelines to help agencies identify, in a consistent manner, the types of information and information systems, (*e.g.*, privacy, medical, proprietary, financial, contractor sensitive, mission critical) appropriate for each category of information and information system. For the third task, NIST plans to develop standards that will describe the minimum sets of security controls for each defined category of information and information system.

Authority: Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Institute of Standards and Technology after approval by the Secretary of Commerce, pursuant to section 5131 of the Information Technology Management Reform Act of 1996 (Pub. L. 104–106), the Federal Information Security Management Act of 2002 (Pub. L. 107–347), and Appendix III to Office of Management and Budget Circular A–130.

Executive Order 12866: This notice has been determined to be not significant under Executive Order 12866.

Dated: May 9, 2003.

Karen H. Brown,

Deputy Director, NIST.

[FR Doc. 03–12319 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Judges Panel of the Malcolm Baldrige National Quality Award

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Judges Panel of the Malcolm Baldrige National Quality Award will meet Wednesday, June 4, 2003. The Judges Panel is composed of nine members prominent in the field of quality management and appointed by the Secretary of Commerce. The purpose of this meeting is to Review the 2003 Baldrige Award Cycle; Discussion of Senior Examiner Training for Site Visits and Final Judging Interaction; Judges' Survey of Applicants; and Judging Process Improvement for Final Judges' Meeting Preparation. The applications under review contain trade secrets and proprietary commercial information

submitted to the Government in confidence.

DATES: The meeting will convene June 4, 2003, at 11 a.m. and adjourn at 4:30 p.m. on June 4, 2003. The entire meeting will be closed.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Building 222, Red Training Room, Gaithersburg, Maryland 20899.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on December 3, 2002, that the meeting of the Judges Panel will be closed pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. 2, as amended by section 5(c) of the Government in the Sunshine Act, Pub. L. 94–409. The meeting, which involves examination of Award applicant data from U.S. companies and a discussion of this data as compared to the Award criteria in order to recommend Award recipients, may be closed to the public in accordance with section 552b(c)(4) of title 5, United States Code, because the meetings are likely to disclose trade secrets and commercial or financial information obtained from a person which is privileged or confidential.

Dated: May 9, 2003.

Karen H. Brown,

Deputy Director.

[FR Doc. 03–12317 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award Board of Overseers

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that there will be a meeting of the Board of Overseers of the Malcolm Baldrige National Quality Award on June 5, 2003. The Board of Overseers is composed of 11 members prominent in the field of quality management and appointed by the Secretary of Commerce, assembled to advise the Secretary of Commerce on the conduct of the Baldrige Award. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology with the members of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Discussions on Preparing for a Baldrige Non-Profit Category, Should We Guarantee Stage 2 Review to State Award Recipients?, Baldrige Program Metrics; Booz Allen CEO Study Status and Directions, and BNQP Hosin for 2004, a Program Update and Issues from June 4 Judges' Meeting. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, email address and phone number to Virginia Davis no later than Monday, June 2, 2003, and she will provide you with instructions for admittance. Ms. Davis' email address is *virginia.davis@nist.gov* and her phone number is 301/975–2361.

DATES: The meeting will convene June 5, 2003, at 8:30 a.m. and adjourn at 3 p.m. on June 5, 2003.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Administration Building. Lecture Room B, Gaithersburg, Maryland 20899. Please note admittance instructions under **SUMMARY** paragraph.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

Dated: May 9, 2003.

Karen H. Brown,

Deputy Director.

[FR Doc. 03–12318 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–13–P

COMMITTEE FOR THE IMPLEMENTATIONS OF TEXTILE AGREEMENTS

Establishment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textiles and Textile Products Produced or Manufactured in the Socialist Republic of Vietnam

May 12, 2003.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection establishing limits

EFFECTIVE DATE: May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection website at http://www.customs.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

Consultations on textiles were held with the Government of the Socialist Republic of Vietnam February 20-21 and April 9-18, 2003. On April 25, 2003, representatives of the United States and Vietnam initialed a bilateral textile agreement; this agreement will enter into force upon translation and signature. Pending translation and signature, and in order to carry out the WTO Agreement on Textiles and Clothing, the attached directive to the Commissioner of Customs and Border Protection imposes limits consistent with those provided for in the initialed bilateral textile agreement. These limits apply to goods exported on or after May 1, 2003.

These limits may be revised if Vietnam becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Vietnam.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 68 FR 1599, published on January 13, 2003).

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 12, 2003.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); and Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on May 16, 2003, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool

and man-made fiber textiles and textile products in the following categories, produced or manufactured in Vietnam and exported during the eight period beginning on May 1, 2003 and extending through December 31, 2003 in excess of the following levels of restraint:

Category	Restraint limit
200	200,000 kilograms.
301	453,333 kilograms.
332	666,667 dozen pairs.
333	24,000 dozen.
334/335	450,000 dozen.
338/339	9,333,333 dozen.
340/640	1,333,333 dozen.
341/641	508,465 dozen.
342/642	369,789 dozen.
345	200,000 dozen.
347/348	4,666,667 dozen.
351/651	321,333 dozen.
352/652	1,233,333 dozen.
359–C/659–C [1]	216,667 kilograms.
359-S/659-S [2]	350,000 kilograms.
434	10,800 dozen.
435	26,667 dozen.
440	1,667 dozen.
447	34,667 dozen.
448	21,333 dozen.
620	4,242,667 square meters.
632	333,333 dozen pairs.
638/639	847,333 dozen.
645/646	133,333 dozen.
647/648	1,315,545 dozen.

[1] Category 359-C: only HTS numbers 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010; Category 659-C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[2] Category 359-S: only HTS numbers 6112.39.0010, 6112.49.0010, 6211.11.8010, 6211.11.8020, 6211.12.8010 and 6211.12.8020; Category 659-S: only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

Textile products in the above categories exported to the United States prior to May 1, 2003 shall not be subject to this directive.

Textile products in the above categories which have been released from the custody of the Bureau of Customs and Border Protection under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1) prior to the effective date of this directive shall not be denied entry under this directive.

These limits may be revised if Vietnam becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Vietnam.

In carrying out the above directions, the Commissioner of Customs and Border Protection should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03–12314 Filed 5–15–03; 8:45 am]

BILLING CODE 3510–DR–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0150]

Federal Acquisition Regulation; Submission for OMB Review; Small Disadvantaged Business Procurement Credits

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0150).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning small business procurement credit programs. A request for public comments was published in the **Federal Register** at 68 FR 12685 on March 17, 2003. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 16, 2003.

ADDRESSES: Submit comments including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Rhonda Cundiff, Acquisition Policy Division, GSA, 501–0044.

SUPPLEMENTARY INFORMATION:

A. Purpose

This FAR requirement concerning small disadvantaged procurement credit programs implements the Department of Justice proposal to reform affirmative action in Federal procurement, which was designed to ensure compliance with the constitutional standards established by the Supreme Court. The credits include price evaluation factor targets and certifications.

B. Annual Reporting Burden

Number of Respondents: 20,340.

Responses Per Respondent: 8.97.

Total Responses: 183,257.

Average Burden Hours Per Response: 2.09.

Total Burden Hours: 383,007.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (MVA), Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0150, Small Disadvantaged Business Procurement Credit Programs, in all correspondence.

Dated: May 9, 2003.

Ralph J. Destefano,

Acting Director, Acquisition Policy Division.

[FR Doc. 03–12226 Filed 5–15–03; 8:45 am]

BILLING CODE 6820–EP–P

DELAWARE RIVER BASIN COMMISSION

Notice of Public Hearing; Proposal To Revise the Fee Schedule for the Review of Projects Under Section 3.8 and Article 10 of the Delaware River Basin Compact

AGENCY: Delaware River Basin Commission.

ACTION: Notice of public meeting.

SUMMARY: The Commission will hold a public hearing and solicit comment on proposed changes to the fee schedule for the review of projects under Section 3.8 and Article 10 of the Delaware River Basin Compact. The Commission instituted project review fees in 1972, in order to allocate to applicants a portion of the cost of reviewing water resource projects. The fees, which are paid to the

Commission at the time applications are filed, were increased only once, in 1991, and have not been revised since.

The substantive revisions include the following: Instituting filing fees for projects sponsored by political subdivisions of the basin states; for public projects costing less than $250,000, charging a fee of $250; for privately sponsored projects costing $250,000 or less, increasing the fee from $250 to $500; for projects costing from $250,001 to $10,000,000, increasing the fee from 0.1 to 0.2 percent of project cost; and for projects costing over $10,000,000, increasing the fee from 0.04 to 0.06 percent of project cost, not to exceed $50,000. In addition, the surcharge for any project resulting in an out-of-basin diversion is proposed to be increased from 50 percent to double the fee calculated in accordance with the foregoing. The method of calculating project costs is proposed to remain unchanged. New fees are proposed to be instituted for two types of actions: (1) A fee of $5,000 is proposed for a request for an emergency certificate under Section 2.3.9B of the Commission's Rules of Practice and Procedure to waive or amend a docket condition; and (2) a fee of $500 is proposed for the transfer of a docket upon a change of ownership as defined in Resolution No. 87–15. In all cases, if the fixed fee or fee calculated in accordance with the prescribed formulas is deemed by the executive director to be insufficient due to exceptional costs associated with Commission review, it is proposed that the Commission may charge the applicant 100 percent of all costs deemed by the executive director to be exceptional. The revised fee schedule is proposed to become effective on July 1, 2003 for all applications submitted on or after July 1, 2003.

DATES: The public hearing will be held on June 26, 2003 during the Commission's regular business meeting, which will begin at 1 p.m. The hearing will continue until all those present who wish to testify are afforded an opportunity to do so. Persons wishing to testify are asked to register in advance with the Commission Secretary, by phoning 609–883–9500 x203. Written comments will be accepted through the close of the public hearing.

ADDRESSES: The public hearing will be held at the Commission's offices at 25 State Police Drive in West Trenton, New Jersey. Directions are posted on the Commission's Web site at *http://www.drbc.net*. Written comments may be submitted electronically to *fees@drbc.state.nj.us*, with a subject line reading "FEES," or in hard copy to the Commission Secretary, DRBC, PO Box 7360, West Trenton, NJ 08628–0360. The full name, street or post office address, and telephone number for the entity or individual submitting the comment must appear on all submissions.

FOR FURTHER INFORMATION CONTACT: Please contact Pamela M. Bush at 609–883–9500, ext. 203 with questions about the hearing process and comment period or the proposed changes in the project review fee schedule.

SUPPLEMENTARY INFORMATION: A draft resolution containing the proposed new fee schedule may be viewed on the Commission's Web site, *http://www.drbc.net*. The current fee schedule, set forth in Resolution No. 91–3, also may be viewed on the web site.

Dated: May 12, 2003.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 03–12230 Filed 5–15–03; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 15, 2003.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 8, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Federal Student Aid

Type of Review: Extension.

Title: Lender's Request for Payment of Interest and Special Allowance—LaRS.

Frequency: Quarterly, Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 14,184.

Burden Hours: 34,573.

Abstract: The Lender's Request for Payment of Interest and Special Allowance—LaRS (ED Form 799) is used by approximately 3,546 lenders participating in the Title IV, Part B loan programs. The ED Form 799 is used to pay interest and special allowance to holders of the Part B loans; and to capture quarterly data from lender's loan portfolio for financial and budgetary projections.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2273. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to

(202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joe Schubart at (202) 708–9266 or via his e-mail address *Joe.Schubart@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.

Federal Student Aid

Type of Review: Extension of a currently approved collection.

Title: National Student Loan Data System (NSLDS) (JS).

Frequency: On Occasion Weekly Monthly Quarterly.

Affected Public: Not-for-profit institutions (primary), Businesses or other for-profit, State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 29952.

Burden Hours: 179712.

Abstract: The U.S. Department of Education will collect data from postsecondary schools and guaranty agencies about federal Perkins loans, federal family education loans, and William D. Ford direct student loans to be used to determine eligibility for Title IV student financial aid.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 2278. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joe Schubart at his e-mail address *joe.schubart@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. 03–12224 Filed 5–15–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 16, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Karen Lee, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Karen_F._Lee@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: May 12, 2003.

John D. Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Revision of a currently approved collection.

Title: Performance Report for the Jacob K. Javits Fellowship Program (JS).

Frequency: Annually.

Affected Public: Not-for-profit institutions (primary). Businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 115.

Burden Hours: 690.

Abstract: This information collection provides the U.S. Department of Education with information needed to determine if grantees have made substantial progress toward meeting the program's objectives and allow program staff to monitor and evaluate the program. The Congress has mandated (through the Government's Performance and Results Act of 1993) that the U.S. Department of Education provide documentation about the progress being made by the program.

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 2256. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joe Schubart at his e-mail address *joe.schubart@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. 03–12225 Filed 5–15–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No. 84.184E]

Office of Safe and Drug-Free Schools—Emergency Response and Crisis Management Grant Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

Purpose: The Emergency Response and Crisis Management Program provides grants to local educational

agencies (LEAs) to improve and strengthen emergency response and crisis management plans, including training school personnel, students, and parents in emergency response procedures and coordinating with local law enforcement, public safety, health, and mental health agencies.

Eligible Applicants: LEAs with a significant need for emergency preparedness improvements and a lack of fiscal capacity to implement these improvements.

Applications Available: May 16, 2003.

Deadline for Transmittal of Applications: June 30, 2003.

Deadline for Intergovernmental Review: August 29, 2003.

Estimated Available Funds: $38 million.

Estimated Range of Awards: $100,000–$500,000.

Estimated Average Size of Awards: We estimate that: A small school district (with 1–20 school facilities) will need up to $100,000 for the 18-month period; a medium-size school district (with between 21 and 75 school facilities) will need a maximum of $250,000 for the 18-month period; and a large-size school district (with 76 or more school facilities) will need a maximum of $500,000 for the 18-month period. Applicants requesting funds in excess of the recommended amounts will need to justify their need for those funds.

Estimated Number of Awards: 150.

Note: The Department is not bound by any estimate in this notice.

Project Period: Up to 18 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 80, 81, 82, 85, 97, 98, and 99. (b) The regulations in 34 CFR part 299.

General: Contingent upon the availability of funds, we may make additional awards in FY 2004 from the rank-ordered list of unfunded applications from this competition.

Participation by Private-School Children and Teachers: LEAs that receive a grant are required to provide for the equitable participation of eligible private-school children and their teachers or other educational personnel. In order to ensure that grant program activities address the needs of private-school children, timely and meaningful consultation with appropriate private school officials must occur during the design and development of the program. Administrative direction and control over grant funds must remain with the grantee.

Maintenance of Effort: LEAs may receive a grant only if the State educational agency finds that the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency for the preceding fiscal year was not less than 90 percent of the combined effort or aggregate expenditures for the second preceding fiscal year.

Absolute Priority: We give an absolute preference to applications that meet the following priority, and fund under this competition only those applications that meet the following absolute priority: LEA projects to improve and strengthen emergency response and crisis management plans, including training school personnel, students and parents in emergency response procedures and coordinating with local law enforcement, public safety, health, and mental health agencies.

To be considered for a grant award, applications must include an agreement that details the participation of the LEA and the following five community-based partners from the local area: Law enforcement, public safety, health, mental health, and the head of your local government (for example your mayor, city manager, or county executive). The agreement must detail the roles and responsibilities each of the required partners will have in improving and strengthening the plan. The agreement must also reflect each partner's agreement to receive a final copy of the plan. Finally, your agreement must include an authorized signature representing the LEA and each community-based partner.

If one or more of these five partners is not present in your community, or cannot feasibly participate, the agreement must explain the absence of each missing partner. Every application must include signatures representing at least the LEA and two of the required five partners, and explanations for the absence any of the remaining required partners.

Applications that fail to include the required agreement (with signatures and explanations for missing signatures as specified) will not be read.

Although this program requires partnerships with other parties, administrative direction and fiscal control for the project must remain with the local educational agency.

Selection Criteria: We use the following selection criteria to evaluate applications for new grants under this competition. The maximum score for all of these criteria is 100 points. The maximum score for each criterion or factor under that criterion is indicated in parentheses.

(1) *Need for project.* (25 points)

In determining the need for the proposed project, the following factors are considered:

(a) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project (15 points).

Note: Under this factor we will look for a clear and convincing demonstration of significant need—such as a recent vulnerability and needs assessment—to improve and strengthen the LEA's emergency response and crisis management plan, as well as how the proposed plan will address need.

(b) The extent to which specific gaps and weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses (10 points).

Note: Under this factor we will look at the extent to which the applicant demonstrates a lack of fiscal capacity to implement needed improvements to its emergency response/crisis management plan.

(2) *Significance.* (25 points)

In determining the significance of the proposed project, the following factors are considered:

(a) The likelihood that the proposed project will result in system change and improvement (10 points).

(b) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population (15 points).

Note: Under the Significance criterion, we will look for the applicant's identification of the vulnerabilities to which its school facilities may be exposed and its comprehensive approach to addressing those vulnerabilities in the proposed emergency response/crisis management plan. We expect that applicants will propose comprehensive approaches that do not rely solely on equipment and technology purchases, and address the four phases of crisis planning—mitigation/prevention, preparedness, response and recovery.

(3) *Quality of the project design.* (35 points)

In determining the quality of the design of the proposed project, the following factors are considered:

(a) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance (10 points).

Note: Under this factor we will look for the applicant's intent to develop a plan that will respond to emerging potential crises and is practiced, updated, and revised frequently.

(b) The extent to which the design of the proposed project reflects up-to-date

knowledge from research and effective practice (20 points).

Note: Under this factor we will look for the applicant's inclusion of the four phases (mitigation/prevention, preparedness, response, and recovery) in "Practical Information on Crisis Planning: A Guide for Schools and Communities" (available online at *http://www.ed.gov/emergencyplan*) and a clear description of how the proposed project will address those four phases.

(c) The extent to which the proposed project encourages parental involvement. (5 points)

(4) *Quality of the project evaluation.* (5 points)

In determining the quality of the evaluation, the following factor is considered:

(a) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (5 points)

(5) *Quality of the management plan.* (10 points)

In determining the quality of the management plan, the following factor is considered:

(a) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate. (10 points)

Note: Under this criterion we will look at the quality of the applicant's planned coordination and collaboration with the head of the local government, and community-based law enforcement, public safety, health, and mental health agencies in the strengthening and improvement of the plan. This description should go beyond simply the roles and responsibilities discussed in the absolute priority.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Secretary generally offers interested parties the opportunity to comment on proposed rules. Section 437(d)(1) of the General Education Provisions Act, however, exempts from this requirement rules that apply to the first competition under a new or substantially revised program authority. This is the first competition under the Emergency Response and Crisis Management Grant Program. These rules will apply to the FY 2003 grant competition only.

For Applications Contact: Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. Fax: (301) 470–1244. If you use a telecommunications device for the deaf, you may call 1–877–576–7734. You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs/html.*

Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA No. 84.184.E. Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed below.

Pilot Project for Electronic Submission of Applications: In FY 2003, the U.S. Department of Education is continuing to expand its pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The Emergency Response and Crisis Management Grant Program (CFDA #84.184.E) is one of the programs included in the pilot project. If you are an applicant under this grant program, you may submit your application to us in either electronic or paper format.

The pilot project involves the use of the Electronic Grant Application System (e-Application) portion of the Grant Administration and Payment System (GAPS). Users of e-Application will be entering data on-line while completing their applications. You may not e-mail a soft copy of a grant application to us. If you participate in this voluntary pilot project by submitting an application electronically, the data you enter on-line will be saved into a database. We request your participation in e-Application. We shall continue to evaluate its success and solicit suggestions for improvement.

If you participate in e-Application, please note the following:

- Your participation is voluntary.
- You will not receive any additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format. When you enter the e-Application system, you will find information about its hours of operation.
- You may submit all documents electronically, including the Application for Federal Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Assistance (ED 424) to the Application Control Center after following these steps:

(1) Print ED 424 from the e-Application system.

(2) The institution's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.

(4) Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on all other forms at a later date.
- Closing Date Extension in Case of System Unavailability: If you elect to participate in the e-Application pilot for the Emergency Response and Crisis Management Grant Program and you are prevented from submitting your application on the closing date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. For us to grant this extension—

(1) You must be a registered user of e-Application, and have initiated an e-Application for this competition; and

(2)(a) The e-Application system must be unavailable for 60 minutes or more between the hours of 8:30 and 3:30 p.m., Washington, DC time, on the deadline date; or

(b) The e-Application system must be unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 and 4:30 p.m., Washington, DC time) on the deadline date.

The Department must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension you must contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Emergency Response and Crisis Management Grant Program at: *http://e-grants.ed.gov.*We have included additional information about the e-Application pilot project (see Parity Guidelines between Paper and Electronic Applications) in the application package. If you want to apply for a grant and be considered for funding, you must meet the deadline requirements included in this notice.

FOR FURTHER INFORMATION CONTACT: Connie Ann Deshpande or Jennifer

Medearis, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E332, Washington, DC 20202–6450. Connie Deshpande: Telephone: (202) 401–2140; email address: Connie.Deshpande@ed.gov; Jennifer Medearis: Telephone: (202) 260–5571; email address: *Jennifer.Medearis@ed.gov.* If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–888–877–8339.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO) toll free at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html*

(Catalog of Federal Domestic Assistance Number 84.184.E, Safe and Drug-Free Schools and Community Act National Programs—Emergency Response and Crisis Management Grant Program)

Program Authority: 20 U.S.C. 7131.

Dated: May 13, 2003.

Judge Eric Andell,

Deputy Under Secretary for Safe and Drug-Free Schools.

[FR Doc. 03–12394 Filed 5–15–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

William D. Ford Federal Direct Loan Program

AGENCY: Department of Education.

ACTION: Notice of the annual updates to the Income Contingent Repayment (ICR) plan formula for 2003.

SUMMARY: The Secretary announces the annual updates to the ICR plan formula for 2003. Under the William D. Ford Federal Direct Loan (Direct Loan) Program, borrowers may choose to repay their student loans under the ICR plan, which bases the repayment amount on the borrower's income, family size, loan amount, and interest rate. Each year, we adjust the formula for calculating a borrower's payment to reflect changes due to inflation. This notice contains the adjusted income percentage factors for 2003 and charts showing sample repayment amounts based on the adjusted ICR plan formula. It also contains examples of how the calculation of the monthly ICR amount is performed and a constant multiplier chart for use in performing the calculations. The adjustments for the ICR plan formula contained in this notice are effective from July 1, 2003 to June 30, 2004.

FOR FURTHER INFORMATION CONTACT: Don Watson, U.S. Department of Education, Room 092B1, UCP, 400 Maryland Avenue, SW., Washington, DC 20202–5400. Telephone: (202) 377–4008. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: Direct Loan Program borrowers may choose to repay their Direct Loans under the ICR plan. The attachment to this notice provides updates to examples of how the calculation of the monthly ICR amount is performed, the income percentage factors, the constant multiplier chart, and charts showing sample repayment amounts.

We have updated the income percentage factors to reflect changes based on inflation. We have revised the income percentage factors table by changing the dollar amounts of the incomes shown by a percentage equal to the estimated percentage change in the Consumer Price Index for all urban consumers from December 2002 to December 2003. Further, we provide examples of monthly repayment amount calculations and two charts that show sample repayment amounts for single and married or head-of-household borrowers at various income and debt levels based on the updated income percentage factors.

The updated income percentage factors, at any given income, may cause a borrower's payments to be slightly lower than they were in prior years. This updated amount more accurately reflects the impact of inflation on a borrower's current ability to repay.

Electronic Access to This Document

You may review this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

Program Authority: 20 U.S.C. 1087 *et seq.*

Dated: May 13, 2003.

Theresa S. Shaw,

Chief Operating Officer, Federal Student Aid.

Attachment—Examples of the Calculations of Monthly Repayment Amounts

Example 1. This example assumes you are a single borrower with $15,000 in Direct Loans, the interest rate being charged is 8.25 percent, and you have an adjusted gross income (AGI) of $33,042.

Step 1: Determine your annual payments based on what you would pay over 12 years using standard amortization. To do this, multiply your loan balance by the constant multiplier for 8.25 percent interest (0.131545). The constant multiplier is a factor used to calculate amortized payments at a given interest rate over a fixed period of time. (The 8.25 percent interest rate used in this example is the maximum interest rate that may be charged for all Direct Loans excluding Direct PLUS Loans and certain Direct PLUS Consolidation Loans; your actual interest rate may be lower. You can view the constant multiplier chart at the end of this notice to determine the constant multiplier that you should use for the interest rate on your loan. If your exact interest rate is not listed, use the next highest for estimation purposes.)

- 0.131545 × $15,000 = $1,973.18

Step 2: Multiply the result of Step 1 by the income percentage factor shown in the income percentage factors table that corresponds to your income and then divide the result by 100. (If your income is not listed in the income percentage factors table, calculate the applicable income percentage factor by following the instructions under the "Interpolation" heading later in this notice.):

- 88.77 × $1,973.18 ÷ 100 = $1,751.59

Step 3: Determine 20 percent of your discretionary income (your discretionary income is your AGI minus the HHS Poverty Guideline amount for your family size). Because you are a single borrower, subtract the poverty level for a family of one, as published in the **Federal Register** on February 7, 2003 (68 FR 6456), from your AGI and multiply the result by 20 percent:

- $33,042 − $8,980 = $24,062
- $24,062 × 0.20 = $4,812.40

Step 4: Compare the amount from Step 2 with the amount from Step 3. The lower of the two will be your annual payment amount. In this example, you will be paying the amount calculated under Step 2. To determine your monthly repayment amount, divide the annual amount by 12.

- $1,751.59 ÷ 12 = $145.97

Example 2. In this example, you are married. You and your spouse have a combined AGI of $62,439 and are repaying your loans jointly under the ICR plan. You have no children. You have a Direct Loan balance of $10,000, and your spouse has a Direct Loan balance of $15,000. Your interest rate is 8.25 percent.

Step 1: Add your and your spouse's Direct Loan balances together to determine your aggregate loan balance:

- $10,000 + $15,000 = $25,000

Step 2: Determine the annual payment based on what you would pay over 12 years using standard amortization. To do this, multiply your aggregate loan balance by the constant multiplier for 8.25 percent interest (0.131545). (The 8.25 percent interest rate used in this example is the maximum interest rate that may be charged for all Direct Loans excluding Direct PLUS Loans and certain Direct PLUS Consolidation Loans; your actual interest rate may be lower. You can view the constant multiplier chart at the end of this notice to determine the constant multiplier that you should use for the interest rate on your loan. If your exact interest rate is not listed, use the next highest for estimation purposes.)

- 0.131545 × $25,000 = $3,288.63

Step 3: Multiply the result of Step 2 by the income percentage factor shown in the income percentage factors table that corresponds to your and your spouse's income and then divide the result by 100. (If your and your spouse's aggregate income is not listed in the income percentage factors table, calculate the applicable income percentage factor by following the instructions under the "Interpolation" heading later in this notice.):

- 109.40 × $3,288.63 ÷ 100 = $3,597.76

Step 4: Determine 20 percent of your discretionary income. To do this, subtract the poverty level for a family of two, as published in the **Federal Register** on February 7, 2003 (68 FR 6456), from your combined AGI and multiply the result by 20 percent:

- $62,439 − $12,120 = $50,319
- $50,319 × 0.20 = $10,063.80

Step 5: Compare the amount from Step 3 with the amount from Step 4. The lower of the two will be your annual payment amount. You and your spouse will pay the amount calculated under Step 3. To determine your monthly repayment amount, divide the annual amount by 12.

- $3,597.76 ÷ 12 = $299.81

Interpolation: If your income does not appear on the income percentage factors table, you will have to calculate the income percentage factor through interpolation. For example, assume you are single and your income is $25,000.

Step 1: Find the closest income listed that is less than your income of $25,000 and the closest income listed that is greater than your income of $25,000.

Step 2: Subtract the lower amount from the higher amount (for this discussion, we will call the result the "income interval"):

- $26,306 − $22,108 = $4,198

Step 3: Determine the difference between the two income percentage factors that are given for these incomes (for this discussion, we will call the result, the "income percentage factor interval"):

- 80.33% − 71.89% = 8.44%

Step 4: Subtract from your income the closest income shown on the chart that is less than your income of $25,000:

- $25,000 − $22,108 = $2,892

Step 5: Divide the result of Step 4 by the income interval determined in Step 2:

- $2,892 ÷ $4,198 = 0.6889

Step 6: Multiply the result of Step 5 by the income percentage factor interval:

- 8.44% × 0.6889 = 5.8143%

Step 7: Add the result of Step 6 to the lower of the two income percentage factors used in Step 3 to calculate the income percentage factor interval for $25,000 in income:

- 5.8143% + 71.89% = 77.70% (rounded to the nearest hundredth)

The result is the income percentage factor that will be used to calculate the monthly repayment amount under the ICR plan.

2003 Income Percentage Factors

[Based on Annual Income]

Single		Married/head of household	
Income	% Factor	Income	% Factor
8,637	55.00	8,637	50.52
11,885	57.79	13,629	56.68
15,293	60.57	16,243	59.56
18,779	66.23	21,234	67.79
22,108	71.89	26,306	75.22
26,306	80.33	33,042	87.61
33,042	88.77	41,439	100.00
41,440	100.00	49,840	100.00
49,840	100.00	62,439	109.40
59,901	111.80	83,435	125.00
76,701	123.50	112,831	140.60
108,633	141.20	157,799	150.00
124,558	150.00	257,856	200.00
221,860	200.00		

CONSTANT MULTIPLIER CHART FOR 12-YEAR AMORTIZATION

Interest rate percent	Annual constant multiplier
4.06	0.105413
4.86	0.110146
7.00	0.123406
7.25	0.125011
7.46	0.126368

CONSTANT MULTIPLIER CHART FOR 12-YEAR AMORTIZATION—Continued

Interest rate percent	Annual constant multiplier
7.50	0.126627
7.75	0.128255
8.00	0.129894
8.25	0.131545
8.50	0.133207

CONSTANT MULTIPLIER CHART FOR 12-YEAR AMORTIZATION—Continued

Interest rate percent	Annual constant multiplier
8.75	0.134880
9.00	0.136564

BILLING CODE 4000–01–P

Sample First-Year Monthly Repayment Amounts for a Single Borrower at Various Income and Debt Levels

Income	Initial Debt																							
	$ 2,500	$ 5,000	$ 7,500	$ 10,000	$ 12,500	$ 15,000	$ 17,500	$ 20,000	$ 22,500	$ 25,000	$ 30,000	$ 35,000	$ 40,000	$ 45,000	$ 50,000	$ 55,000	$ 60,000	$ 65,000	$ 70,000	$ 75,000	$ 80,000	$ 85,000	$ 90,000	$100,000
$ 1,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9,000	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5
10,000	15	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17	17
12,500	16	32	48	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59	59
15,000	17	33	50	66	83	99	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
17,500	18	35	53	70	88	105	123	140	142	142	142	142	142	142	142	142	142	142	142	142	142	142	142	142
20,000	19	37	56	75	94	112	131	150	168	184	184	184	184	184	184	184	184	184	184	184	184	184	184	184
22,500	20	40	60	80	100	120	139	159	179	199	225	225	225	225	225	225	225	225	225	225	225	225	225	225
25,000	21	43	64	85	106	128	149	170	192	213	256	267	267	267	267	267	267	267	267	267	267	267	267	267
30,000	23	47	70	93	116	140	163	186	210	233	279	326	350	350	350	350	350	350	350	350	350	350	350	350
35,000	25	50	75	100	125	150	175	200	225	250	300	350	401	434	434	434	434	434	434	434	434	434	434	434
40,000	27	54	81	108	134	161	188	215	242	269	323	376	430	484	517	517	517	517	517	517	517	517	517	517
45,000	27	55	82	110	137	164	192	219	247	274	329	384	438	493	548	600	600	600	600	600	600	600	600	600
50,000	27	55	82	110	137	165	192	220	247	275	329	384	439	494	549	604	659	684	684	684	684	684	684	684
55,000	29	58	87	116	145	174	203	233	262	291	349	407	465	523	581	639	698	756	767	767	767	767	767	767
60,000	31	61	92	123	153	184	215	245	276	307	368	429	491	552	613	674	736	797	850	850	850	850	850	850
65,000	32	63	95	126	158	190	221	253	285	316	379	443	506	569	632	695	759	822	885	934	934	934	934	934
70,000	33	65	97	130	163	195	228	261	293	326	391	456	521	586	651	716	782	847	912	977	1017	1017	1017	1017
75,000	34	67	101	134	168	201	235	268	302	335	402	469	536	603	670	737	805	872	939	1006	1073	1100	1100	1100
80,000	34	69	103	137	172	206	240	275	309	343	412	481	550	618	687	756	824	893	962	1030	1099	1168	1184	1184
85,000	35	70	105	140	176	211	246	281	316	351	421	491	562	632	702	772	843	913	983	1053	1123	1194	1264	1267
90,000	36	72	108	143	179	215	251	287	323	359	430	502	574	646	717	789	861	933	1004	1076	1148	1219	1291	1350
95,000	37	73	110	147	183	220	256	293	330	366	440	513	586	659	733	806	879	952	1026	1099	1172	1245	1318	1434
100,000	37	75	112	150	187	224	262	299	336	374	449	523	598	673	748	822	897	972	1047	1122	1196	1271	1346	1495

Sample repayment amounts are based on an interest rate of 8.25%

Sample First-Year Monthly Repayment Amounts for a Married or Head-of-Household Borrower at Various Income and Debt Levels

Income	Family Size = 3 Initial Debt																							
	$ 2,500	$ 5,000	$ 7,500	$ 10,000	$ 12,500	$ 15,000	$ 17,500	$ 20,000	$ 22,500	$ 25,000	$ 30,000	$ 35,000	$ 40,000	$ 45,000	$ 50,000	$ 55,000	$ 60,000	$ 65,000	$ 70,000	$ 75,000	$ 80,000	$ 85,000	$ 90,000	$ 100,000
$ 1,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12,500	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17,500	17	34	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37	37
20,000	18	36	54	72	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79	79
22,500	19	38	57	76	95	115	121	121	121	121	121	121	121	121	121	121	121	121	121	121	121	121	121	121
25,000	20	40	60	80	100	121	141	161	162	162	162	162	162	162	162	162	162	162	162	162	162	162	162	162
30,000	22	45	67	90	112	135	157	180	202	225	246	246	246	246	246	246	246	246	246	246	246	246	246	246
35,000	25	50	74	99	124	149	174	198	223	248	298	329	329	329	329	329	329	329	329	329	329	329	329	329
40,000	27	54	80	107	134	161	188	215	241	268	322	376	412	412	412	412	412	412	412	412	412	412	412	412
45,000	27	55	82	110	137	164	192	219	247	274	329	384	438	493	493	493	493	493	493	493	493	493	493	493
50,000	27	55	82	110	137	165	192	220	247	274	329	384	439	493	549	579	579	579	579	579	579	579	579	579
55,000	28	57	85	114	142	171	199	228	256	285	342	398	455	512	569	626	662	662	662	662	662	662	662	662
60,000	29	59	88	118	147	177	206	236	265	295	354	413	472	531	590	649	708	746	746	746	746	746	746	746
65,000	31	61	92	122	153	183	214	244	275	305	366	427	488	549	610	671	732	793	829	829	829	829	829	829
70,000	32	63	95	126	158	189	221	252	284	315	378	441	504	567	630	693	757	820	883	912	912	912	912	912
75,000	33	65	98	130	138	172	207	241	276	310	345	414	483	552	621	690	759	828	897	966	1035	1103	1162	1162
80,000	34	67	101	134	168	201	235	268	302	336	403	470	537	604	671	738	805	872	940	1007	1074	1079	1079	1079
85,000	34	69	103	138	172	207	241	276	310	345	414	483	552	621	690	759	828	897	966	1035	1103	1162	1162	1162
90,000	35	70	106	141	176	211	246	282	317	352	423	493	563	634	704	775	845	915	986	1056	1127	1197	1246	1246
95,000	36	72	108	144	180	216	252	288	323	359	431	503	575	647	719	791	863	934	1006	1078	1150	1222	1394	1329
100,000	37	73	110	147	183	220	257	293	330	367	440	513	587	660	733	807	880	953	1027	1100	1173	1247	1320	1412

Sample repayment amounts are based on an interest rate of 8.25%.

[FR Doc. 03–12283 Filed 5–15–03; 8:45 am]
BILLING CODE 4000–01–C

DEPARTMENT OF EDUCATION

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice implementing a new electronic process(eZ-Audit) for submitting compliance and financial statement audits.

SUMMARY: The Secretary gives notice that on June 16, 2003, the Department will fully implement the eZ-Audit process under which an institution that participates, or seeks to participate, in the Federal student aid programs submits its compliance and financial statement audit information electronically. The Federal student aid programs are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs). This notice applies to any compliance or financial statement audits that an institution is required to submit under 34 CFR 600.20(a) or (b) to begin or continue participating in the Title IV, HEA Programs, any financial statement audits required for an institution that undergoes a change in ownership resulting in a change in control as provided under 34 CFR 600.20(g), any compliance and financial statement audits that an institution is required to submit annually under 34 CFR 668.23, and any compliance and financial statement audits required of an institution that ceases to participate in the Title IV, HEA Programs as provided under 34 CFR 668.26(b).

Effective immediately, institutions may voluntarily begin using eZ-Audit to submit any required audits. Beginning on June 16, 2003, all institutions are required to use eZ-Audit for submitting electronically any required audit that is due on or after that date. However, if an institution is unable to use eZ-Audit to submit its first audit that is due on or after June 16, 2003, it should contact the person identified below to make alternative arrangements for submitting that audit.

FOR FURTHER INFORMATION CONTACT: Ti Baker, Management and Program Analyst, Schools Channel, Federal Student Aid, U.S. Department of Education, Union Center Plaza, 074G2, 830 First Street, Washington, DC 20202. Telephone: (202) 377–3156, Fax: (202) 275–5726, or via Internet: *fsaezaudit@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: eZ-Audit is a web-based process designed to facilitate the submission of compliance and financial statement audits, expedite the review of those audits by the Department, and provide more timely and useful information to institutions regarding the Department's review. This notice deals only with the procedures for submitting audits under the eZ-Audit process. More detailed information about other aspects of the eZ-Audit process is available under the Electronic Announcements section at *http://www.IFAP.ed.gov*.

Proprietary institutions are required to submit audits directly to the Department regardless of the reason those audits are required. Currently, all non-profit and public institutions are required to conduct and submit annual compliance and financial statement audits in accordance with Office of Management and Budget (OMB) Circular A–133. Under OMB Circular A–133, these institutions submit their annual audits to the Federal Audit Clearinghouse (Clearinghouse) that in turn provides copies to the Department and other Federal agencies. For any other audits that a non-profit or public institution is required to conduct under the Title IV, HEA Program regulations, those audits are submitted directly to the Department.

OMB Circular A–133 also provides that in response to a request from a Federal agency, non-profit and public institutions must submit their annual audits directly to that agency. Accordingly, the Department hereby requests non-profit and public institutions to submit copies of their OMB Circular A–133 annual audits directly to us through eZ-Audit. The Department makes this request to maximize the utility of eZ-Audit by establishing a uniform process under which all institutions submit any audit required under the Title IV, HEA Program regulations. We note that non-profit and public institutions whose annual audits are conducted in accordance with OMB Circular A–133 must continue to submit those audits to the Clearinghouse.

The Department will carefully monitor the utility of the eZ-Audit approach in identifying fraud and reducing error in Federal student aid programs and improving the validity and reliability of the data reported. The Department will also ensure that it minimizes the burden associated with submitting audits under this approach.

After completing the first cycle of audits under this approach, the Department will implement any reforms necessary to enhance the utility of the data it receives and reduce burden on institutions. Moreover, the Department will consider modifying the eZ-Audit process in view of any significant changes the Clearinghouse may make in accepting electronic audit submissions and in response to the continuing efforts by the accounting community to standardize the format and presentation of electronic audit data.

eZ-Audit Process

An authorized person at an institution submits required audits on behalf of the institution by (1) accessing the appropriate page on the eZ-Audit website using identity credentials issued to the institution by the Department, (2) entering general information about the institution's compliance audit, (3) entering general information and specific financial data from the institution's audited financial statements, and (4) attaching authentic copies of the signed audits.

Identity Credentials

An institution obtains credentials for accessing the eZ-Audit system by completing and signing registration materials described under the Electronic Announcements section at *http://www.IFAP.ed.gov*, and submitting them to: The U.S. Department of Education, Federal Student Aid, *Attention:* Ti Baker,830 First Street, NE.,Washington, DC 20202.

After receiving the registration materials, the Department will send electronically identity credentials (initially a username and password) to the institution. Although we expect to be able to issue identity credentials within a few days after receiving a request, an institution should submit its registration materials as soon as possible to ensure that it can use the eZ-Audit system to submit required audits on and after June 2, 2003.

Entering Information About the Audits

An institution enters general and specific information about its compliance audits and financial statements on the appropriate eZ-Audit web pages. General information is used to determine whether the audits are materially complete and conducted in accordance with applicable standards.

Specific financial data is used to make a preliminary determination as to whether a non-profit or for-profit institution is financially responsible under 34 CFR part 668, subpart L of the Student Assistance General Provisions regulations (or in the case of a change in ownership resulting in a change in control, whether the institution satisfies the financial ratio requirements under 34 CFR 668.15).

Attaching an Authentic Copy of the Audits

After an institution enters all requested information, it must attach (or upload) to the eZ-Audit Web page an electronic copy of any required compliance and financial statement audits that were prepared and signed by the independent auditor(s) engaged by the institution to conduct those audits. The electronic copy of any required audit must be a read-only Portable Document Format (PDF) file made using Adobe Acrobat version 5.0 or higher.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

Program Authority: 20 U.S.C. 1099c.

Dated: May 13, 2003.

Theresa S. Shaw,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 03–12286 Filed 5–15–03; 8:45 am]

BILLING CODE 4001–01–P

DEPARTMENT OF ENERGY

Notice of Availability of the West Valley Demonstration Project Draft Waste Management Environmental Impact Statement

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The Department of Energy (DOE) announces the availability of the West Valley Demonstration Project (WVDP) Draft Waste Management Environmental Impact Statement (EIS) for public review and comment. This Draft EIS has been prepared in accordance with the requirements of the National Environmental Policy Act of 1969 as amended (NEPA)(42 U.S.C. 4321 *et seq.*); Council on Environmental Quality regulations implementing NEPA (40 Code of Federal Regulations (CFR) Parts 1500–1508); and DOE NEPA Implementing Procedures (10 CFR part 1021).

DOE's proposed action (and preferred alternative) is to ship radioactive wastes that are either currently in storage on the WVDP site, or that will be generated from WVDP operations over the next ten years, to offsite disposal locations, and to continue managing its onsite waste storage tanks. The potential environmental consequences of the proposed action are evaluated in this Draft EIS, including impacts to workers and the public from waste transportation and waste management. The Draft EIS also analyzes a No Action Alternative, under which most wastes would continue to be stored over the next ten years, and an alternative under which certain wastes would be shipped to interim offsite storage locations prior to disposal, along with the addition of retrievable grout to the waste storage tanks for interim stabilization. Indefinite waste storage onsite was considered but not analyzed.

The public is invited to comment on the Draft EIS during a 45-day public comment period, which ends on June 30, 2003. All comments received during the public comment period will be considered in preparing the Final EIS. Comments received after the public comment period ends will be considered to the extent practicable.

ADDRESSES: Requests for information about this Draft EIS should be directed to: Daniel W. Sullivan, EIS Document Manager, DOE West Valley Area Office, 10282 Rock Springs Road, WV–49, West Valley, New York 14171–9799, Telephone: (716) 942–4016.

Copies of the document can be requested by telephone at (716) 942–2152 or (800) 633–5280.

Written comments on the Draft EIS can be mailed to: Daniel W. Sullivan, WVDP WM EIS, 10282 Rock Springs Road, WV–49, West Valley, New York 14171–9799.

Written comments may also be submitted by fax to: (716) 942–4199, or submitted electronically to *allens@wvnsco.com.*

Oral comments on the Draft EIS will be accepted only during the public hearing scheduled for the date and location provided in the **DATES** section of this Notice.

For information regarding the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, Telephone: (202) 586–4600, or leave a message at (800) 472–2756.

The Draft EIS will be available at *http://tis.eh.doe.gov/nepa/docs.docs.htm* or *www.wv.doe.gov.* Copies of the Draft EIS and supporting technical reports also are available for review at the locations listed in the **SUPPLEMENTARY INFORMATION** section of this Notice.

DATES: The public is invited to submit written and/or oral comments on the Draft EIS. The comment period on the Draft EIS begins on the date of this Notice and ends on June 30, 2003. DOE will consider all comments postmarked by that date in preparing the Final EIS. Comments postmarked after that date will be considered to the extent practicable.

DOE will hold public hearings on June 11, 2003, at: Ashford Office Complex, 9030 Route 219, Town of Ashford, Buffalo, New York, 1:30 p.m. to 3:30 p.m.,7:00 p.m. to 9:00 p.m.

Requests to speak at the public hearings can be made by calling or writing the EIS Document Manager (see **ADDRESSES**, above). Requests to speak that have not been submitted prior to the hearing will be accepted in the order in which they are received during the hearing. Speakers are encouraged to provide written versions of their oral comments for the record. Each speaker will be allowed five minutes to present comments unless more time is requested and available. Comments will be recorded by a court reporter and will become part of the public hearing record.

SUPPLEMENTARY INFORMATION: The WVDP is located on the Western New York Nuclear Service Center (also referred to as the Center). The Center comprises approximately 13.5 square kilometers (five square miles) in West Valley, New York, and is located in the town of Ashford, approximately 50 kilometers (30 miles) southeast of Buffalo, New York. The Center was the site of the world's first commercial nuclear fuel reprocessing plant, which was the only one to have operated in the United States. The Center operated under a license issued by the Atomic

Energy Commission (now the U. S. Nuclear Regulatory Commission [NRC]) in 1966 to Nuclear Fuel Services, Incorporated, and the New York State Atomic and Space Development Authority, now known as the New York State Energy Research and Development Authority (NYSERDA).

During reprocessing, spent nuclear fuel from commercial nuclear power plants and DOE sites was chopped, dissolved, and processed by a solvent extraction system to recover uranium and plutonium. Fuel reprocessing ended in 1972 when the plant was shut down for modifications to increase its capacity, reduce occupational radiation exposure, and reduce radioactive effluents.

In 1976, Nuclear Fuel Services estimated that over $600 million would be required to modify the facility to increase its capacity and to comply with changes in regulatory standards. As a result, the company decided to withdraw from the nuclear fuel reprocessing business and exercise its contractual right to yield responsibility for the Center to NYSERDA. Nuclear Fuel Services withdrew from the Center without removing any of the in-process nuclear wastes. NYSERDA now holds title to and manages the Center on behalf of the people of the State of New York.

In 1980, Congress passed the WVDP Act (Pub. L. 96–368). This Act requires DOE to demonstrate that the liquid high-level radioactive waste (HLW) from reprocessing can be safely managed by solidifying it at the Center and transporting it to a geologic repository for permanent disposal. In addition to HLW, the WVDP also manages low-level radioactive waste (LLW), transuranic (TRU) waste, and mixed waste (radioactive and hazardous) generated as a result of Project activities.

The Project Facilities and areas storing the waste are: the Process Building, which includes approximately 70 rooms and cells that comprised the NRC-licensed spent nuclear fuel reprocessing operations (one of the cells—the Chemical Process Cell—now serves as the storage facility for the vitrified HLW canisters); the Tank Farm, which includes the underground HLW storage tanks; Waste Storage Areas, which include several facilities such as Lag Storage Areas and the Chemical Process Cell Waste Storage Area; and the Radwaste Treatment System Drum Cell (Drum Cell), which stores cement-filled drums of stabilized LLW.

The scope of this Draft EIS departs from that which was announced in a March 2001 Notice of Intent (NOI) (66 FR 16447, March 26, 2001). The scope is now limited to onsite waste management and offsite waste transportation activities, and no longer includes decontamination activities as proposed in the NOI. DOE modified the scope of this EIS as a result of public comments received during scoping and the Department's further evaluation of activities that might be required independently of final decisions on decommissioning and/or long-term stewardship (LTS) at the WVDP. DOE published an Advance NOI (66 FR 56090, November 6, 2001) inviting preliminary public comment on a proposed scope for a decommissioning and/or LTS EIS and recently published an NOI (68 FR 12004, March 13, 2003).

Description of Alternatives

DOE analyzed three alternatives in the Draft EIS. Under the No Action Alternative, Continuation of Ongoing Waste Management Activities, waste management would include continued storage of most of the existing LLW, the TRU waste, and the HLW, and limited shipments of some LLW to offsite disposal. The emptied HLW storage tanks and their surrounding vaults would continue to be ventilated to manage moisture levels as a corrosion prevention measure.

Under Alternative A, Offsite Shipment of HLW, LLW, Mixed LLW, and TRU Wastes to Disposal and Ongoing Management of the Waste Storage Tanks (DOE's preferred alternative), DOE would ship the LLW and mixed LLW to one of two DOE potential disposal sites (in Washington or Nevada) or to a commercial disposal site (such as the Envirocare facility in Utah), ship TRU waste to the Waste Isolation Pilot Plant (WIPP) in New Mexico, and ship the HLW to the proposed Yucca Mountain HLW Repository in Nevada. LLW and mixed LLW would be shipped over the next ten years. TRU waste shipments to WIPP could occur within the next ten years if the TRU waste is determined to meet all the requirements for disposal in this repository; however, if some or all of WVDP's TRU waste does not meet these requirements, the Department would need to explore other alternatives for disposal of this waste. Offsite disposal of HLW would occur at the proposed Yucca Mountain HLW Repository sometime after 2025, assuming a license to operate is granted by NRC and a disposal contract between DOE and the State of New York is in place. The HLW storage tanks would continue to be managed as described under the No Action Alternative.

Under Alternative B, Offsite Shipment of LLW and Mixed LLW to Disposal, Shipment of HLW and TRU Waste to Interim Storage, and Interim Stabilization of the Waste Storage Tanks, the LLW and mixed LLW would be shipped offsite for disposal at the same locations as Alternative A. TRU wastes would be shipped for interim storage at one of five DOE sites: Hanford Site in Washington; Idaho National Engineering and Environmental Laboratory; Oak Ridge National Laboratory in Tennessee; Savannah River Site (SRS) in South Carolina; or WIPP in New Mexico. TRU wastes would subsequently be shipped to WIPP (or would remain at WIPP) for disposal. The HLW would be shipped to SRS or Hanford for interim storage with subsequent shipment toYucca Mountain for disposal. The HLW storage tanks and their surrounding vaults would be partially filled with a retrievable grout to provide for interim stabilization of the tanks.

Availability of the Draft EIS

Copies of this Draft EIS have been distributed to Federal, State, and local officials, Members of Congress, and agencies, organizations, and individuals who may be interested or affected. This Draft EIS will be available on the Internet at: *http://tis.eh.doe.gov/nepa/docs.docs.htm* or *http://www.wv.doe.gov*. Additional copies can also be requested by telephone at (716) 942–2152 or (800) 633–5280.

Copies of the Draft EIS and supporting technical reports are also available for public review at the locations listed below.

Hulbert Library of the Town of Concord, 18 Chapel Street, Springville, New York 14141

Central Library of the Buffalo and Erie County Public Library System, Science and Technology Department, Lafayette Square, Buffalo, New York 14203

West Valley Central School Library, 5359 School Street, West Valley, New York 14171

The Olean Public Library, 134 North 2nd Street, Olean, New York 14760

Ashford Office Complex, 9030 Route 219, West Valley, New York 14171

Issued in Washington, DC, on May 2, 2003.

Jessie Hill Roberson,

Assistant Secretary for Environmental Management.

[FR Doc. 03–12280 Filed 5–15–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Rocky Flats

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Rocky Flats. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of these meeting be announced in the **Federal Register**.

DATES: Thursday, June 5, 2003, 6 p.m. to 9:30 p.m.

ADDRESSES: Jefferson County Airport, Terminal Building, Mount Evans Room, 11755 Airport Way, Broomfield, CO.

FOR FURTHER INFORMATION CONTACT: Ken Korkia, Board/Staff Coordinator, Rocky Flats Citizens Advisory Board, 9035 North Wadsworth Parkway, Suite 2250, Westminster, CO, 80021; telephone (303) 420–7855; fax (303) 420–7579.

SUPPLEMENTARY INFORMATION: Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

1. Presentation and discussion of management alternatives related to the Comprehensive Conservation Plan for the Rocky Flats National Wildlife Refuge.
2. Discussion of draft recommendations and comments related to the Building 776 demolition strategy and revisions to the Decommissioning Operations Plan.
3. Draft letter of recommendation regarding deer organ testing.
4. Presentation and discussion of remediation alternatives for the Original Landfill.
5. Other Board business may be conducted as necessary.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Ken Korkia at the address or telephone number listed above. Requests must be received at least five days prior to the meeting and reasonable provisions will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Public Reading Room located at the Office of the Rocky Flats Citizens Advisory Board, 9035 North Wadsworth Parkway, Suite 2250, Westminister, CO 80021; telephone (303) 420–7855. Hours of operations for the Public Reading Room are 8:30 a.m. to 4:30 p.m., Monday-Friday, except Federal holidays. Minutes will also be made available by writing or calling Deborah French at the address or telephone number listed above. Board meeting minutes are posted on RFCAB's Web site within one month following each meeting at: *http://www.rfcab.org/Minutes.HTML.*

Issued at Washington, DC, on May 12, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–12279 Filed 5–15–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC03–567–000, FERC–567]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

May 9, 2003.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due by July 11, 2003.

ADDRESSES: Copies of the proposed collection of information can be obtained from Michael Miller, Office of the Executive Director, ED–30, 888 First Street NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing.

For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426 and refer to Docket No. IC03–567–000.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on "Make an E-filing," and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the FERRIS link. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 208–2425, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–567 "Gas Pipeline Certificates: Annual Reports of System Flow Diagrams and System Capacity" (OMB No. 1902–0005) is used by the Commission to implement the statutory provisions of sections 4, 5, 6, 7, 9, 10(a) and 16 of the Natural Gas Act (NGA), 15 U.S.C. 717–717w and title III, sections 301(a), 303(a), 304(d), title IV, sections 401 and 402, title V, section 508 of the Natural Gas Policy Act (Pub. L. 95–621). The information collected under the requirements of FERC–567 is used by the Commission to obtain accurate data on pipeline facilities. Specifically, the FERC–567 data is used in determining the configuration and location of installed pipeline interconnections and receipt and delivery points; and developing and evaluating alternatives to proposed facilities as a means to mitigate environmental impact of new pipeline construction.

FERC–567 also contains valuable information that can be used to assist federal officials in maintaining adequate natural gas service in times of national emergency. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR part 260.8 and 284.13.

Action: The Commission is requesting a three-year extension of the current

expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
91	1,714*	81.58	12,724

*Derived by dividing the total number of response expected annually (156) by the number of respondents(91) and rounding to three places.

Estimated cost burden to respondents: 12,724 hours / 2,080 hours per year x $117,041 per year = $715,976. The cost per respondent is equal to $ 7,868.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, 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 *e.g.*, permitting electronic submission of responses.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12322 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC03–585–000, FERC–585]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

May 9, 2003.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specifics of the information collection described below.

DATES: Comments on the collection of information are due by July 11, 2003.

ADDRESSES: Copies of the proposed collection of information can be obtained from Michael Miller, Office of the Executive Director, ED–30, 888 First Street NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing.

For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426 and refer to Docket No. IC03–585–000.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on "Make an E-filing," and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the FERRIS link. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202)502–8415, by fax at (202)208–2425, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–585 "Reporting of Electric Energy Shortages and Contingency Plans Under PURPA" (OMB Control No. 1902–0138) is used by the Commission to implement the statutory provisions of sections 206 of the Public Utility Regulatory Policies Act of 1979 (PURPA) Pub. L. 95–617, 92 Stat. 3117 added to the Federal Power Act (FPA) section 202, subsection (g). FPA section 202(g) requires the Commission to establish rules requiring each public utility to report to FERC and appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect the utility's ability to serve its wholesale customers; and submit to the Commission and the appropriate State regulatory authority, and periodically revise contingency plans respecting shortages of electric energy or capacity which would equitably accommodate service to both direct retail customers and those served by utilities supplied at wholesale by the public utility.

The Commission uses the information to evaluate and formulate appropriate options for action in the event an unanticipated shortage is reported and/or materializes. Without this information, the Commission and State

agencies would be unable to: (1) examine and approve or modify utility actions, (2) prepare a response to anticipated disruptions in electric energy, and (3) ensure equitable treatment of all public utility customers under the shortage situations. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR part 294.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data. *Burden Statement:* Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
7	1	73	511

Estimated cost burden to respondents: 511 hours/2,080 hours per year × $117,041 per year = $28,754. The cost per respondent is equal to $ 4,108.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, 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 *e.g.*, permitting electronic submission of responses.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12323 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC03–716–000, FERC–716]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

May 12, 2003.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due by July 11, 2003.

ADDRESSES: Copies of the proposed collection of information can be obtained from Michael Miller, Office of the Executive Director, ED–30, 888 First Street NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing.

For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC 20426 and refer to Docket No. IC03–716–000.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on "Make an E-filing," and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the FERRIS link. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202)502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202)208–2425, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–716 "Good Faith Request for Transmission Service and Response by Transmitting Utility Under Sections 211(a) and 213(a) of the Federal Power Act" (OMB Control No. 1902–0170) is used by the Commission to implement the statutory provisions of sections 211 and 213 of the Federal Power Act (FPA) as amended and added by the Energy Policy Act of 1992. The information is not filed with the Commission, however, the request and response may be analyzed as part of a section 211 proceeding. This collection of information covers the information that must be contained in the request and in the response.

The Energy Policy Act of 1992 amended section 211 of the FPA and expanded the Commission's authority to order transmission service. Under the revised section 211, the Commission may order transmission services if it finds that such action would be in the public interest, would not unreasonably impair the continued reliability of

electric systems affected by the order, and would meet the requirements of amended section 211 of the FPA.

The Commission's policy statement in Pub. L. 93–3, Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Section 211(a) and 213(a) of the Federal Power Act, as Amended, implemented a data exchange between a transmission requester and a transmitting utility prior to the submission of section 211 request with the Commission. Components of the data exchange are identified in the Code of Federal Regulations (CFR), 18 CFR 2.20. The general policy sets forth standards by which the Commission determines whether and when a valid good faith request for transmission has been made under section 211 of the FPA. In developing the standards, the Commission sought to encourage an open exchange of information with a reasonable degree of specificity and completeness between the party requesting transmission services and the transmitting utility. As a result, twelve components of a good faith estimate are identified under 18 CFR 2.20. Information in the data exchange is not filed as noted above with the Commission, unless negotiations between the transmission requestor and the transmitting utility have not been successful and the transmission requestor files a section 211 request (FERC–716A, 1902–0168) with the Commission. The request and response may be analyzed by the Commission as part of the section 211 proceeding.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
10	1	100	1,000

Estimated cost burden to respondents: 1,000 hours / 2,080 hours per year × $117,041 per year = $56,270. The cost per respondent is equal to $ 5,627.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, 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 *e.g.*, permitting electronic submission of responses.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12324 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC03–716A–000, FERC–716A]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

May 9, 2003.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due by July 11, 2003.

ADDRESSES: Copies of the proposed collection of information can be obtained from Michael Miller, Office of the Executive Director, ED–30, 888 First Street NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing.

For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and refer to Docket No. IC03–716A–000.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on "Make an E-filing," and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's E-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the FERRIS link. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202)502–8415, by fax at

(202)208–2425, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–716A "Application for Transmission Services Under Section 211 of the Federal Power Act" (OMB No. 1902–0168) is used by the Commission to implement the statutory provisions of section 211 of the Federal Power Act(FPA), 16 U.S.C. 824) as amended by the Energy Policy Act 1992 (Pub. L. 102–486) 106 Stat. 2776. Under section 211, the Commission may order transmission services if it finds that such action would be in the public interest and would not unreasonably impair the continued reliability of systems affected by the order. Section 211 allows any electric utility, Federal power marketing agency or any other person generating electric energy for sale or resale to apply **Federal Register**, and notify the affected parties.

The Commission uses the information to carry out its responsibilities under part II of the Federal Power Act. The Commission implements these filing requirements in the Code of federal Regulations (CFR) under 18 CFR part 36.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
10	1	2.5 hours	25 hours

Estimated cost burden to respondents: 25 hours/2,080 hours per year × $117,041 per year = $1,407. The cost per respondent is equal to $ 141.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, 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 *e.g.*, permitting electronic submission of responses.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12325 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–471–000]

MIGC, Inc.; Notice of Compliance Filing

May 9, 2003.

Take notice that on May 7, 2003, MIGC, Inc. (MIGC) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to become effective July 1, 2003:

Fifth Revised Sheet No. 48
Second Revised Sheet No. 49A
Seventh Revised Sheet No. 52
Fourth Revised Sheet No. 84
Fourth Revised Sheet No. 87
Original Sheet No. 87A
Original Sheet No. 87B
Fourth Revised Sheet No. 88
Sixth Revised Sheet No. 89

MIGC asserts that the purpose of this filing is to comply with the Commission's order issued March 12, 2003, in Docket No. RM96–1–024, requiring all interstate pipelines to file tariff sheets in compliance with Order No. 587–R.

MIGC states that copies of the filing are being served on all jurisdictional customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: May 19, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12337 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–176–086]

Natural Gas Pipeline Company of America; Notice of Negotiated Rate

May 9, 2003.

Take notice that on May 5, 2003, Natural Gas Pipeline Company of America(Natural) tendered for filing to become part of its FERC Gas Tariff, Sixth Revised Volume No. 1, certain tariff sheets, to be effective May 3, 2003.

Natural states that the purpose of this filing is to implement an amendment to an existing negotiated rate transaction with Aquila Merchant Services, Inc. (Aquila) under Natural's Rate Schedule FTS pursuant to section 49 of the General Terms and Conditions of Natural's Tariff.

Natural states that copies of the filing are being mailed to all parties set out on the official service list at Docket No. RP99–176.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: May 19, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12339 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–518–043]

PG&E Gas Transmission, Northwest Corporation; Notice of Negotiated Rate

May 9, 2003.

Take notice that on May 5, 2003, PG&E Gas Transmission, Northwest Corporation (GTN) tendered for filing to be part of its FERC Gas Tariff, Second Revised Volume No. 1–A, Twelfth Revised Sheet No. 15.

GTN states that this sheet is being filed to reflect the implementation of one new negotiated rate agreement. GTN requests that the Commission accept the proposed tariff sheet to be effective May 3, 2003.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: May 19, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12340 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER03–505–000]

Quonset Point Cogen, L.P.; Notice of Issuance of Order

May 9, 2003.

Quonset Point Cogen, L.P. (Quonset) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for the sale of capacity and energy at market-based rates. Quonset also requested waiver of various Commission regulations. In particular, Quonset requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Quonset.

On April 2, 2003, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—South, granted the request for blanket approval under part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Quonset should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214).

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is May 19, 2003.

Absent a request to be heard in opposition by the deadline above, Quonset are authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Quonset, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Quonset's issuances of securities or assumptions of liability.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket

number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12321 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 344]

Southern California Edison; Notice of Authorization for Continued Project Operation

May 9, 2003.

Southern California Edison, licensee for the San Gorgonio Project No. 344, did not file an application for new or subsequent license, which was due by April 26, 2001, pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 344 is located on the San Gorgonio River in San Bernardino County, California.

The license for Project No. 344 was issued for a period ending April 26, 2003. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 344 is issued to Southern California Edison for a period effective April 27, 2003, through April 26, 2004, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before April 27, 2004, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Southern California Edison is authorized to continue operation of the San Gorgonio Project No. 344 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12332 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–312–122]

Tennessee Gas Pipeline Company; Notice of Negotiated Rate Tariff Filing

May 9, 2003.

Take notice that on May 2, 2003, Tennessee Gas Pipeline Company (Tennessee), tendered for filing its Negotiated Rate Tariff Filing.

Tennessee states that its filing requests that the Commission approve an April 23, 2003, negotiated rate arrangement between Tennessee and CIMA Energy, L.L.C. Tennessee also states that it requests that the Commission grant all necessary waivers to provide such approval effective February 1, 2003.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: May 14, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12338 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–1783–003, et al.]

Duke Energy Vermillion, LLC, et al.; Electric Rate and Corporate Filings

May 8, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Duke Energy Vermillion, LLC

[Docket No. ER00–1783–003]

Take notice that on May 5, 2003, Duke Energy Vermillion, LLC (Duke Vermillion) tendered for filing with the Federal Energy Regulatory Commission (Commission) its triennial market power analysis in compliance with the Commission's Order granting it market-based rate authority in Docket No. ER00–1783–000 and ER00–1783–001 on May 4, 2000.

Duke Vermillion states that copies of this filing were served upon those parties on the official service list.

Comment Date: May 27, 2003.

2. California Independent System

[Docket Nos. ER03–218–003 and ER03–219–003]

Take notice that on May 5, 2003, California Independent System Operator Corporation (ISO) tendered for filing with the Federal Energy Regulatory Commission (Commission) a Motion to Withdraw Elements of Compliance

Filing that was filed with the Commission on April 15, 2003 in compliance with the Commission's January 24, 2003 order in Docket Nos. ER03–218–000 and ER03–219–000.

Comment Date: May 27, 2003.

3. American Electric Power Service Corporation

[Docket No. ER03–242–002]

Take notice that on April 30, 2003, American Electric Power Service Corporation, on behalf of certain operating companies of the American Electric Power System (collectively AEP) tendered for filing with the Federal Energy Regulatory Commission (Commission) a request for permission to withdraw the rate filing made in Docket No. ER03–242–000 on December 3, 2003.

AEP states that copies of this filing have been served on the parties to this docket and on the public service commissions of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia and West Virginia.

Comment Date: May 15, 2003.

4. The New PJM Companies: American Electric Power Service Corporation

On Behalf of its Operating Companies: Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company

Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc; The Dayton Power and Light Company; Virginia Electric and Power Company; and PJM Interconnection, L.L.C.

[Docket No. ER03–262–004]

Take notice that on May 1, 2003, American Electric Power Service Corporation (AEP), Commonwealth Edison Company (ComEd), Dayton Power and Light Company, and Virginia Electric and Power Company (collectively referred to as the New PJM Companies), and PJM Interconnection, L.L.C. (PJM), jointly submitted this filing with the Federal Energy Regulatory Commission (Commission) in compliance with the Commission's order of April 1, 2003, in the above-referenced proceeding, American Electric Power Service Corporation, *et al.*, 103 FERC ¶ 61,008 (2003).

New PJM Companies and PJM state that a paper copy of the transmittal letter describing this filing was served on all state public utility commissions having jurisdiction over the New PJM Companies, all PJM members and all transmission customers of the New PJM Companies. In addition, PJM Companies state that the filing, in its entirety, is being posted on the PJM Web site (*http://www.pjm.com*) to download by any interested party.

Comment Date: May 22, 2003.

5. Idaho Power Company

[Docket Nos. ER03–487–001 and ER03–488–001]

Take notice that on May 1, 2003, Idaho Power Company (Idaho Power) filed with the Federal Energy Regulatory Commission (Commission) its compliance filing pursuant to the Commission's order issued March 31, 2003,102 FERC 61,351.

Comment Date: May 22, 2003.

6. New England Power Company

[Docket No. ER03–678–001]

Take notice that on May 5, 2003, New England Power Company (NEP) tendered for filing with the Federal Energy Regulatory Commission (Commission) an amendment to its March 31, 2003 filing in this docket. The filing concerns a Third Revised Service Agreement No. 20 between NEP and its affiliate, Massachusetts Electric Company (MECO), under NEP's FERC Electric Tariff, Original Volume No. 1.

NEP states that copies of this filing have been served on MECO and regulators in the state of Massachusetts.

Comment Date: May 27, 2003.

7. American Transmission Company LLC

[Docket No. ER03–780–001]

Take notice that on May 5, 2003, American Transmission Company LLC, (ATCLLC) tendered for filing a revised Service Agreement designation for the Generation-Transmission Interconnection Agreement between ATCLLC and Wisconsin Public Service Corporation that was filed on April 28, 2003. ATCLLC requests an effective date of March 28, 2003.

Comment Date: May 27, 2003.

8. Midwest Energy, Inc.

[Docket No. ER03–812–000]

Take notice that on May 5, 2003, Midwest Energy, Inc. (Midwest) tendered for filing with the Federal Energy Regulatory Commission (Commission) the Transaction Service Agreement entered into between Midwest and Public Service Company of Colorado.

Midwest states that it is serving copies of the instant filing on the Kansas Corporation Commission.

Comment Date: May 27, 2003.

9. Midwest Energy, Inc.

[Docket No. ER03–813–000]

Take notice that on May 5, 2003, Midwest Energy, Inc. (Midwest) tendered for filing with the Federal Energy Regulatory Commission (Commission) the Transaction Service Agreement entered into between Midwest and Southwestern Public Service Company.

Midwest states that it is serving copies of the instant filing on the Kansas Corporation Commission.

Comment Date: May 27, 2003.

10. Midwest Energy, Inc.

[Docket No. ER03–814–000]

Take notice that on May 5, 2003, Midwest Energy, Inc. (Midwest) tendered for filing with the Federal Energy Regulatory Commission (Commission) the Transaction Service Agreement entered into between Midwest and Northern States Power Company.

Midwest states that it is serving copies of the instant filing on the Kansas Corporation Commission.

Comment Date: May 27, 2003.

11. FPL Energy Services, Inc.

[Docket No. ER03–815–000]

Take notice that on May 5, 2003, FPL Energy Services, Inc. tendered for filing with the Federal Energy Regulatory Commission (Commission) a Notice of Cancellation pursuant to sections 35.15 and 131.53 of the Commission's regulations, 18 CFR 35.15 and 131.53, in order to reflect the cancellation of its market-based rate tariff, designated as Rate Schedule FERC No. 1, originally accepted for filing in Docket No. ER99–2337–000.

Comment Date: May 27, 2003.

12. Commonwealth Edison Company

[Docket No. ER03–816–000]

Take notice that on May 5, 2003, Commonwealth Edison Company (ComEd) tendered for filing with the Federal Energy Regulatory Commission (Commission) a Service Agreement and associated Dynamic Scheduling Agreement between ComEd and Alliant Energy under ComEd's Open Access Transmission Tariff. ComEd requests an effective date of April 1, 2003.

ComEd states that copies of the filing were served upon Alliant Energy and the Illinois Commerce Commission.

Comment Date: May 27, 2003.

13. New England Power Pool

[Docket No. ER03–817–000]

Take notice that on May 2, 2003, the New England Power Pool (NEPOOL) Participants Committee filed for

acceptance materials to: (1) Permit NEPOOL to expand its membership to include Connecticut Resources Recovery Authority (CRRA), Cinergy Services, Inc. (CSI), FPL Energy New England Transmission, LLC (FPL NET), Millennium Power Partners, LP (Millennium), and Rainbow Energy Marketing Corporation (Rainbow); and (2) to terminate the membership of PECO Energy Company—Power Team (PECO).

The NEPOOL Participants Committee requests the following effective dates:April 1, 2003 for the termination of PECO; May 1, 2003 for the commencement of participation in NEPOOL by CSI, Millennium, and Rainbow; July 1, 2003 for commencement of participation in NEPOOL by CRRA; and an effective date for commencement of participation in NEPOOL by FPL NET as of the date the Commission approves in Docket No. EC03–69–000 the transfer of certain jurisdictional assets related to the interconnecting transmission facilities for the Seabrook Nuclear Generating Station from FPL Energy Seabrook, LLC to FPL NET.

The Participants Committee states that copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in NEPOOL.

Comment Date: May 23, 2003.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12256 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2206–021]

Carolina Power & Light Company; Notice of Availability of Draft Environmental Assessment

May 9, 2003.

A draft environmental assessment (DEA) is available for public review. The DEA analyzes the environmental impacts of a Shoreline Management Plan (SMP) filed for the Tillery Development of the Yadkin—Pee Dee River Project. The project is located on the Yadkin—Pee Dee River in Anson, Richmond, Montgomery, and Stanly Counties, North Carolina. The Tillery Development is located on the Pee Dee River in Stanly and Montgomery counties, North Carolina. Lake Tillery, the upper reservoir of the Yadkin—Pee Dee Project, is owned and operated by Carolina Power & Light Company (CP&L).

The DEA was written by staff in the Office of Energy Projects, Federal Energy Regulatory Commission. Commission staff concludes that approving the SMP would not constitute a major Federal action significantly affecting the quality of the human environment. The DEA is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Anyone may file comments on the DEA. The public as well as Federal and state resource agencies are encouraged to provide comments. All written comments must be filed within 45 days of the issuance date of this notice shown above. Send an original and eight copies of all comments marked with the project number, P–2206–021, to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

If you have any questions regarding this notice, please call Shana High at (202) 502–8674.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12330 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene, Protests, and Comments

May 9, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No.:* 12184–000.

c. *Date filed:* June 4, 2002.

d. *Applicant:* Sardis Lake Hydro, LLC.

e. *Name of Project:* Sardis Lake Project.

f. *Location:* On Jackfork Creek, Pushmataha, Latimer, LeFlore, McCurtain, Choctaw, Bryan, Atoka, and Pittsburg Counties, Oklahoma utilizing the Sardis Lake Dam administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, President, Northwest Power Services, Inc., Agent for Sardis Lake Hydro, LLC, P.O. Box 535, Rigby, ID 83442, (208) 745–8630, E-mail *npsihydro@aol.com.*

i. *FERC Contact:* Robert Bell, (202) 505–6062.

j. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an

issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project would utilize the existing U.S. Army Corps of Engineers' Sardis Lake Dam and would consist of: (1) a proposed intake structure, (2) a proposed 200-foot-long, 60-inch-diameter steel penstock, (3) a proposed powerhouse containing one generating unit having an installed capacity of 1.2 MW, (4) a proposed 1-mile-long, 15 kV transmission line, and (5) appurtenant facilities.

The applicant estimates that the average annual generation would be 4.496 GWh and would be sold to a local utility.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing an original and eight copies to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12326 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of Exemption and Soliciting Comments, Motions To Intervene, and Protests

May 12, 2003.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of license to change project boundary.

b. *Project No:* 1417–126.

c. *Date Filed:* March 6, 2003, and supplemented on May 6, 2003.

d. *Applicant:* Central Nebraska Public Power and Irrigation District (Central).

e. *Name of Project:* Kingsley Dam Project.

f. *Location:* The project is located on the North Platte and Platte Rivers in Garden, Keith, Lincoln, Dawson, and Gosper Counties, Nebraska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Jeremiah Maher, Environmental Resources Manager, Central Nebraska Public Power and Irrigation District, 415 Lincoln St., P.O. Box 740, Holdrege, NE 68949–0740, (308) 995–8601.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Robert Shaffer at (202) 502–8944, or e-mail address: *robert.shaffer@ferc.gov*.

j. *Deadline for filing comments and or motions:* June 13, 2003.

k. *Description of Request:* Central proposes to change the project boundary at Johnson Lake, which is located in Gosper and Dawson Counties, Nebraska. Central proposes to modify the project boundary by removing 101.7 acres and adding 12.1 acres, to assure the adequacy of lands for project's operational functions. Central states that it made the filing pursuant to the plan for reviewing the project's boundary, which is part of Central's Land and Shoreline Management Plan that was approved in an October 7, 2002, Commission Order.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12327 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

May 9, 2003.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment to recreation plan.

b. *Project No:* 2100–119.

c. *Date Filed:* April 4, 2003.

d. *Applicant:* California Department of Water Resources.

e. *Name of Project:* Feather River Project.

f. *Location:* The project is in Butte County, near the City of Oroville. Lake Oroville is one the project reservoirs and is located on the Feather River.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a), 825(r), 799 and 801.

h. *Applicant Contact:* Mr. Daniel F. Peterson, Chief of the Department of Environmental Assessment Branch, California Department of Water Resources, (916) 653–9978.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Brian Romanek at (202) 502–6175, or e-mail address: *brian.romanek@ferc.gov*.

j. *Deadline for filing comments and or motions:* June 9, 2003.

All documents (original and eight copies) should be filed with: Ms. Magalie Roman Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2100–119) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* The licensee filed a request to amend the approved project recreation plan to convert recreational trails within the project to "shared use" trails as opposed to the present designated use trails. The shared use system would allow concurrent use of the same trail by hikers, bicyclists, and equestrians. Under the present plan some trails are designated for hiker and equestrian use only.

l. Location of the Application: This filing is available for review at the Commission in the Public Reference Room 888 First Street, NE., Room 2A, Washington, DC 20426 or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file

comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,
Secretary.

[FR Doc. 03–12328 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Combined Initial Information Meeting and Scoping Meeting, Project Site Visit, and Solicitation of Scoping Comments for an Applicant-Prepared Environmental Assessment Using the Alternative Licensing Process

May 12, 2003.

a. *Type of Application:* Alternative licensing process.

b. *Project No.:* 2204–019.

c. *Applicant:* City and County of Denver, Colorado.

d. *Name of Project:* Williams Fork Reservoir Project.

e. *Location:* On the Williams Fork River near its confluence with the Colorado River at Parshall, in Grand County, Colorado. No federal lands would be affected.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contact:* Kevin Urie, Denver Water, 1600 W. 12th Ave., Denver, CO 80204, (303) 628–5987.

h. *FERC Contact:* Dianne Rodman, at (202) 502–6077 or *dianne.rodman@ferc.gov.*

j. *Deadline for filing scoping comments:* August 4, 2003.

Comments should be addressed to: Mr. Kevin Urie, Project Coordinator—Williams Fork Project Relicensing, Denver Water, 1600 W. 12th Ave., Denver, CO 80204.

All documents (original and eight copies) should also be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Federal Energy Regulatory Commission's (Commission) rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

k. The existing project consists of: (1) The 209-foot-high, 670-foot-long concrete thin arch dam with a crest elevation of 7,814 feet above mean sea level (msl); (2) the Williams Fork reservoir with a surface area of 1,628 acres and storage of 96,822 acre-feet at elevation 7,811 feet msl; (3) a reinforced concrete penstock intake on the face of the dam, with a 7-foot by 5-foot fixed wheel penstock gate controlling flows into a 66-inch-diameter steel penstock running through the dam; (4) river outlet works on the face of the dam, leading to a 54-inch-diameter steel embedded pipe that conveys water to the outlet works valves; (5) a 66-foot-long, 30-foot-wide, 60-foot-high concrete powerhouse at the toe of the dam, containing one vertical-axis turbine/generator with a capacity of 3,150 kilowatts (kW); (6) a tailrace excavated in the streambed rock, carrying the combined powerhouse and river outlet discharges; (7) a 60-foot by 40-foot switchyard; (8) and appurtenant equipment.

The applicant proposes to submit a license application that may request the Commission to first review the application for a small hydroelectric power project exemption from licensing, or alternatively for a new license. Under the exemption alternative, the applicant would increase the project's generating capacity to 3,650 kW by installing a second turbine/generator. Under the relicensing alternative, the applicant would to continue to operate the existing turbine/generator with a 3,150–kW capacity and would not install a second unit.

Scoping Process

The City and County of Denver, Colorado, acting by and through its Board of Water Commissioners (Denver Water), intends to utilize the Commission's alternative licensing process (ALP). Under the ALP, Denver Water intends to prepare an Applicant Prepared Environmental Assessment (APEA) and exemption/license application for the Williams Fork Reservoir Hydroelectric Project.

Denver Water expects to file with the Commission, the APEA and the exemption/license application for the Williams Fork Reservoir Hydroelectric Project by December 31, 2004. Although Denver Water's intent is to prepare an EA, there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

The purpose of this notice is to inform you of the opportunity to participate in the upcoming scoping meetings identified below, and to solicit your scoping comments.

Site Visit

On Wednesday, June 4, 2003, from 11 a.m. until 3:30 p.m., a site visit of the project will be conducted. The site visit is intended to provide the opportunity for interested individuals to learn more about the project, its operations, and the surrounding environment. Those wishing to attend should meet in Kremmling, Colorado by 11 a.m. at the Colorado State University Cooperative Extension of Grand County office (210 11th Street, Fairgrounds, Kremmling, CO, (970) 724–3436). Please contact Mr. Joe Sloan of Denver Water at (303) 628–6320 by May 26, 2003, if you plan to attend the site visit.

Scoping Meetings

Denver Water and the Commission staff will hold two scoping meetings, one in the daytime and one in the evening, to help us identify the scope of issues to be addressed in the APEA.

The daytime scoping meeting will focus on resource agency concerns, while the evening scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the environmental issues that should be analyzed in the APEA. The times and locations of these meetings are as follows:

Daytime Meeting

Thursday, June 5, 2003, 1 p.m. to 4 p.m. Colorado State Cooperative Extension, 210 11th Street, Fairgrounds, Kremmling, CO.

Evening Meeting

Thursday, June 5, 2003, 6 p.m. to 9 p.m. Colorado State Cooperative Extension, 210 11th Street, Kremmling, CO.

To help focus discussions, an initial information package (IIP) and Scoping Document 1 was mailed in April 2003, outlining the subject areas to be addressed in the APEA to the parties on the mailing list. Copies of the IIP and SD1 also will be available at the scoping meetings. The IIP and SD1 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 "FERRIS" 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 email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Based on all written comments received, a Scoping Document 2 (SD2) may be issued. SD2 will include a revised list of issues, based on the scoping sessions.

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the APEA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the APEA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the APEA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meetings and to assist Denver Water in defining and clarifying the issues to be addressed in the APEA.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12329 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

May 12, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* License amendment for non-project use of project lands and waters.

b. *Project No:* 2376–035.

c. *Date Filed:* March 19, 2003.

d. *Applicant:* American Electric Power.

e. *Name of Project:* Reusens Project.

f. *Location:* Reusens Project reservoir on the James River, in Amherst County, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. J. L. Fariss, American Electric Power, P.O. Box 2021, Roanoke, VA 24022.

i. *FERC Contact:* Ms. Monica Maynard (202) 502–6013.

j. *Deadline for filing motions to intervene, protests and comments:* June 13, 2003.

The Commission's rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Proposed Action:* The Applicant seeks to allow the Amherst County Service Agency (ACSA) withdraw up to 2 MGD from the James River within the Reusens Project boundary during drought emergencies. The Applicant would allow the ACSA to temporarily install a pump and screened intake pipe to move water from the project reservoir into pipe leading to its water drinking water supply system during drought emergency conditions.

l. The 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 "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item h.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically in the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* CFR 18 385.2001(a)(1)(iii) and the instructions

on the Commission's Web site, *http://ferc.gov*, under the "e-filing" link.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12331 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice Soliciting Scoping Comments

May 12, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 4914–010.

c. *Date Filed:* November 20, 2002.

d. *Applicant:* International Paper Company.

e. *Name of Project:* Nicolet Mill Dam Project.

f. *Location:* At the U.S. Army Corps of Engineers' De Pere Dam, on the Fox River, in the City of De Pere, Brown County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C.791(a)–825(r).

h. *Applicant Contact:* Thomas Piette, International Paper Company, 200 Main Avenue, De Pere, WI 54115, (920) 336–4211.

i. *FERC Contact:* Peter Leitzke, (202) 502–6059 or *peter.leitzke@ferc.gov.*

j. *Deadline for filing scoping comments:* June 26, 2003.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–4914–010) on any comments or motions filed.

The Commission's rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site, *http://www.ferc.gov*, under the "e-Filing" link.

k. This application is not ready for environmental analysis at this time.

l. The existing Nicolet Mill Dam Project consists of the following existing facilities: (1) A 13.6 foot-high, 400-foot-long diversion structure attached to the westerly end of the U.S. Army Corps of Engineers' De Pere Dam; (2) intake works consisting of 28 gates screened with steel racks; (3) a powerhouse containing eight 135-kilowatt (kW) generating units with a total installed capacity of 1,080 kW; and (4) other appurtenances.

m. A copy of the 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 "FERRIS" link. Enter the docket number excluding the last three digits (P–4914) in the docket number field to access the document. For assistance, contact FERC Online Asupport at *FERCOlineSupport@ferc.gov* or call 1–866–208–3676 or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via email 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.

n. *Scoping Process:* The Commission staff intends to prepare an Environmental Assessment (EA) for the Nicolet Mill Dam Project (FERC No. 4914–010) in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Commission staff does not propose to conduct any on-site scoping meetings at this time. Instead, we will solicit comments, recommendations, information, and alternatives by issuing a Scoping Document (SD).

Copies of the SD outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the SD may be viewed on the Web at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call 1–866–208–3676 or for TTY (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12333 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Surrender of Exemption and Soliciting Comments, Motions To Intervene, and Protests

May 9, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender of conduit exemption.

b. *Project No.:* 6270–004.

c. *Date Filed:* January 28, 2003.

d. *Applicant:* Moon Lake Water Users Association.

e. *Name of Project:* Big Sand Wash Project.

f. *Location:* On the "C" Canal in Duchesne County, Utah.

g. *Filed pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Lynn R. Winterton, Moon Lake Water Users Association, 263 East Lagoon Street, Roosevelt, Utah, (435) 722–2002.

i. *FERC Contact:* Regina Saizan, (202) 502–8765.

j. *Deadline for filing motions to intervene, protests and comments:* June 9, 2003.

The Commission's rules of practice and procedure require all interveners filing a document with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

k. *Description of Proposed Action:* The proposed Uintah Basin Replacement Project authorized by section 203(a)(1–4) of Pub. L. 102–575 includes the enlargement of the Big Sand Wash Reservoir. The enlargement of the storage area will inundate the applicant's hydropower project. Consequently, the applicant seeks Commission approval to surrender its conduit exemption.

l. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the

Commission's Web site at *http://www.ferc.gov* using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item h.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rules of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing an original and eight copies to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Comments, protests, and motions to intervene 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.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. 03–12334 Filed 5–15–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Scoping Meetings, Site Visit, Scoping Document 1 and Soliciting Scoping Comments

May 9, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender application.

b. *Project No.:* 696–013.

c. *Date filed:* December 31, 2003.

d. *Applicant:* PacifiCorp.

e. *Name of Project:* American Fork Hydroelectric Project.

f. *Location:* On American Fork Creek, near the City of American Fork, Utah County, Utah, about 3 miles east of Highland, Utah. The project affects about 28.8 acres of federal lands within the Uinta National Forest and 2,000 feet of the project flowline passes through the Timpanogos Cave National Monument, administered by the U.S. Department of the Interior, National Park Service (NPS).

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact Monte Garrett, Licensing Manager, PacifiCorp, 825 NE. Multnomah, suite 1500, Portland, Oregon, 97232 (503) 813–6629.

i. *FERC Contact:* Kenneth Hogan (202) 502–8434, e-mail at *kenneth.hogan@ferc.gov*.

j. *Deadline for filing scoping comments:* 60 days from the date of this notice.

All documents (original and eight copies) should be filed with: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's rules of practice and procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping 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, *http://www.ferc.gov*, under the "e-Filing" link.

k. This application is not ready for environmental analysis at this time.

l. *Description of the Project:* The existing project consists of: (1) A 29-foot 9-inch wide and 4.5-foot-high reinforced concrete diversion dam; (2) a 6-foot-wide 6-foot-long intake; (3) a 6-foot-long 6-foot-wide manually operated sluice gate; (4) a 2-foot-long 2-foot-wide manually operated upstream sluice gate; (5) a 28-inch-diameter welded steel pipe flowline approximately 11,666-foot-long which transitions into a 33-inch-diameter riveted steel penstock 253-foot-long that transitions into a 20-inch-diameter riveted steel penstock 61-foot-long; (6) an approximately 2,700-square-foot brick powerhouse; (7) one turbine generator unit with a rated capacity of 1,050 kilowatts; and (8) other appurtenances.

m. A copy of the application is on file with the Commission and is available for public inspection. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

n. *Scoping Process:* The Commission intends to prepare an environmental assessment (EA) for the surrender of the license for the project in accordance with the National Environmental Policy Act. The EA may consider reasonable alternatives to the proposed action.

Scoping Meetings and Site Visit

FERC staff will conduct a site visit, an agency scoping meeting and a public scoping meeting. The site visit will consist of a tour of project facilities and lands and any pertinent surrounding features. The agency scoping meeting will focus on resource agency and non-governmental organization (NGO) concerns, while the public scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings,

and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of the site visit and meetings are as follows:

Site Visit:
June 3, 2003.
Time: 10 a.m.
Timpanogos Cave National Monument's Visitors Center, Rural Route 3, Box 200, American Fork, Utah.

Public Scoping Meeting:
June 3, 2003.
Time: 7 p.m.
American Fork High School, 510 North 600 East, American Fork, Utah 84003. (801) 756–8547.

Agency Scoping Meeting:
June 4, 2003.
Time: 10 a.m.
American Fork High School, 510 North 600 East, American Fork, Utah 84003. (801) 756–8547.

Copies of SD1 outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of SD1 are available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

As part of scoping the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from comments all available information, especially quantifiable data, on the resources at issue; (3) encourage comments from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis. Consequently, interested entities are requested to file with the Commission any data and information concerning environmental resources and land uses in the project area and the subject project's impacts to the aforementioned.

o. The tentative schedule for preparing the American Fork Surrender Application EA is:

Major milestone	Target date
Ready for Environmental Analysis Notice.	October, 2003.
Draft EA Issued	January, 2004.
Final EA Issued	April, 2004.

Magalie R. Salas,
Secretary.
[FR Doc. 03–12335 Filed 5–15–03; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Regulations Governing Off-the-Record Communications; Public Notice

May 9, 2003.

This constitutes notice, in accordance with 18 CFR 385.2201(h), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or a prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, to deliver a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such requests only when it determines that fairness so requires.

Any person identified below as having made a prohibited off-the-record communication should serve the document on all parties listed on the official service list for the applicable proceeding in accordance with rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of prohibited and exempt communications recently received in the Office of the Secretary. The communications listed are grouped by docket numbers. 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 "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Prohibited

Docket No.	Date filed	Presenter or requester
1. Project Nos. 637–022, 460–0004–30–03 and 2342–011.	.....	Mary Morton/ Jamie Simler [1].
2. EL01–10–000.	4–30–03	Mary Morton/ Jamie Simler [2].
3. Project No. 2342–000.	5–1–03	Keith Bonney.

[1] Memorandum of site visits to Pacific Northwest hydro projects.
[2] Memorandum of site visit to Cushman hydro project.

Exempt

Docket No.	Date filed	Presenter or requester
1. CP01–409–000.	5–1–03	Charles Brown.
2. Project No. 477–000.	5–8–03	David Heintzman.
3. Project No. 255–058.	5–8–03	F. Allen Wiley.

Magalie R. Salas,
Secretary.
[FR Doc. 03–12336 Filed 5–15–03; 8:45 am]
BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–6]

Proposed Settlement Agreement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended, 42 U.S.C. 7413(g), notice is hereby given

of a proposed settlement agreement in the following case filed in the U.S. Court of Appeals for the District of Columbia Circuit: *Antek Instruments* v. *EPA*, No. 00–1149. This case concerns the U.S. Environmental Protection Agency's (EPA) promulgation of regulations requiring refiners and importers of gasoline to control sulfur content in their product and to test for sulfur content using a specified test procedure.

DATES: Written comments on the proposed settlement agreement must be received by June 16, 2003.

ADDRESSES: Copies of the proposed settlement are available from Phyllis Cochran, Air and Radiation Division (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202)564–7606. Written comments should be sent to Susmita Dubey at the above address and must be submitted on or before June 16, 2003.

SUPPLEMENTARY INFORMATION: In February 2000, EPA promulgated regulations limiting sulfur content in gasoline. 65 FR 6698 (April 10, 2000). The regulations include a requirement that gasoline refiners and importers test their product for sulfur content using a specified test procedure. Antek Instruments filed a petition challenging the final rule. EPA and Antek entered into negotiations and have reached a proposed settlement of this litigation. The proposed settlement agreement outlines a rulemaking proposal to identify alternative sulfur test procedures that can be used to satisfy the regulatory testing requirement, if the resulting test result is correlated with the rule's primary test method.

For a period of thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the proposed settlement agreement from persons who were not named as parties or interveners to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determine, based on any comment which may be submitted, that consent to the settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

Dated: May 8, 2003.

Lisa K. Friedman,

Associate General Counsel, Air and Radiation Law Office.

[FR Doc. 03–12358 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6640–3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental ReviewProcess (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 1, 2003 (68 FR 16511).

Draft EISs

ERP No. D–COE–E32180–FL Rating EC1, Miami Harbor Navigation Improvements Project to Study the Feasibility of Widening and Deepening Portions of the Port, Miami-Dade County, FL.

Summary: EPA expressed some environmental concerns about the unavoidable project impacts to sensitive biological resources, but concluded the proposed mitigation plan should adequately address these losses in the long-term.

ERP No. D–FHW–H40178–MO Rating EC2, I–64/US 40 Corridor, Reconstruction of the existing I–64/US 40 Facility with New Interchange Configurations and Roadway, Funding, City of St.Louis, St. Louis County, MO.

Summary: EPA has environmental concerns regarding the proposed project on the basis of the degree of information provided to ensure compliance with section 4(f). EPA requests that consultation with the State HistoricalPreservation Officer (SHPO) be undertaken to identify appropriate mitigation measures for the properties that will be adversely impacted if the preferred alternative is selected. EPA also requests that identified Environmental Justice communities be evaluated for opportunities to reduce cumulative environmental and human health burdens through project implementation.

ERP No. D–NRC–H06005–NE Rating EC2, GENERIC EIS—Fort Calhoun Station, Unit 1, Renewal of the Operating Licenses (OLs) for an Additional 20 Years, Supplement 12 (NUREG–1437)Omaha Public Power District, Washington County, NE.

Summary: EPA expressed environmental concerns with the proposed re-licensing on the basis of the long (10 year) lead time before the current license expires. EPA recommended that the NRC improve cumulative effects information on current and future heat contributors to the Missouri River, and that NRC detail possible cooling strategies if faced with limited Missouri River assimilative capacity (heat) in the future.

ERP No. DS–AFS–L65300–ID Rating LO, Goose Creek Watershed Project, Reviewing and Updating Information on the Pileated Woodpecker and Soil Impacts, Payette National Forest, New Meadows Ranger District, Adams County, ID.

Summary: EPA has no concerns with the proposed action; however, EPA suggests including information on the potential cumulative effects of 5 other proposed timber sale projects on pileated woodpecker habitat within the National Forest.

ERP No. DS–AFS–L65325–ID Rating LO, Sloan-Kennally Timber Sale Project, Reviewing and Updating Information on the Pileated Woodpecker and Soil Impacts, Payette National Forest, McCallRanger District, Adams County, ID.

Summary: EPA has no significant concerns with the proposed action; however, EPA suggests including information on the potential cumulative effects of 5 other proposed timber sale projects on pileated woodpecker habitat within the National Forest.

ERP No. DS–AFS–L65336–ID Rating LO, Brown Creek Timber Sale Project, Reviewing and Updating Information on the Pileated Woodpecker and Soil Impacts, Payette National Forest, New Meadow Ranger District, Adams County, ID.

Summary: EPA expressed no concerns with the proposed action; however, EPA suggests including information on the potential cumulative effects of 5 other proposed projects on pileated woodpecker habitat within the National Forest.

ERP No. DS–AFS–L65346–ID Rating LO, Middle Fork Weiser River Watershed Project, Reviewing and Updating Information on the Pileated Woodpecker and Soil Impacts, Payette National Forest, Council Ranger District, Adams County, ID.

Summary: EPA has no concerns with the proposed action; however, EPA suggests including information on the

potential cumulative effects of 5 other proposed timber sale projects on pileated woodpecker habitat within the National Forest.

ERP No. DS–AFS–L65379–ID Rating LO, Little Weiser Landscape Vegetation Management Project, Reviewing and Updating Information on the Pileated Woodpecker and Soil Impacts, Payette National Forest, Adams County, ID.

Summary: EPA has no concerns with the proposed action; however, EPA suggests including information on the potential cumulative effects of 5 other proposed timber sale projects on pileated woodpecker habitat within the National Forest.

Final EISs

ERP No. F–BLM–G65083–NM Farmington Resource Management Plan, Implementation, Managing Public Lands within the Farmington Field Office (FF0) Boundaries and Federal Oil and Gas Resources within the New Mexico Portion of San Juan Basin, San Juan, McKinley, Rio Arriba and Sandoval Counties, NM.

Summary: EPA's comments on air quality impacts and mitigation have been addressed with additional air quality analysis and assurance that the NMAQB air permitting program will minimize air quality impacts. The FourCorners Ozone Task Force will offer future recommendations to BLM for consideration in the plan.

ERP No. F–FHW–E40788–AL Memphis to Atlanta Corridor Construction, I–65 in North Central Alabama eastward to the Georgia State Line, U.S. Army COE Section 404, U.S. Coast Guard and NPDES Permits, Limestone, Morgan, Madison, Jackson, Marshall, DeKalb and CherokeeCounties, AL.

Summary: EPA continues to have environmental concerns with the proposed project regarding impacts to wetlands and aquatic resources, storm water, noise, relocations and other natural habitat impacts. EPA recommends that tangible minimization and/or mitigation commitments for these impacts be developed and implemented.

ERP No. F–FHW–E40789–MS East Harrison County Connector Construction, I–10 to U.S. 90, Funding, U.S. Army COE and US Coast Guard Permits Issuance and Possible Transfer of Federal Lands, Harrison County, MS.

Summary: EPA continues to have environmental concerns with impacts arising from the proposed project relating to noise, floodplains, wetlands and historic properties. EPA wishes to reiterate the importance of MDOT and FHWA's commitment to provide wetland and noise mitigation for impacts attributable to the proposed project.

ERP No. F–FHW–H40170–MO US 50 East-Central Corridor Highway Improvements, US 50 to US 63 east of Jefferson City, Funding and Major Transportation Investment Analysis, Osage, Gasconade and Franklin Counties, MO.

Summary: The FEIS adequately supplements information needs and addresses the concerns that EPA had expressed in the review of the DEIS for this project. Consequently, EPA has no objections.

ERP No. F–FHW–K40245–CA CA–78/111 Brawley Bypass, Construction of an Expressway from CA–86 to CA–111, City of Brawley, Funding, Imperial County, CA.

Summary: EPA has continuing environmental concerns about air quality impacts arising from the proposed project, particularly regarding PM–10. EPA supports the commitment to offset the loss of prime farmland from the project by purchasing conservation easements. EPA requests that unresolved air quality issues and mitigation for farmland impacts be addressed in the Record of Decision.

ERP No. F–NPS–D61054–VA Jamestown Project, Improvements at the Jamestown Unit of Colonial National Park and the JamestownNational Historic Site, Implementation, James City County, VA.

Summary: EPA expressed lack of objections with the proposed action.

ERP No. F–SFW–G91002–NM Rio Grande Silvery Minnow (Hybognathus amarus) Critical Habitat Designation, Implementation, Bernalillo, Sandoval, Socorro and Valencia Counties, NM.

Summary: EPA has no objection to the selection of the preferred plan of action. EPA's comments on the Draft EIS were addressed.

Dated: May 13, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–12350 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6640–2]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 5647167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed May 5, 2003, through May 9, 2003, Pursuant to 40 CFR 1506.9.

EIS No. 030209, DRAFT EIS, AFS, WA, 49 Degrees North Mountain Resort Revised Master Development Plan, Implementation, Colville National Forest, Newport Ranger District, Stevens County, WA, Comment Period Ends: June 30, 2003, Contact: Lynn Kaney (509) 447–7300.

This document is available on the Internet at: *http://www.fs.fed.us/r6/colville.*

EIS No. 030210, DRAFT EIS, BLM, OR, CA, Upper Klamath River Management Plan, Resource Management Plan Amendments, Implementation, Upper Klamath River stretch between Lake Ewauna, OR, south to Irongate Dam in CA, Comment Period Ends: August 14, 2003, Contact: Larry Frazier (541) 883–6916.

This document is available on the Internet at: *http://www.or.blm.gov/Lakeview/kfra/index.htm.*

EIS No. 030211, DRAFT EIS, COE, MS, Royal D'Iberville Hotel and Casino Development Project, Construction and Operation, U.S. Army COE Section 10 and 404 Permits, NPDES Permit, City of D'Iberville on the Back Bay, Mississippi Gulf Coast, Harrison, MS, Comment Period Ends: June 30, 2003, Contact: Susan Ivester Rees (251) 694–4141.

EIS No. 030212, FINAL EIS, COE, TX, Bayport Channel Container/Cruise Terminal Project, To Construct and Operate a Marine Terminal Complex on the Bayport Ship Channel, Issuance of Permit, Section 404 and 10 Permits, Harris County, TX, Wait Period Ends: June 16, 2003, Contact: Fred Anthamatten (409) 766–3943.

EIS No. 030213, DRAFT EIS, NRC, SC, H.B. Robinson Steam Electric Plant, Unit No. 2 (RNP), Application for Operating License Renewal of Nuclear Plants for 20-Year, Supplement 13 located on the Shore of Lake Robinson, Darlington and Chesterfield Counties, SC, Comment Period Ends: July 20, 2003, Contact: Richard L. Emch (301) 415–1590.

EIS No. 030214, DRAFT EIS, AFS, KY, Daniel Boone National Forest Project, Proposal to Revise the Land and Resource Management Plan, Implementation, Winchester, Several Counties, KY, Comment Period Ends: August 14, 2003, Contact: Rick Wilcox (859) 745–3156.

This document is available on the Internet at: *http://www.southregion.fs.fed/boone/.*

EIS No. 030215, FINAL EIS, FHW, SC, Dave Lyle Boulevard Extension, New Location from the S.C. Route 161/ Dave Lyle Boulevard Intersection in York County To S.C. Route 75, in the vicinity of the U.S. Route 521/S.C., York County Metropolitan Road Corridor Project, Funding, York and Lancaster Counties, SC, Wait Period Ends: June 16, 2003, Contact: Patrick Tyndall (803) 765–5460.

EIS No. 030216, DRAFT EIS, FHW, OH, OH–161/37 Improvement, from OH–161 (New Albany Bypass) to west of OH–161/37 Interchange with OH–16, Funding, Franklin and Licking Counties, OH, Comment Period Ends: July 18, 2003, Contact: Larry Anderson (614) 469–6896.

EIS No. 030217, DRAFT EIS, NSA, NM, Chemistry and Metallurgy Research Building Replacement Project, Consolidation and Relocation, Los Alamos National Laboratory, Los Alamos County, NM, Comment Period Ends: June 30, 2003, Contact: Elizabeth Withers (505) 667–8690.

EIS No. 030218, FINAL EIS, FRC, WY, MT, ND, Grasslands Pipeline Project, Interstate Natural Gas Pipeline System Construction and Operation, Docket No. CP02–037–000, WY, ND and MT, Wait Period Ends: June 16, 2003, Contact: Rich McGuire (202) 502–6177.

This document is available on the Internet at: *http://www.ferc.gov.*

EIS No. 030219, FINAL EIS, BLM, NV, Ivanpah Energy Center Project, 500 Megawatt (MW) Gas-Fired Electric Power Generating Station Construction and Operation, Approval, Right-of-Way Grant, BLM Temporary Use Permit, FHWA Permit to Cross Federal Aid Highway, U.S. Army COE Section 10 and 404 Permits and NPDES Permit Issuance, Clark County, NV, Wait Period Ends: June 16, 2003, Contact: Jerrold E. Crockford (505) 599–6333.

EIS No. 030220, FINAL EIS, AFS, WI, Cayuga Project Area, Various Resource Management Projects, Chequamegon-Nicolet National Forest, Great Divide Ranger District, Ashland County, WI, Wait Period Ends: June 16, 2003, Contact: Debra Sigmund (715) 634–4821.

This document is available on the Internet at: *http://www.fs.fed.us/r9/cnnf/natres/index.html.*

EIS No. 030221, FINAL EIS, NOA, Amendment 13 to the Fishery Management Plan for Summer Flounder, Scup, and Black Sea Bass, Implementation, in the Western Atlantic Ocean, from Cape Harteras, NC, northward to the US-Canadian Border, Wait Period Ends: June 16, 2003, Contact: Steven Kokkinakis (202) 482–3639.

EIS No. 030222, FINAL SUPPLEMENT, COE, CA, Bel Marin Keys Unit V Expansion of the Hamilton Wetland Restoration Project, New and Updated Information, Application for Approval of Permits, Novato Creek, Marin County, CA, Wait Period Ends: June 16, 2003, Contact: Eric Jolliffe (415) 977–8543.

This document is available on the Internet at: *http://www.coastalconservancy.ca.gov/belmarin.*

EIS No. 030223, FINAL EIS, AFS, MT, Post Fire Vegetation and Fuels Management Project, Fuel Reduction, Bark Beetle Sanitation and Maintenance, and/or Restoration of Vegetative Communities, Beaverhead Deerlodge National Forest, Wisdom and Pintler Ranger Districts, Beaverhead and Deerlodge Counties, MT, Wait Period Ends: June 16, 2003, Contact: Amy Nerbun (406) 683–3948.

EIS No. 030224, DRAFT EIS, DOE, NY, West Valley Demonstration Project, Waste Management, Onsite Management and Offsite Transportation of Radioactive Waste, West Valley, Cattaraugus County, NY, Comment Period Ends: June 30, 2003, Contact: Daniel W. Sullivan (800) 633–5280.

Amended Notices

EIS No. 030198, DRAFT EIS, AFS, NV, Jarbidge Canyon Project, To Implement a Road Management Plan and Construct a Water Projects along the Charleston-Jarbidge Road, and Reconstruct the South Canyon Road, Humbolt-Toiyabe National Forest, Jarbidge Ranger District, ELko County, NV, Comment Period Ends: June 23, 2003, Contact: Jim Winfrey (775) 778–0229.

Revision of FR Notice Published on 5/9/2003: Correction to Contact Person Telephone Number.

EIS No. 030204, FINAL EIS, STB, TX, Bayport Loop New Rail Line, Construction and Operation, Finance Docket No. 34079, Houston, Harris County, TX, Wait Period Ends: June 9, 2003, Contact: Dana White (888) 229–7857.

Revision of FR Notice Published on 5/9/2003: Correction of EIS Status from Draft EIS to Final EIS. Correction of CEQ Comment Period Ending 6/23/2003 to Wait Period Ending 6/9/2003.

Dated: May 13, 2003.

Jóseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–12351 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0128; FRL–7303–2]

Forchlorfenuron; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical In or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2003–0128, must be received on or before June 16, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dennis McNeilly, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–6742; e-mail address: mcneilly.dennis@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to

assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0128. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2003–0128. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov,* Attention: Docket ID Number OPP–2003–0128. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0128.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0128. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 7, 2003.

Debra Edwards,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

KIM-C1, LLC

PP 3F6550

EPA has received a pesticide petition (3F6550) from KIM-C1, LLC, c/o Siemer & Associates, Inc., 4672 W. Jennifer, Ste. 103, Fresno, CA 93722 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of Forchlorfenuron (CPPU) in or on the raw agricultural commodities grapes and kiwifruit and the processed commodity raisins at 0.03 parts per million (ppm). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* ^{14}C radiolabel studies were conducted on apples, grapes, and kiwifruit. Results of these three studies showed that the metabolism of CPPU in apples, grapes, and kiwifruit is similar, if not identical. Metabolism of CPPU in these crops involved hydroxylation of the phenyl-ring to form 3-hydroxy-CPPU or 4-hydroxy-CPPU followed by conjugation with glucose to form β-glycosides. These studies were conducted using CPPU at 15 ppm and 75 ppm. Most of the residue remained on the treated surface and was primarily associated with pulp tissue. Very little radioactivity was found in the juice.

2. *Analytical method.* Two analytical methods, both based on high performance liquid chromatography (HPLC) procedures have been developed. The first used a visible ultraviolet (UV) detector while the second used a Mass Spec detector. Since the Mass Spec detector is capable of both qualitative as well as quantitative measurement it is the preferred method. The level of quantification (LOQ) in whole grape fruit was 0.01 ppm; the level of detection (LOD) was 0.003 ppm. In grape juice, the LOQ was 0.002 ppm and the LOD was 0.007 ppm (0.7 parts per billion (ppb)). In raisins, the LOQ was 0.01 ppm and the LOD was 0.003 ppm.

3. *Magnitude of residues.* The magnitude of the residues in or on grapes, excluding outliers three standard deviations beyond the mean, are 0.03 ppm. One outlier was at 0.04 ppm. Grape juice residues are below 0.01 ppm. Raisin residues are at or below 0.02 ppm while kiwifruit will be at or below 0.1 ppm.

B. Toxicological Profile

A full battery of toxicology testing including studies of acute, subchronic, chronic, oncogenicity, developmental, reproductive and genotoxicity effect is available for CPPU. The acute toxicity of

CPPU is low by all routes. The lowest subchronic study no observed effect level (NOEL) value is 16.8 milligrams/kilogram/day (mg/kg/day) obtained from the dog 90–day toxicity study. Chronic studies indicate that CPPU is not carcinogenic. The lowest chronic dietary NOEL is 7 mg/kg/day from male rats fed CPPU for 104 weeks. CPPU showed no evidence of developmental toxicity in rats and rabbits. In a rat reproduction study, reproductive effects were only observed at maternally toxic doses. Finally, genetic toxicity studies indicate that CPPU is not genotoxic. For the purposes of dietary risk analysis, 0.07 mg/kg/day is proposed for the chronic Population Adjusted Dose (cPAD). The cPAD is based on a chronic endpoint of 7 mg/kg/day which is the NOEL for males from the rat chronic/oncogenicity feeding study and an uncertainty factor of 100. No acute toxicity endpoint could be identified and therefore an acute dietary risk assessment is considered unnecessary.

1. *Acute toxicity.* The acute toxicity of CPPU is low by all routes. The battery of acute toxicity studies place CPPU into Toxicity Category III. CPPU has low acute toxicity when administered orally, dermally or via inhalation to rats. It is not a skin irritant and is only a mild eye irritant. CPPU is not a skin sensitizer.

2. *Genotoxicity.* The genotoxic potential of CPPU was studied *in vitro* in bacteria and mammalian cells and *in vivo* in the unscheduled DNA synthesis test. The test systems assayed did not show any evidence of genotoxicity except in the bacterial mutagenicity assay, strain TA1535, without metabolic activation. The weight of the evidence indicates that CPPU does not possess significant genotoxicity concerns.

3. *Reproductive and developmental toxicity.* Developmental effects of CPPU were studied in rats and rabbits and multigenerational effects on reproduction were studied in rats.

i. *Rat developmental.* In the developmental toxicity study conducted with rats, CPPU was administered by gavage at levels of 0, 100, 200 and 400 mg/kg/day. The maternal and developmental no observed adverse effect levels (NOAELs) are 200 mg/kg/day based on reduced body weights, body weight gain and food consumption and an increased incidence of alopecia in dams. There were no developmental effects.

ii. *Rabbit developmental.* In the rabbit developmental study, gavage doses of 0, 25, 50 and 100 mg/kg/day were administered. Maternal toxicity (decreased body weight and body weight gains) was observed at 50 mg/kg/day and above. The maternal NOAEL is 25 mg/kg/day and the developmental NOAEL is 100 mg/kg/day. There were no developmental effects.

iii. *Reproduction.* In the rat reproduction study, CPPU was administered in the diet at levels of 0, 150, 2,000, and 7,500 ppm for two generations. There were no adverse effects of CPPU on reproductive success. Parental toxicity consisted of clinical signs, inhibition of body weight gain, reduced food consumption, and macroscopic and microscopic effects in the kidney. Reproductive toxicity at the highest dose consisted of slightly reduced live litter sizes in the F_2 litters. In the pups, body weights and survival (late lactation period) were reduced and at the high dose, pup mortality and emaciation was increased. The parental, pup, and reproductive NOAELs are 150 ppm, 150 ppm, and 2,000 ppm, respectively.

4. *Subchronic toxicity.* Subchronic toxicity studies have been conducted with CPPU in the rat, mouse, and dog.

i. *Rats.* CPPU technical was tested in rats in a 3–month study at dietary levels of 0, 200, 1,000 and 5,000 ppm. Observations were decreased body weight, body weight gain and food efficiency. The NOAEL in males is 5,000 ppm (400 mg/kg/day) and in females is 1,000 ppm (84 mg/kg/day).

ii. *Mice.* A 13–week feeding study in mice was conducted at dose levels of 0, 900, 1,800, 3,500 and 7,000 ppm. Effects included decreased body weight and food consumption, increased relative liver weight and lymphocytic cell infiltration in the kidneys. The NOAEL is 3,500 ppm (609 mg/kg/day in males and 788 mg/kg/day in females).

iii. *Dogs.* A 13–week dietary toxicity study was conducted in beagle dogs at dose levels of 0, 50, 500 and 5,000 ppm. Effects included decreased body weight gain, food consumption and food efficiency. The NOAEL for both sexes was 500 ppm (16.8 mg/kg/day in males and 19.1 mg/kg/day in females).

5. *Chronic toxicity.* CPPU has been tested in chronic studies in dogs, rats, and mice.

i. *Rats.* In a 104–week chronic/oncogenicity study in rats, CPPU was administered at dose levels of 0, 150, 2,000 and 7,500 ppm in the diet. Findings were decreased body weight, body weight gain and food consumption, and organ weight and histopathological effects in the kidney. No oncogenicity was found. The NOAEL for this study is 150 ppm (7 mg/kg/day in males and 9 mg/kg/day in females).

ii. *Mice.* CPPU was administered in the diet to mice for 78–weeks at dose levels of 0, 10 and 1,000 mg/kg/day. Observations were decreased body weight and body weight gain, food consumption, increased kidney weights and incidence of chronic kidney histopathological lesions. The NOAEL for both sexes is 10 mg/kg/day.

iii. *Dogs.* In a 12–month study, CPPU was administered in the diet to dogs at dose levels of 0, 150, 3,000 and 7,500 ppm. Observations included reduced body weight, body weight gain and food consumption and various hematology changes. The NOAEL for both sexes was 3,000 ppm (87 mg/kg/day in males and 91 mg/kg/day in females).

iv. *Carcinogenicity.* CPPU did not produce carcinogenicity in chronic studies with rats or mice. The oncogenicity classification of CPPU will be "E" (no evidence of carcinogenicity for humans).

6. *Animal metabolism.* A rat metabolism study indicates that CPPU is almost completely absorbed and most of the ^{14}C-CPPU-derived radioactivity is rapidly eliminated primarily via the urine. The majority of the metabolism of CPPU was via hydroxylation of the phenyl ring. The sulfate conjugate of hyrdoxyl CPPU was the major metabolite excreted in the urine, accounting for as much as approximately 96% of the urinary radioactivity. Tissue residues accounted for less than 1% of the administered dose at 168 hours post-dosing.

7. *Metabolite toxicology.* Metabolites occur at levels below 0.1 ppm and therefore are below levels required to be assayed in animal testing.

8. *Endocrine disruption—Potential endocrine effects.* No special studies to investigate the potential for endocrine effects of CPPU have been performed. However, as summarized above, a large and detailed toxicology data base exists for the compound including studies in all required categories. These studies include acute, sub-chronic, chronic, developmental, and reproductive toxicology studies including detailed histology and histopathology of numerous tissues, including endocrine organs, following repeated or long-term exposures. These studies are considered capable of revealing endocrine effects. The results of all of these studies show no evidence of any endocrine-mediated effects and no pathology of the endocrine organs. Consequently, it is concluded that CPPU does not possess estrogenic or endocrine disrupting properties.

C. Aggregate Exposure

1. *Dietary exposure.* This dietary risk assessment was conducted by Infoscientific.com for KIM-C1, LLC. The dietary exposure assessment was

conducted for foods containing forchlorfenuron: Chemical Abstracts Service (CAS): 68157–60–8 (CPPU) by using the CARES (Cumulative and Aggregate Risk Evaluation System) model. The data input included the following categories of data for performing the dietary exposure assessment: Subpopulations of interest, (infants 1 to 2 years of age and adults 20 to 49 years of age); List of foods which were: blueberry, grape, grape juice, grape raisin, grape wine/sherry, and kiwifruit; food residues which were: 0.001 (blueberry baby food), 0.0007 for grape juice, 0.0007 for grape juice in baby food, 0.03 for raisins, 0.007 for grape as wine/sherry, and 0.01 for kiwifruit; and toxicological benchmarks which were 0.07 mg/kg/day for the oral no observed effect level (NOEL) on a chronic (365–day) basis and 25 mg/kg/day for the oral NOEL based on an acute (1–day) basis. The FCID (Food Consumption Information Database) data set was used to obtain food consumption data in grams per kilogram of body weight.

i. *Food.* The chronic dietary exposure calculations for infants (1 to 2 years old) indicate that over a period of one year:

- 99.9% of infants would ingest less than 0.0000515 mg/kg/day (0.071% of Oral NOEL)
- 99.0% of infants would ingest less than 0.0000469 mg/kg/day (0.067% of Oral NOEL)
- 95.0% of infants would ingest less than 0.0000429 mg/kg/day (0.061% of Oral NOEL)

Similar dietary exposure calculations for adults (20 to 49 years old) indicate that:

- 99.9% of adults would ingest less than 0.0000076 mg/kg/day (0.011% of Oral NOEL)
- 99.0% of adults would ingest less than 0.0000067 mg/kg/day (0.010% of Oral NOEL)
- 95% of adults would ingest less than 0.0000060 mg/kg/day (0.009% of Oral NOEL)

Blueberries have not been included in the petition for registration even though they were included in the dietary risk assessment which is shown above. Even with the blueberries included in the risk assessment the total percent of the oral NOEL on a chronic basis represents only 0.0229% of the oral NOEL. On this basis, there cannot be any anticipated harmful effects to public health.

Acute (1–day) Exposure does not represent any hazard since no acute exposure was identified in this risk assessment.

ii. *Drinking water.* The very low use rate of CPPU, i.e. 10 grams active ingredient or less per acre if used constantly for 20 years would apply less than 0.5 pounds of CPPU per acre during that 20 year period. Computer modeling, using the conservative pesticide root zone model (PRZM) means of analysis has shown that no CPPU would reach ground water, even in sandy loam soils. The results of this risk analysis supported an unambiguous conclusion of "essentially zero risk to ground water" even under reasonable worst-case assumptions. Concentrations are not predicted to exceed 15 to 20 ppb of CPPU in the soil in the upper soil horizons, even following yearly applications for as long as 30 years. No secondary exposure is anticipated as a result of contamination of drinking water.

2. *Non-dietary exposure.* No non-dietary exposure is expected since CPPU is not anticipated to be found in the drinking water. This material does not translocate in plants and thus secondary exposure through plants growing in soil receiving CPPU is not anticipated. The extremely low application rates will not result in significant buildup in the environment. Data indicate that any parent material of CPPU left in the soil will be strongly bound to soil particles and will not move.

D. Cumulative Effects

There are no cumulative effects expected since CPPU is not taken up by plants from the soil. It slowly degrades to mineral end points. Its low use rates and infrequent applications are not conducive to build in the environment.

E. Safety Determination

1. *U.S. population.* As pointed out above in dietary exposure-food the percentage of the reference dose consumed by treating the subject crops represents less than 1% of the estimated safe level for the most sensitive segment of the population, non-nursing infants.

2. *Infants and children.* No developmental, reproductive or fetotoxic effects have been associated with CPPU. The calculation of safety margins with respect to these segments of the population were taken into consideration in the CARES (Cumulative and Aggregate Risk Evaluation System) model estimates with respect to the risk associated with the percentage of the reference dose being consumed.

F. International Tolerances

There is no CODEX maximum residue level established for CPPU. However, CPPU is registered for use on grapes and other crops in Japan, Chile, Mexico, and South Africa.

[FR Doc. 03–12360 Filed 5–15–03; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0168; FRL–7306–6]

(Z,E)-3,13-octadecadienyl and (Z,Z)-3,13-octadecadienyl; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Oregon Department of Agriculture and the Washington State Department of Agriculture to use the pesticides (*Z,E*)-3,13-octadecadienyl and (*Z,Z*)-3,13-octadecadienyl to treat up to 32,000 acres of hybrid poplar grown for pulp and saw timber to control poplar clearwig moth (WPCM). The Applicant proposes the use of two new pheromones which have not been registered by EPA. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments, identified by docket ID number OPP–2003–0168, must be received on or before May 21, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Barbara Madden, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; fax number: (703) 308–5433; e-mail address: Madden.Barbara@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a federal or state government agency (NAICS 9241) involved in administration of environmental quality programs (i.e., Departments of Agriculture, Environment, etc).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0168. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2003–0168. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2003–0168. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0168.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0168. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

II. Background

What Action is the Agency Taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Oregon Department of Agriculture and the Washington State Department of Agriculture have requested the Administrator to issue specific exemptions for the use of (*Z,E*)-3,13-octadecadienyl and (*Z,Z*)-3,13-octadecadienyl on hybrid poplar grown for pulp and saw timber to control poplar clearwig moth (WPCM). Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the Applicants assert that higher trap captures of male WPCM have been observed in areas where poplar trees are being harvested. WPCMs have become the number one pest in poplar plantings in Oregon and Washington. WPCM spend most of their life cycle in the heartwood of trees, away from contact of even systemic insecticides. Repeated use of registered pesticides has failed to control adult males. However, males are exceptionally responsive to sex pheromones. The greatest damage to pulp wood production is damage in the newly planted trees. Young trees and limbs of larger trees damaged by the burrowing activity of WPCM larvae are very prone to wind-throw. Trees less than 2 years old will need to be replaced. Burrowing activity of the larvae downgrades the value of the pulp from quality bond paper to discolored, less valuable product. Net losses are estimated to be 22% in 2003 and future losses could reach 41% to 56%.

The Applicant proposes to use three different formulations containing the same active ingredients (ai) (*Z,E*)-3,13-octadecadienyl and (*Z,Z*)-3,13-octadecadienyl. A stationary, retrievable, hand applied dispenser to protect newly planted trees; a battery operated puffer-type dispenser to protect 2 and 3–year old trees up to 15 meters tall, and a flowable pheromone formulation will be used to protect mature tress (greater than 15 meters in height). All three formulations are a 4:1 ratio of *Z,E*: *Z,Z*-3,13-octadecadienyl straight-chain 18 carbon alcohols that serves as the sex pheromone of the WPCM. The dispensers are placed in 1–year old plantings at one dispenser per five trees. Each dispenser contains approximately 24 milligrams (mg) active ingredient. A maximum of three applications may be made to newly planted trees. The puffers will be applied by placing two dispensers per acre. Each dispenser will be loaded with a canister containing 2.5 gal ai and releasing mg quantities per day. After the initial placement of the puffer dispensers there may be a need for one replacement. The flowable formulation will be applied at a rate of 1.25 gal ai per acre per application with sequential applications being made 30 days apart between May 1 and October 1, 2003, with a maximum of six applications. Up to 32,000 acres of poplar trees in Oregon and Washington may be treated.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a specific exemption proposing use of new chemicals (i.e., active ingredients) which have not been registered by EPA. The notice provides an opportunity for public comment on the application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Oregon Department of Agriculture and the Washington Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: May 6, 2003.

Debra Edwards,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 03–12361 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–5]

Notice of Proposed Administrative Order on Consent Pursuant to Section 122(g)(4) and (7) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), PCB Treatment, Inc., Kansas City, KS, and Kansas City, MO, Docket No. CERCLA 07–2002–0209

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Administrative Order on Consent, PCB Treatment, Inc. Superfund Site, Kansas City, Kansas, and Kansas City, Missouri

SUMMARY: Notice is hereby given that a proposed administrative order on consent between Transformer Services, Inc. and the United States Environmental Protection Agency (EPA) was signed by the United States Environmental Protection Agency (EPA) on March 21, 2003 and approved by the United States Department of Justice (DOJ) on April 16, 2003. This settlement relates to the PCB Treatment Inc. Superfund Site (Site).

DATES: EPA will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed agreement.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 901 N. Fifth Street, Kansas City, Kansas 66101 and should refer to *the PCB Treatment, Inc. Superfund Site Administrative Order on Consent, CERCLA Docket No. 07–2002–0209.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, KS 66101 (913) 551–7255.

SUPPLEMENTARY INFORMATION: The Site consists of two facilities, about two miles apart, located in the industrial areas of Kansas City, Kansas at 45 Ewing Street and Kansas City, Missouri at 2100 Wyandotte Street. The facilities were formerly operated by PCB Treatment Inc., now a defunct corporation. Between 1982 and 1987, PCB Treatment, Inc. and its subsidiaries or affiliates treated and stored PCBs contained in used transformers, capacitors, oil, equipment, and other materials at the Wyandotte facility and the Ewing facility. During its period of operations, spills of PCB contaminated waste occurred.

Samples collected at the Site in the late 1990s indicated that the PCB contamination at Ewing Street exceeded 1,790 parts per million (ppm) in the building and 1,450 ppm in the soils. At Wyandotte Street, the PCB contamination exceeded 23,800 ppm in the building and 800 ppm in the soils.

Over 1000 parties arranged for disposal of PCB wastes at the Site. EPA identified a large number of these parties, including Transformer Services, Inc., as *de minimis* parties. EPA offered settlements to the *de minimis* parties based on their allocated share of the waste plus a premium. The payments by the *de minimis* parties have been placed in a Special Account that will be used towards the cleanup of the Site, estimated to cost $35,000,000. Based on financial information submitted by Transformer Services, Inc., EPA determined that Transformer Services, Inc. demonstrated an inability to pay its allocated share, and qualifies for a reduction in the settlement amount. This proposed settlement requires Transformer Services, Inc. to pay $44,000 to resolve its liability at the Site. Through this settlement, and subject to certain reopeners, EPA covenants not to sue Transformer Services, Inc. for injunctive relief or response costs concerning the Site. In addition, Transformer Services, Inc. receives contribution protection for matters addressed in the settlement.

Dated: May 2, 2003.

Gale Hutton,

Acting Regional Administrator, United States Environmental Protection Agency, Region VII.

[FR Doc. 03–12352 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–4]

Notice of Proposed Administrative Order on Consent Pursuant to Section 122(g)(4) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), PCB Treatment, Inc. Superfund Site, Kansas City, KS, and Kansas City, MO, Docket No. CERCLA 07–2002–0003

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative order on consent, PCB Treatment, Inc. Superfund Site, Kansas City, Kansas, and Kansas City, Missouri.

SUMMARY: Notice is hereby given that a proposed administrative order on consent betweenDenton County Electric Cooperative, Inc. and the United States Environmental Protection Agency (EPA) was approved by the United States Department of Justice (DOJ) on April 16, 2003 and signed by the United States Environmental Protection Agency (EPA) on April 28, 2003. This settlement relates to the PCB Treatment Inc. Superfund Site (Site).

DATES: EPA will receive, until June 16, 2003, comments relating to the proposed agreement.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 901 N. Fifth Street, Kansas City, Kansas 66101 and should refer to *the PCB Treatment, Inc. Superfund Site Administrative Order on Consent, CERCLA Docket No. 07–2002–0003.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, KS 66101 (913) 551–7255.

SUPPLEMENTARY INFORMATION: The Site consists of two facilities, about two miles apart, located in the industrial areas of Kansas City, Kansas at 45 Ewing Street and Kansas City, Missouri at 2100 Wyandotte Street. The facilities were formerly operated by PCB Treatment, Inc., now a defunct corporation. Between 1982 and 1987, PCB Treatment, Inc. and its subsidiaries or affiliates treated and stored PCBs contained in used transformers, capacitors, oil, equipment, and other materials at the Wyandotte facility and the Ewing facility. During its period of operations, spills of PCB contaminated waste occurred.

Samples collected at the Site in the late 1990s indicated that the PCB contamination at Ewing Street exceeded 1,790 parts per million (ppm) in the building and 1,450 ppm in the soils. At Wyandotte Street, the PCB contamination exceeded 23,800 ppm in the building and 800 ppm in the soils.

Over 1000 parties arranged for disposal of PCB wastes at the Site. EPA identified a large number of these parties, including Denton County Electric Cooperative, Inc., as *de minimis* parties. EPA offered settlements to the *de minimis* parties based on their allocated share of the waste plus a premium. The payments by the *de minimis* parties have been placed in a Special Account that will be used towards the cleanup of the Site, estimated to cost $35,000,000.

Denton County Electric Cooperative, Inc. filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas and subsequently accepted EPA's offer to settle as a *de minimis* party, subject to approval of the United States Bankruptcy Court.

Through this settlement, and subject to the Bankruptcy Court approval, Denton County Electric Cooperative, Inc. will pay $6,742.19 to the EPA Hazardous Substance Superfund, PCB Treatment, Inc. Special Account. Subject to certain reopeners, EPA covenants not to sue Denton County Electric Cooperative, Inc. for injunctive relief or response costs concerning the Site. In addition, Denton County Electric Cooperative, Inc. receives contribution protection for matters addressed in the settlement.

Dated: May 2, 2003.

Gale Hutton,

Acting Regional Administrator, United States Environmental Protection Agency, Region VII.

[FR Doc. 03–12353 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–3]

Notice of Proposed Administrative Order on Consent Pursuant to Section 122(g)(4) and (7) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), PCB Treatment, Inc. Superfund Site, Kansas City, KS, and Kansas City, MO, Docket No. CERCLA 07–2003–0079

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative order on consent, PCB Treatment, Inc. Superfund Site, Kansas City, Kansas, and Kansas City, Missouri.

SUMMARY: Notice is hereby given that a proposed administrative order on consent between Midwest Energy, Inc. and the United States Environmental Protection Agency (EPA) was signed by the United States Environmental Protection Agency (EPA) on March 21, 2003 and approved by the United States Department of Justice (DOJ) on April 16, 2003. This settlement relates to the PCB Treatment Inc. Superfund Site (Site).

DATES: EPA will receive, until June 16, 2003, comments relating to the proposed agreement.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 901 N. Fifth Street, Kansas City, Kansas 66101 and should refer to *the PCB Treatment, Inc. Superfund Site Administrative Order on Consent, CERCLA Docket No. 07–2003–0079.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, KS 66101 (913) 551–7255.

SUPPLEMENTARY INFORMATION: The Site consists of two facilities, about two miles apart, located in the industrial areas of Kansas City, Kansas at 45 Ewing Street and Kansas City, Missouri at 2100 Wyandotte Street. The facilities were formerly operated by PCB Treatment, Inc., now a defunct corporation. Between 1982 and 1987, PCB Treatment, Inc. and its subsidiaries or affiliates treated and stored PCBs contained in used transformers, capacitors, oil, equipment, and other materials at the Wyandotte facility and the Ewing facility. During its period of operations, spills of PCB contaminated waste occurred.

Samples collected at the Site in the late 1990s indicated that the PCB contamination at Ewing Street exceeded 1,790 parts per million (ppm) in the building and 1,450 ppm in the soils. At Wyandotte Street, the PCB contamination exceeded 23,800 ppm in the building and 800 ppm in the soils.

Over 1000 parties arranged for disposal of PCB wastes at the Site. EPA identified a large number of these parties, including Midwest Energy, Inc., as *de minimis* parties. EPA offered settlements to the *de minimis* parties based on their allocated share of the waste plus a premium. The payments by the *de minimis* parties have been placed in a Special Account that will be used towards the cleanup of the Site, estimated to cost $35,000,000. Based on financial information submitted by Midwest Energy, Inc., EPA determined that Midwest Energy, Inc. demonstrated an inability to pay its allocated share, and qualifies for a reduction in the settlement amount. This proposed settlement requires Midwest Energy, Inc. to pay $200,000 to resolve its liability at the Site. Through this settlement, and subject to certain reopeners, EPA covenants not to sue Midwest Energy, Inc. for injunctive relief or response costs concerning the Site. In addition, Midwest Energy, Inc. receives contribution protection for matters addressed in the settlement.

Dated: May 2, 2003.

Gale Hutton,

Acting Regional Administrator, United States Environmental Protection Agency, Region VII.

[FR Doc. 03–12354 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–2]

Notice of Proposed Administrative Order on Consent Pursuant to Section 122(g)(4) and (7) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), PCB Treatment, Inc. Superfund Site, Kansas City, KS, and Kansas City, MO; Docket No. CERCLA 07–2003–0067

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative order on consent, PCB Treatment, Inc. Superfund Site, Kansas City, Kansas, and Kansas City, Missouri.

SUMMARY: Notice is hereby given that a proposed administrative order on consent between Northwest Automatic Products, Inc. and the United States Environmental Protection Agency (EPA) was signed by the United States Environmental Protection Agency (EPA) on March 21, 2003 and approved by the United States Department of Justice (DOJ) on April 16, 2003. This settlement relates to the PCB Treatment Inc. Superfund Site (Site).

DATES: EPA will receive, until June 16, 2003, comments relating to the proposed agreement.

ADDRESSES: Comments should be addressed to Audrey Asher, Senior Assistant Regional Counsel, United States Environmental Protection Agency, Region VII, 901 N. Fifth Street, Kansas City, Kansas 66101 and should refer to *the PCB Treatment, Inc. Superfund Site Administrative Order on Consent, CERCLA Docket No. 07–2003–0067.*

The proposed agreement may be examined or obtained in person or by mail at the office of the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, KS 66101 (913) 551–7255.

SUPPLEMENTARY INFORMATION: The Site consists of two facilities, about two miles apart, located in the industrial areas of Kansas City, Kansas at 45 Ewing Street and Kansas City, Missouri at 2100 Wyandotte Street. The facilities were formerly operated by PCB Treatment, Inc., now a defunct corporation. Between 1982 and 1987, PCB Treatment, Inc. and its subsidiaries or affiliates treated and stored PCBs contained in used transformers, capacitors, oil, equipment, and other materials at the Wyandotte facility and the Ewing facility. During its period of operations, spills of PCB contaminated waste occurred.

Samples collected at the Site in the late 1990s indicated that the PCB contamination at Ewing Street exceeded 1,790 parts per million (ppm) in the building and 1,450 ppm in the soils. At Wyandotte Street, the PCB contamination exceeded 23,800 ppm in the building and 800 ppm in the soils.

Over 1000 parties arranged for disposal of PCB wastes at the Site. EPA identified a large number of these parties, including Northwest Automatic Products, Inc., as *de minimis* parties. EPA offered settlements to the *de minimis* parties based on their allocated share of the waste plus a premium. The payments by the *de minimis* parties have been placed in a Special Account that will be used towards the cleanup of the Site, estimated to cost $35,000,000. Based on financial information submitted by Northwest Automatic Products, Inc., EPA determined that

NorthwestAutomatic Products, Inc. demonstrated an inability to pay its allocated share, and qualifies for a reduction in the settlement amount. This proposed settlement requires Northwest Automatic Products, Inc. to pay $10,000 to resolve its liability at the Site. Through this settlement, and subject to certain reopeners, EPA covenants not to sue Northwest Automatic Products, Inc. for injunctive relief or response costs concerning the Site. In addition, Northwest Automatic Products, Inc. receives contribution protection for matters addressed in the settlement.

Dated: May 2, 2003.

Gale Hutton,

Acting Regional Administrator, United States Environmental Protection Agency, Region VII.

[FR Doc. 03–12355 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7499–1]

Notice of Proposed Purchaser Agreement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, As Amended

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, ("CERCLA"), 42 U.S.C. 9601–9675, notice is hereby given that a proposed prospective purchaser agreement ("Purchaser Agreement") associated with the Wade/ABM Superfund Site, Chester City, Delaware County, Pennsylvania was executed by the Environmental Protection Agency and the Department of Justice and is now subject to public comment, after which the United States may modify or withdraw its consent if comments received disclose facts or considerations which indicate that the Purchaser Agreement is inappropriate, improper, or inadequate. The Purchaser Agreement would resolve certain potential EPA claims under sections 106 and 107 of CERCLA, 42 U.S.C. 9606, 9607, against the Chester Parking Authority ("Purchaser"). The settlement would require the Purchaser to, among other things, pay $1,000 to defray the United States' administrative costs incurred in preparing the Purchaser Agreement, upgrade the existing containment and storm water management controls, implement the institutional controls detailed in the Purchaser Agreement, and redevelop the subject property as a parking facility.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the Purchaser Agreement. The Agency's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103.

DATES: Comments must be submitted on or before June 16, 2003.

ADDRESSES: The Purchaser Agreement and additional background information relating to the Purchaser Agreement are available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. A copy of the Purchaser Agreement may be obtained from Thomas A. Cinti (3RC42), Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103. Comments should reference the "Wade/ABM Superfund Site, Prospective Purchaser Agreement" and "EPA Docket No. CERC–03–2002–0293PP," and should be forwarded to Thomas A. Cinti at the above address.

FOR FURTHER INFORMATION CONTACT: Thomas A. Cinti (3RC42), Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103, Phone: (215) 814–2634.

Dated: May 8, 2003.

James W. Newsom,

Acting Regional Administrator, Region III.

[FR Doc. 03–12357 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7498–9]

Notice of Approval of Submissions To Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern Pursuant to Section 118 of the Clean Water Act and the Water Quality Guidance for the Great Lakes System for the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Notice is hereby given of approval of submissions by the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin to prohibit mixing zones for bioaccumulative chemicals of concern (BCCs) in the Great Lakes System pursuant to section 118(c) of the Clean Water Act and the Water Quality Guidance for the Great Lakes System, as amended.

DATES: EPA's approval is effective on May 16, 2003.

FOR FURTHER INFORMATION CONTACT: Mery Jackson-Willis, U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604, or telephone her at (312) 353–3717. Copies of materials considered by EPA in its decision are available for review by appointment at U.S. EPA Region 5, 77 West Jackson Blvd, Chicago, IL 60604. Appointments may be made by calling Ms. Jackson-Willis.

SUPPLEMENTARY INFORMATION: On March 23, 1995, EPA published the Final Water Quality Guidance for the Great Lakes System (Guidance). *See* 60 FR 15366. The 1995 Guidance established minimum water quality standards, antidegradation policies, and implementation procedures for the waters of the Great Lakes System in the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. Specifically, the 1995 Guidance specified numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and provided methodologies to derive numeric criteria for additional pollutants discharged to these waters. The 1995 Guidance also included minimum implementation procedures and an antidegradation policy.

The 1995 Guidance, which was codified at 40 CFR part 132, required the Great Lakes States to adopt and submit to EPA for approval water quality criteria, methodologies, policies and procedures that are consistent with the Guidance. 40 CFR 132.4 & 132.5. EPA is required to approve of the State's submission within 90 days or notify the State that EPA has determined that all or part of the submission is inconsistent with the Clean Water Act (CWA) or the Guidance and identify any necessary changes to obtain EPA approval. If the State fails to make the necessary changes within 90 days after the notification, EPA must publish a notice in the **Federal Register** identifying the approved and disapproved elements of the submission and a final rule identifying the provisions of part 132 that shall apply for discharges within the State.

Soon after being published, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance (*American Iron and Steel Institute, et al.* v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997)); however, the Court vacated the provisions of the Guidance that would have eliminated mixing zones for BCCs (115 F.3d at 985). The Court held that EPA had "failed to address whether the measure is cost-justified," and remanded the provision to EPA for an opportunity to address this issue (115 F.3d at 997). In response to the Court's remand, EPA reexamined the factual record, including its cost analyses, and published the Proposal to Amend the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern in the **Federal Register** on October 4, 1999 (64 FR 53632). EPA received numerous comments, data, and information from commenters in response to the proposal.

After reviewing and analyzing the information in the rulemaking record, including those comments, on November 13, 2000, EPA published the final rule amending the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern, to be codified in appendix F, procedure 3.C of 40 CFR part 132. As amended, the Guidance requires that States adopt mixing zone provisions that prohibit mixing zones for new discharges of BCCs effective immediately upon adoption of the provision by the State, and to prohibit mixing zones for existing discharges of BCCs after November 15, 2010, except where a mixing zone is determined by the State to be necessary to support water conservation measures and overall load reductions of BCCs or where a mixing zone is determined by the State to be necessary for technical or economic reasons. Under the amended Guidance, States were given two years to adopt and submit revised water quality standards conforming with the amended Guidance.

EPA has conducted its review of the States' submissions to prohibit mixing zones for BCCs in accordance with the requirements of section 118(c)(2) of the CWA and 40 CFR part 132. Section 118 requires that States adopt policies, standards and procedures that are "consistent with" the Guidance. EPA has interpreted the statutory term "consistent with" to mean "as protective as" the corresponding requirements of the Guidance. Thus, the Guidance gives States the flexibility to adopt requirements that are not the same as the Guidance, provided that the State's provisions afford at least as stringent a level of environmental protection as that provided by the corresponding provision of the Guidance. In making its evaluation, EPA has considered the language of each State's standards, policies and procedures, as well as any additional information provided by the State clarifying how it interprets or will implement its provisions.

In this proceeding, EPA has reviewed the States' submissions to determine their consistency only with respect to appendix F, procedure 3.C of 40 CFR part 132. EPA has not reopened part 132 in any respect, and today's action does not affect, alter or amend in any way the substantive provisions of part 132. To the extent any members of the public commented during this proceeding that any provision of part 132 is unjustified as a matter of law, science or policy, those comments are outside the scope of this proceeding.

Today's notice identifies the elements of the States' Great Lakes BCC mixing zone provisions that EPA is approving today. Additional explanations of EPA's review of and conclusions regarding the States' submissions on this issue are contained in the administrative record for today's actions in documents prepared for each State.

1. The State of Illinois

Illinois' regulations for mixing zones for BCCs are found at Title 35: Environmental Protection, Subtitle C: Water Pollution, Chapter I: Pollution Control Board, Part 302: Water Quality Standards, Subpart E: Lake Michigan Basin Water Quality Standards, Section 302.530: Supplemental Mixing Provisions for Bioaccumulative Chemicals of Concern. Illinois adopted its BCC mixing zone provisions at the same time it adopted its other Great Lakes water quality standards. Illinois' supplemental mixing provisions for BCCs at 302.530 prohibit mixing zones for new discharges of BCCs commencing on or after December 24, 1997, prohibit mixing zones for existing discharges after March 23, 2007 except where a continued mixing zone is necessary for water conservation that will result in an overall reduction in BCC mass loadings to the Lake Michigan Basin or where a mixing zone is determined to be necessary based on technical or economic grounds. EPA reviewed Illinois' rules at 302.503 and determined that they are consistent with the requirements of the amended Guidance. EPA therefore approves of Illinois' rules at 302.530.

2. The State of Indiana

Indiana's mixing zone provisions for BCCs are found at 327 IAC 5–2–11.4(b)(1). Indiana's rules prohibit mixing zones for BCCs for new discharges of BCCs and existing and new discharges of BCCs to the open waters of Lake Michigan. Mixing zones for existing discharges of BCCs to waters other than the open waters of Lake Michigan will be prohibited beginning January 1, 2004 with the exceptions allowed under the amended Guidance for water conservation measures and technical and economic considerations. Indiana adopted its rules prohibiting mixing zones at the same time it adopted its original Great Lakes rules. EPA reviewed Indiana's rules at 327 IAC 5–2–11.4(b)(1) and determined that they are consistent with the requirements of the amended Guidance. EPA therefore approves of Indiana's rules at 327 IAC 5–2–11.4(b)(1).

3. The State of Michigan

Michigan's regulations for mixing zones for BCCs are found at R 323.1082(6). Michigan adopted its BCC mixing zone provisions at the same time it adopted its other Great Lakes water quality standards. Michigan's mixing provisions for BCCs at R 323.1082(6) prohibit mixing zones for new discharges of BCCs, prohibit mixing zones for existing discharges after March 23, 2007 except where a continued mixing zone is necessary for water conservation that will result in an overall reduction in BCC mass loadings or where a mixing zone is determined to be necessary based on technical or economic grounds. EPA reviewed Michigan's rules at R 323.1082(6) and determined that they are consistent with the requirements of the amended Guidance. EPA therefore approves of Michigan's rules at R 323.1082(6).

4. The State of Minnesota

Minnesota's regulations for mixing zones for BCCs are found at 7052.0210, subpart 3, of Minnesota's administrative code. Minnesota adopted its BCC mixing zone provisions at the same time it adopted its other Great Lakes water quality standards. Minnesota's mixing provisions for BCCs at 7052.0210, subpart 3 prohibit mixing zones for new discharges of BCCs as of March 9, 1998 and for existing discharges after March 23, 2007, except where a continued mixing zone is necessary for water conservation that will result in an overall reduction in BCC mass loadings or where a mixing zone is determined

to be necessary based on technical or economic grounds. EPA reviewed Minnesota's rules at 7052.0210, subpart 3 and determined that they are consistent with the requirements of the amended Guidance. EPA therefore approves of Minnesota's rules at 7052.0210, subpart 3.

5. The State of Ohio

Ohio's regulations for mixing zones for BCCs are found at OAC 3745–2–05 and 3745–2–08. Ohio's rules for mixing zones for BCCs were adopted on August 30, 2002, and became effective on December 30, 2002. Ohio's mixing provisions for BCCs at OAC 3745–2–05 prohibit mixing zones for new discharges of BCCs as of the effective date of the rule, December 30, 2002, and for existing discharges after November 15, 2010, except where a continued mixing zone is necessary for water conservation that will result in an overall reduction in BCC mass loadings or where a mixing zone is determined to be necessary based on technical or economic grounds. EPA reviewed Ohio's rules at OAC 3745–2–05 and 3745–2–08 and determined that they are consistent with the requirements of the amended Guidance. EPA therefore approves of Ohio's rules at OAC 3745–2–05 and 3745–2–08.

6. The State of Wisconsin

Wisconsin's regulations for mixing zones for BCCs are found at NR 106.06(2). Wisconsin's rules for mixing zones for BCCs were adopted at the same time as Wisconsin adopted its other Great Lakes rules. Wisconsin's mixing provisions for BCCs at NR 106.06(2) prohibit mixing zones for new discharges of BCCs as of March 23, 1997. Wisconsin's rules do not address mixing zones for BCCs for existing discharges, except to state in a note included within Wisconsin's rules at NR 106.06(2) that Wisconsin is aware of the requirement to prohibit mixing zones for BCCs for existing discharges and will adopt rules prohibiting mixing zones for BCCs for existing discharges prior to the effective date of the prohibition. EPA reviewed Wisconsin's rules at NR 106.06(2) and determined that they are consistent with the requirements of the amended Guidance that have immediate force and effect. EPA therefore approves of Wisconsin's rules at NR 106.06(2). EPA will review the rules to be developed by Wisconsin to implement the mixing zone prohibition for BCCs for existing Great Lakes dischargers when they are developed and submitted to EPA. If Wisconsin fails to adopt and submit to EPA rules to ensure that the prohibition takes effect in Wisconsin on or before November 15, 2010, EPA will take the necessary actions to ensure that mixing zones are prohibited for existing discharges of BCCs for waters of the Great Lakes System in the State of Wisconsin by that date.

David A. Ullrich,

Acting Regional Administrator, Region 5.

[FR Doc. 03–12356 Filed 5–15–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Issuance of Statement of Federal Financial Accounting Standards (SFFAS) No. 23)

Board Action: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 1999, notice is hereby given that the Federal Accounting Standards Advisory Board has issued Statement of Federal Financial Accounting Standards (SFFAS) No. 23, *Eliminating the Category National Defense Property, Plant and Equipment.*

The Board approved the Statement in February 2003, and submitted it to FASAB principals for a 90-day review. The review period closed on May 8, 2003.

SFFAS No. 23 represents a major step in the process of ensuring accountability for all operating property, plant, and equipment through the framework of generally accepted accounting principles.

The standards prescribed in SFFAS No. 23 are effective for periods beginning after September 30, 2002. Hard copies of the statement will be mailed to the FASAB mailing list. It is also available on the FASAB Web site at *www.fasab.gov* or by calling 202–512–7350.

FOR FURTHER INFORMATION CONTACT: Wendy Comes, Executive Director, 441 G St., NW., Mail Stop 6K17V, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463.

Dated: May 9, 2003.

Wendy M. Comes,

Executive Director.

[FR Doc. 03–12210 Filed 5–15–03; 8:45 am]

BILLING CODE 1610–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Agency for Toxic Substances and Disease Registry

[Program Announcement 03120]

Applied Research on Antimicrobial Resistance: Characterization of Strains of Community-Associated MRSA; Notice of Availability of Funds; Amendment

A notice announcing the availability of Fiscal Year 2003 funds for a grant program to support applied research on antimicrobial resistance was published in the **Federal Register** dated May 5, 2003, Volume 68, Number 86, pages 23720–23722. The notice is amended as follows: Page 23721, first column, first paragraph, lines five through six, remove the phrase "Multi Locus Sub Typing" and replace with "Multi Locus Sequence Typing".

Dated: May 12, 2003.

Sandra R. Manning,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 03–12238 Filed 5–15–03; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–R–77, CMS–1537, CMS–10067, CMS–R–200, CMS–R–247, CMS–1515/1572, and CMS–668B]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (CMS)), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions;

(2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Limitation on Liability and Information Collection Requirements Referenced in 42 CFR 411.404, 411.406, and 411.408; *Form No.:* CMS–R–77) (OMB# 0938–0465); *Use:* The Medicare program requires to provide written notification of noncovered services to beneficiaries by the providers, practitioners and suppliers. The notification gives the beneficiary, provider, practitioner or supplier knowledge that Medicare will not pay for items or services mentioned in the notification. After this notification, any future claim for the same or similar services will not be paid by the program and the affected parties will be liable for the noncovered services.; *Frequency:* Other: as needed; *Affected Public:* Individuals or Households; *Number of Respondents:* 900,898; *Total Annual Responses:* 3,603,592; *Total Annual Hours:* 300,299.

2. *Type of Information Collection Request:* Reinstatement, without change, of a previously approved collection for which approval has expired; *Title of Information Collection:* Medicare/ Medicaid Hospital Survey Report Form and Supporting Regulations in 42 CFR 482.2 through 482.57; *Form No.:* CMS–1537 (OMB# 0938–0382); *Use:* Section 1861(e) of the Social Security Act (the Act) provides that hospitals participating in Medicare under the Act must meet specific requirements. These requirements are presented as Condition of Participation. State agencies must determine compliance with these conditions through the use of this report form.; *Frequency:* Other: 3–5 years; *Affected Public:* State, Local, or Tribal Government, Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 3323; *Total Annual Responses:* 3323; *Total Annual Hours:* 553.

3. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Pharmacy Plus Template for Low Income Seniors under Medicaid; *Form No.:* CMS–10067 (OMB# 0938–0889); *Use:* The template for the Pharmacy Plus program for low income seniors under Medicaid will enable states to apply, via a standard format, to provide a drug benefit to elderly recipients; use of this format will expedite the process of obtaining CMS review and approval of an application; *Frequency:* Other: 3 years after initial submission for the 1915(c) waiver; 5 years after initial submission for the 1115 demonstration; *Affected Public:* State Government; *Number of Respondents:* 51; *Total Annual Responses:* 25; *Total Annual Hours:* 115.

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Health Plan Employer Data and Information Set (HEDIS) and Health Outcome Survey (HOS) and supporting regulations at 42 CFR 422.152; *Form No.:* CMS–R–200) (OMB# 0938–0701); *Use:* The Centers for Medicare and Medicaid Services (formerly HCFA) collects quality performance measures in order to hold the Medicare managed care industry accountable for the care being delivered, to enable quality improvement, and to provide quality information to Medicare beneficiaries in order to promote informed choice. It is critical to CMS's mission that we collect and disseminate information that will help beneficiaries choose among health plans, contribute to improved quality of care through identification of improvement opportunities, and assist CMS in carrying out its oversight and purchasing responsibilities.; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions, and Individuals or Households; *Number of Respondents:* 166,709; *Total Annual Responses:* 70,992; *Total Annual Hours:* 498,436.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Expanded Coverage for Diabetes Outpatient Self-Management Training Services and Supporting Regulations Contained in 42 CFR 410.141–410.145 and 414.63.; *Form No.:* CMS–R–247) (OMB# 0938–0818); *Use:* 42 CFR 410.141–410.145 and 414.63 provide for uniform coverage of diabetes outpatient self-management training services. These services include educational and training services furnished to a beneficiary with diabetes by an entity approved to furnish the services. The physician or qualified nonphysician practitioner treating the beneficiary's diabetes certifies that these services are needed as part of a comprehensive plan of care. The regulations set forth the quality standards that an entity is required to meet in order to participate in furnishing diabetes outpatient self-management training services.; *Frequency:* On occasion; *Affected Public:* Business or other for-profit; *Number of Respondents:* 1708; *Total Annual Responses:* 6832; *Total Annual Hours:* 53,013.5.

6. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Home Health Agency Survey and Deficiencies Report, Home Health Functional Assessment Instrument and Supporting Regulations in 42 CFR Part 484.1—484.52; *Form No.:* CMS–1515/1572 (OMB# 0938–0355); *Use:* In order to participate in the Medicare program as a Home Health Agency (HHA) provider, the HHA must meet Federal Standards. These forms are used to record information about patients' health and provider compliance with requirements; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 7,000; *Total Annual Responses:* 14,000; *Total Annual Hours:* 14,000.

7. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Post Laboratory Survey Questionnaire—Laboratory, and Supporting Regulations in 42 CFR 493; *Form No.:* CMS–668B (OMB# 0938–0653); *Use:* To provide an opportunity and a mechanism for CLIA laboratories surveyed by CMS or CMS'' agent to express their satisfaction and concerns about the CLIA survey process; *Frequency:* Biennially; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 22,500; *Total Annual Responses:* 11,250; *Total Annual Hours:* 2,813.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS's Web Site address at *http://cms.hhs.gov/regulations/pra/default.asp,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the CMS Paperwork Clearance Officer designated at the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances, Attention: Dawn Willinghan, Room: C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850

Dated: May 8, 2003.

Dawn Willinghan,

CMS Reports Clearance Officer, Division of Regulations Development and Issuances, Office of Strategic Operations and Strategic Affairs.

[FR Doc. 03–12227 Filed 5–15–03; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–R–38, CMS–R–30, CMS–1957, CMS–R–48, CMS–43, and CMS–R–143]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS) (formerly known as the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Conditions for Coverage for Rural Health Clinics—42 CFR 491.9 Subpart A; *Form No.:* CMS–R–38 (OMB #0938–0334); *Use:* This information is needed to determine if rural health clinics meet the requirements for approval for Medicare Participation.; *Frequency:* Initial Application for Medicare approval; *Affected Public:* Business or other for-profit, State, Local, or Tribal Gov't., and not-for-profit institutions, Individuals or households, Farms, and Federal Government; *Number of Respondents:* 3,305; *Total Annual Responses:* 3,305; *Total Annual Hours:* 8,580.

2. *Type of Information Collection Request:* Reinstatement, with change, of a previously approved collection for which approval has expired; *Title of Information Collection:* Information Collection Requirements in the Hospice Conditions for Coverage and supporting regulations in 42 CFR 418.22; 418.24; 418.28; 418.56(b),(e)(1), (e)(3); 418.58; 418.70(e); 418.83; 418.86(b); and 418.100(b).; *Form No.:* CMS–R–30 (OMB #0938–0302); *Use:* Establishes standards for hospices that wish to participate in the Medicare program. The regulations establish standards for eligibility, reimbursement standards, and procedure, and delineate conditions that hospices must meet to be approved for participation in Medicare.; *Frequency:* Record Keeping; On occasion; *Affected Public:* Business or other for-profit; *Number of Respondents:* 2,311; *Total Annual Responses:* 2,311; *Total Annual Hours:* 10,821,923.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* SSO Report of State Buy-In Problems and Supporting Regulation at 42 CFR 407.40; *Form No.:* HCFA–1957; *Use:* The HCFA–1957 is issued to assist with communications between the Social Security District Offices, Medicaid State Agencies and HCFA Central Offices in the resolution of beneficiary entitlement under state buy-ins. It is used when a problem arises which cannot be resolved thru normal data exchange. *Frequency:* On occasion; *Affected Public:* Individuals or Households, State, Local or Tribal Government; *Number of Respondents:* 3,000; *Total Annual Hours:* 1075.

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Hospital COP–42 CFR 482.12, 482.13, 482.22, 482.27, 482.30, 482.41, 482.43, 482.53, 482.56, 482.57, 482.60, 482.61, 482.62, 482.66, 485.618, and 485.631; *Form No.:* CMS–R–48 (OMB # 0938–0328); *Use:* Hospitals seeking to participate in the Medicare and Medicaid programs must meet the Conditions of Participation (COP) for Hospitals, 42 CFR Part 482. The information collection requirements contained in this package are needed to implement the Medicare and Medicaid COP for hospitals.; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions, Federal Government, State, Local, or Tribal Gov.; *Number of Respondents:* 6,017; *Total Annual Responses:* 6,017; *Total Annual Hours:* 4,798,575.40.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Application for Health Insurance Benefits Under Medicare for Individuals with Chronic Renal Disease and Supporting Regulations in 42 CFR 406.7 and .13; *Form No.:* 0938–0080; *Use:* The CMS–43 is used to establish entitlement to Medicare by individuals with End Stage Renal Disease; *Frequency:* One-time only; *Affected Public:* Individuals or Households, Federal Government, State, Loval, or Tribal Gov.; *Number of Respondents:* 60,000; *Total Annual Responses:* 60,000; *Total Annual Hours:* 26,000.

6. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Analysis of Malpractice Premium Data; *Form No.:* CMS–R–143 (OMB #0938–0575); *Use:* Survey of medical liability insurers for use in computing the malpractice component of the geographic practice cost index and the malpractice relation value units.; *Frequency:* Every 3 years.; *Affected Public:* State, Local, or Tribal Gov't., Business or other for-profit, and not-for-profit insitutions; *Number of Respondents:* 50; *Total Annual Responses:* 50; *Total Annual Hours:* 150.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://cms.hhs.gov/regulations/pra/default.asp*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@hcfa.gov*, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Brenda Aguilar, New Executive Office Building, Room 10235, Washington, Dc 20503, Fax Number: (202) 395–6974.

Dated: May 8, 2003.

Dawn Willinghan,

CMS Reports Clearance Officer, Division of Regulations Development and Issuances, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 03–12228 Filed 5–15–03; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–4060–N]

Medicare Program; Town Hall Meeting on the Refinement of the Minimum Data Set (MDS), Version 3.0

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

ACTION: Notice of meeting.

SUMMARY: This notice announces a town hall meeting to allow the public to discuss and give general comments about the revisions to the Minimum Data Set, version 3.0. Specifically, the meeting will attempt to elicit the individual comments and experiences of nursing home providers, consumers, resident advocates, and provider groups related to proposed revisions to the Minimum Data Set; to solicit recommendations on how to continue to improve the instrument and to seek ideas to reduce burden. Beneficiaries, providers, physicians, nursing home staff and industry representatives, MDS specialists, and other interested parties are invited to this meeting to present their individual views about the instrument and to learn about plans for revision of the instrument, the user's manual, care planning protocols and accompanying software. The meeting is open to the public.

DATES: Meeting Date: The town hall meeting announced in this notice will be held on Monday, June 2, 2003, from 12:30 p.m. to 4 p.m. eastern daylight saving time.

ADDRESSES: The town hall meeting will be held in the auditorium at the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244. Directions are available at *http://www.cms.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Bob Connolly 410–786–6882 or Rita Shapiro 410–786–2177. You may also send comments or inquiries about this meeting via e-mail to *mds30comments@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Amidst growing interest and concern about quality in nursing homes during the early 1980s, the Congress and the Department of Health and Human Services (DHHS), in 1983, commissioned an important study on nursing home quality to be conducted by the Institute of Medicine (IoM). The IoM study, "Improving the Quality of Care in Nursing Homes" (1986), reported widespread quality of care problems and recommended the strengthening of Federal regulations for nursing homes. Shortly thereafter, the Congress passed the Omnibus Reconciliation Act of 1987, which required the Secretary to develop a standardized instrument to provide information on resident status that would assist facilities in assessing resident needs and strengths and in developing appropriate care planning. In 1990, we developed the Resident Assessment Instrument (RAI), a standardized assessment instrument required for all residents in Medicare and Medicaid certified nursing homes. The RAI includes the Minimum Data Set (MDS), a set of resident status information collected periodically on every resident living in certified nursing homes. In 1995, we released a second-generation instrument, known as the MDS version 2.0. Version 2.0 was implemented in most homes in 1996. Our longstanding intention to computerize the MDS was fulfilled in 1998 when we funded the development of an infrastructure for automating the transmission of MDS data. Beginning on June 22, 1998, all certified long term care facilities were required to begin transmitting encoded MDS 2.0 data to States. States are also required to transmit these MDS records to a central repository we established.

The original MDS and its subsequent enhanced versions (for example, the quarterly MDS, the Medicare Prospective Payment Assessment Form, and the discharge tracking form) have been integral to the development and implementation of the Medicare prospective payment system as well as approaches to the measurement and improvement of health care outcomes (quality of care) in nursing homes. For example, the Nursing Home Public Reporting Quality Initiative relies on quality measures derived from information submitted by every nursing home using the MDS. In addition, State survey and certification of nursing homes has been refined through the use of MDS-derived quality indicators which can flag resident outcomes that require further investigation by the State surveyor which helps focus the onsite review process to better identify quality of care problems.

While the MDS has revolutionized the way we assess and monitor nursing home care, the MDS was developed over a decade ago and, therefore, requires some revisions to incorporate advances in care. In addition, the MDS tool was originally designed for a long-stay, custodial care population and some items are also relevant to short stay residents. Since its development, the nursing home industry has experienced an increase in the number of short-stay, rehabilitation-intensive admissions as well as a number of homes that specialize in distinct populations such as pediatrics residents whose unique care needs are not perfectly captured by the MDS 2.0. Finally, we have expanded our relationship with external groups with the goal of creating an instrument that can be used to complement current nursing home paper work rather than duplicating efforts already undertaken by nursing home staff in their effort to properly assess and manage their population.

We have contracted to complete validation testing of the MDS 3.0 items by December 2004. Feedback from the Town Hall meeting will be used to advise the validation process and provide us with important information regarding clinical improvements and provider burden. To be considered to make formal comments, commenters must follow the registration procedures described in the **DATES, ADDRESSES,** and **Registration Instructions** sections of this notice.

II. Meeting Format

The meeting will begin with an overview of the goals of the meeting, a review of the feedback received to date and how this feedback has been translated into changes to the draft MDS version 3.0. The timeline for revisions to the MDS 3.0 and plans for implementation will be discussed as well as the plans for evaluating the new instrument prior to its release. The implications of the revised instrument on various CMS operations, including survey and certification of nursing homes, public reporting of quality measures, the resource utilization groups and prospective payment system, software and data transmission, and care planning using the Resident Assessment Protocols (RAPs) will be discussed. The validation contractor will be introduced and a formal moderator will facilitate the meeting. We request written comments prior to the meeting and will entertain public comments from consumers, providers, provider and professional organizations from the Baltimore audience and Regional Office teleconferencing participants. Comments are requested about MDS 3.0, its content, and ways to further reduce the burden of MDS data collection. Comments can address the implications of the revised instrument such as impacts on payment, survey processes, quality indicators, publicly reported quality measures, resident

assessment protocols, RAVEN and information technologies, item-by-item comments on new MDS 3.0 items or deletions of current MDS 2.0 items. Information from this Town Hall Meeting will be used to advise the work of the validation contractor.

On April 3, 2003, a draft version of the MDS 3.0 instrument was posted to the following Web site: *http://www.cms.hhs.gov/providers/nursinghomes/nhi.* Beginning on or about May 19, 2003 information about the MDS 3.0 town hall meeting will be posted at the same Web site address and interested parties will find an agenda for the meeting and handouts to be used during the discussions.

We will limit the time for participants to make formal statements according to the number of registered participants and the number of written comments. Individuals who wish to make formal statements must contact Bob Connolly or Rita Shapiro as soon as possible. Those individuals must subsequently submit their formal statement in writing no later than 5 p.m., Friday, May 23, 2003. Send written submissions to: Rita Shapiro, Division of Ambulatory and Post Acute Care (DAPAC), Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mail Stop S3–02–01, Baltimore, Maryland 21244 or *mds30comments@cms.hhs.gov.* Open microphone town hall segments will provide opportunities for comments from individuals not registered to speak on the day of the meeting.

III. Registration Instructions

The Division of Acute and Post Acute Care is coordinating meeting registration. While there is no registration fee, all individuals must register to attend. Because this meeting will be located on Federal property, for security reasons, any persons wishing to attend this meeting must call Bob Connolly or Rita Shapiro or e-mail *mds30comments@cms.hhs.gov* to register by close of business on May 27, 2003. Attendees must show photographic identification to the Federal Protective Service or Guard Service personnel before they will be permitted to enter the building. Individuals who have not registered in advance will not be allowed to enter the building to attend the meeting. Seating capacity is limited to the first 250 registrants. Our Atlanta, Boston, Chicago, Dallas, Denver, Kansas City, New York, Philadelphia, San Francisco, and Seattle, regional offices will host a Satellite Broadcast of the meeting for participants wanting to participate at these locations. These teleconference lines will be allotted on a first come, first serve basis.

Individuals requiring sign language interpretation for the hearing impaired or other special accommodations should contact Bob Connolly or Rita Shapiro at least 10 days before the meeting.

Authority: Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 12, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 03–12229 Filed 5–15–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[Program Announcement No. ACYF/FYSB 2003–02]

Announcement of the Availability of Financial Assistance and Request for Applications for Mentoring Children of Prisoners Grants

AGENCY: Administration on Children, Youth and Families, ACF, DHHS.

ACTION: Notice.

CFDA Number: The Catalog of Federal Domestic Assistance number is 93.616.

SUMMARY: The Family and Youth Services Bureau (FYSB) within the Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF) announces the availability of financial assistance and request for applications for the FY 2003 Mentoring Children of Prisoners Program activities under section 439, Title IV–B, subpart 2 of the Social Security Act, as amended. The purpose of this program is to make competitive grants to applicants in urban, suburban, rural, and tribal populations with substantial numbers of children of incarcerated parents and to support the establishment and operation of programs using a network of public and private entities to provide mentoring services for these children.

This Program Announcement and its application forms are also available by calling or writing to the ACYF Operations Center at the address below: Educational Services, Inc., ACYF Operations Center, *Attention:* Sylvia Johnson, 1150 Connecticut Avenue, NW., Suite 1100, Washington, DC 20036, *Telephone:* 1–800–351–2293, *Email: FYSB@esilsg.org,* or by downloading the announcement from the FYSB Web site at *http://www.acf.hhs.gov/programs/fysb.*

DATES: The deadline for submitting a grant application under this announcement is July 15, 2003. Applications must be hard copy. One signed original and two copies must be submitted.

Application Mailing and Delivery Instructions: The closing time and date for receipt of applications is 4:30 p.m. (Eastern Time Zone). Mailed applications shall be considered as meeting an announced deadline if they are postmarked on or before the published deadline time and date. Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications handcarried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline date if they are received on or before the published deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the ACYF Operations Center between Monday and Friday (excluding Federal Holidays). The address must appear on the envelope/package containing the application to the Attention of Sylvia Johnson. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

ACF cannot accommodate transmission of applications by fax or through other electronic media. Therefore, applications transmitted to ACF electronically will not be considered in the current competition.

Extension of Deadline: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

The Administration for Children and Families will not accept applications delivered by fax or e-mail regardless of date or time of submission and receipt.

Late Applications. Applications which do not meet the criteria stated above or are not received or postmarked by the deadline date are considered late applications. The Administration for Children and Families will notify each late applicant that its application will

not be considered in the current competition.

FOR FURTHER INFORMATION CONTACT: ACYF Operations Center at the address and telephone number above, or for program information contact: Linda V. Barnett, Youth Services Program Specialist, Administration on Children, Youth and Families, Family and Youth Services Bureau, 330 C Street, SW., Washington DC 20447, (202) 205–8102, or Sylvia Johnson, Grants Management Officer, Office of Administration, (202) 401–4524.

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"Across our Nation, many Americans are responding to the call to service by mentoring a child in need. By offering love, guidance, and encouragement, mentors put hope in children's hearts, and help ensure that young people realize their full potential."

President George W. Bush,

January 2003

Background on Mentoring Children of Prisoners

Witnessing and living with the arrest and incarceration of a parent is devastating for children and families. The living conditions, family configurations, and problems faced by the parents make it likely that significant numbers of children of prisoners will suffer emotional and behavioral difficulties. Often economic, social, and emotional burdens are placed on families and caretakers, especially children. Relationships are disrupted and any existing stability is shattered. As a result, the majority of these children experience multiple changes of caregivers and/or living arrangements.

What Are the Effects of Incarceration on the Child?

Research has found that significant physical absence of a parent has profound effects on child development. Children of incarcerated parents are seven times more likely to become involved in the juvenile and adult criminal justice systems. Parental arrest and confinement often lead to stress, trauma, stigmatization , and separation problems which may be compounded by existing poverty, violence, substance abuse, high-crime environments, child abuse and neglect, multiple caregivers and/or prior separations. These children are more likely to develop attachment disorders and often exhibit broad varieties of behavioral, emotional, health, and educational difficulties. Many children of incarcerated parents are angry and lash out at others resulting in confrontations with law enforcement. Lacking the support of families, schools, and other community institutions, they often do not develop values and social skills leading to the formation of successful relationships.

Who Are the Children?

Between 1991 and 1999, the number of children with a parent in a Federal or state correctional facility increased by more than 100 percent, from approximately 900,000 to approximately 2,000,000. Like their parents, children of criminal offenders reflect the racial disparities of the justice system. Seven percent of African American children have an incarcerated parent, almost three percent of Hispanic children have an incarcerated parent, while less than one percent of white children have an incarcerated parent.

Who Are the Parents?

According to the national data from the Bureau of Justice Statistics, in 2001, 3.5 million parents were supervised by the correctional system. Prior to incarceration, 64 percent of female prisoners and 44 percent of male prisoners in state facilities lived with their children. During incarceration, nearly 90 percent of children of incarcerated fathers lived with their mothers and 79 percent of children of incarcerated mothers lived with a grandparent or other relative. Although research has indicated that parents and children should visit one another, less than 50 percent of prisoners receive visits from their children. In a number of cases, the caregiver may not want the child to visit the inmate and prisons are often located far away from the urban areas where most children of prisoners live. According to the Bureau of Prisons, there is evidence to suggest that inmates who are connected to their children and families are more likely to avoid negative incidents and have reduced sentences.

Who Are the Mentors?

Mentors are recruited from a variety of sources including congregations, faith and community-based organizations, non-profit organizations, service organizations, and the business community. Research has shown that the health and productivity of mentors is enhanced by their connection to a child in need.

How Can Mentoring Help?

It has been demonstrated that mentoring is a potent force for improving youth outcomes. Mentoring increases the likelihood of regular school attendance and academic achievement. It also decreases the chances of engaging in self-destructive or violent behavior. A trusting relationship with a caring adult will provide stability and often have a profound, life-changing effect on the child. Mentoring provides the incarcerated parent with the assurance that somebody is there to look after the best interests of their child.

What Are Possible Outcomes?

Research confirms the societal benefits of mentoring efforts with children. Specifically, data indicates that mentoring programs have reduced first time drug use by almost fifty percent and first-time alcohol use by thirty-three percent. Also, caregiver and peer relationships are shown to improve. In addition, mentored youth displayed greater confidence in their schoolwork and improved their academic performance.

How Are Matches Initiated and Monitored?

Parents, incarcerated parents, caretakers, schools, courts, social service organizations, or congregations will identify children in need of a mentor and initiate the referral to a mentoring organization. The mentoring organization will facilitate and monitor the match by providing parents and other stakeholders' opportunities to provide evaluative feedback on the match. The mentoring organization will develop and distribute status reports to appropriate stakeholders.

What Happens When Parents Return Home From Prison?

Mentors are not meant to be "replacement parents." In situations where incarcerated parents are actively

engaged in the mentoring process, through visits, phone conversations or letters, reunification is a natural process with realistic expectations. Mentors can help facilitate a smooth reentry by helping parents reconnect with their child and are often invited to continue to be a supportive resource well after the return of the parent.

What Is the Family and Youth Services Bureau?

For over thirty years, the Family and Youth Services Bureau (FYSB) within the Administration for Children and Families (ACF) has provided grants at the local level to faith-based organizations and community-based organizations serving a population of vulnerable youth, including runaway, homeless, and street youth.

General Information

Preference for Geographic Distribution

A wide geographic distribution of applicants will be considered, including applicants from urban, suburban, rural and tribal communities, in addition to the rank order of scored applications.

Eligibility

Those eligible to apply for funding under this grant competition include faith and community-based organizations, tribal governments or consortia, and state or local governments where substantial numbers of children of prisoners live. Applicants must apply to establish new programs or to expand existing programs utilizing a network of public and private community entities to provide mentoring services for children of prisoners. Collaboration among eligible entities is strongly encouraged. All eligible organizations, including faith-based organizations, are eligible to compete on equal footing for Federal financial assistance used to support social service programs. No organization may be discriminated against on the basis of religion in the administration or distribution of Federal financial assistance under social service programs. Faith-based organizations are eligible to compete for Federal financial assistance while retaining their identity. mission, religious references, and governance. However, faith-based organizations that receive funding may not use Federal financial assistance, including funds, to meet any cost-sharing requirements, to support inherently religious activities, such as worship, religious instruction, or prayer. In addition, any participation in these activities by beneficiaries must be voluntary.

Project Period

This announcement invites applications for project periods of up to three years. Awards will be made on a competitive basis for a one-year budget period, although project periods may be for up to three years. Applications for continuation grants funded under these awards beyond the one-year budget period, but within the three-year project period, will be entertained in subsequent years on a noncompetitive basis, subject to the availability of funds, satisfactory progress of the grantee, and a determination that continued funding would be in the best interest of the Government.

Estimated Range of Awards

The Family and Youth Services Bureau expects to award approximately $9,500,000 for new competitive grants for Fiscal Year 2003. Grants will range from $100,000 to $1,000,000 depending on the scope of the project and the availability of funds. The ceiling on funding was lowered from the authorizing legislation because of a reduced appropriation. If a program shows a significant growth in the second year, and depending on fund availability, supplemental funds may be added to the existing award. Please note that an automatic increase of funds is not implied, nor are any additional funds guaranteed.

Applicant Share of Project Cost

For the first and second years of the grant, grantees must provide at least 25 percent of the approved project cost. After the second year of the grant, the amount that the grantees must provide increases to 50 percent. The total approved cost of the project is the sum of the Federal share and the non-Federal share. For example if the total project cost of a program is $200,000 then the applicant must demonstrate a commitment of at least a $50,000 match and request funding of $150,000 from the Federal government. The Federal share may be matched by cash or in-kind contributions, although applicants are encouraged to meet their requirement through cash contributions. In determining the amount of the non-Federal share, the fair market value will be attributed to goods, services (excluding mentoring time and services) and facilities contributed from non-Federal sources. Grantees will be held accountable for commitments of required non-Federal funds. Failure to provide the required match will result in disallowance of Federal funds.

Application Requirements

To be considered for a grant, each application must be submitted in accordance with the guidance provided below. The application must be signed by an individual authorized to act for the applicant agency and to assume responsibility for the obligations imposed by terms and conditions of the grant award. If more than one agency is involved in submitting a single application, one entity must be identified as the applicant organization that will have legal responsibility for the grant.

Statutory Priority

This grant competition focuses exclusively on projects designed to meet the statutory priority in Title I, subtitle B, section 121 as amended by the Act known as "Promoting Safe and Stable Families Amendments of 2001".

Program Guidance

To be eligible for funding, a project must propose mentoring programs and activities to serve the children of prisoners in areas with a comparative severity of need for mentoring services, taking into consideration data on the numbers of children (and in particular of low-income children) with an incarcerated parent (or parents) in the service area.

Projects funded under this program must:

1. Link children with mentors who have:
   - Received training and support in mentoring;
   - Completed screening and reference checks, including child and domestic abuse records checks and criminal background checks;
   - Expressed an interest in working with children in disadvantaged situations.
2. Incorporate the elements of Positive Youth Development by providing youth with:
   - Safe and trusting relationships;
   - Healthy messages about life and social behavior;
   - Guidance from a positive adult role model;
   - Increased participation in, and enhanced their ability to benefit from, education;
   - Participation in civic service and community activities;
3. Develop a plan for the whole family:
   - Connect the child with the imprisoned parent with permission from other spouse or guardian when appropriate;
   - Plan to provide support services to siblings and families when appropriate;

• Support caregivers with training, and help navigating the services provided by the mentoring network.

Assurances and Requirements

In addition to the standard assurances of safety, applicants must provide the following assurances:

• Mentors will not be assigned more children than can be served without undermining the mentor's ability to be effective.

• Grantees will recruit mentors who are committed to spending at least one hour per week with assigned children for a period of at least one year.

• The mentoring program will provide children with emotional and academic support as well as exposure to a variety of experiences that they might not otherwise encounter.

• The program will be monitored to ensure that each child benefits from the match. If the match is not found to be beneficial to the child a new mentor will be assigned.

• The program will cooperate with any research or evaluation efforts sponsored by the Administration for Children and Families.

• The program will submit quarterly program reports and annual financial reports, as instructed by FYSB.

• The program will set aside funding for travel to inform the Bureau and meet with other grantees at an annual sharing and technical assistance meeting.

Definitions

Children of Prisoners: Children, where one or both parents are incarcerated in a Federal, state or local correctional facility, on parole or on probation. Children will be 4 years to 15 years of age from childhood to adolescence when they begin to receive services.

Mentoring: A structured, managed program in which children are appropriately matched with screened and trained adult volunteers for one-to-one relationships. This involves meetings and activities on a regular basis between the mentors and children to support a child's need for a caring and supportive adult in their life.

Prisoner: Adult who is incarcerated in a Federal, state, or local correctional facility or is on parole or probation.

Caretaker: The parent or legal guardian charged with the responsibility of caring for a child while the parent is incarcerated.

Mentoring Organization: The organization that coordinates the local community and faith-based organizations and entities participating in the provision of mentoring services and the mentoring support network. Mentoring organizations will be responsible for the application and performance of the grant. They also will be responsible for providing the cash or in-kind contribution.

Mentoring Services: Those services and activities that support a structured, managed program of mentoring, including the management of trained personnel in partnership with sponsoring local organizations. Services will include: outreach to and screening of eligible children; screening and training of adult volunteers; matching of children with suitable adult mentors; support and oversight of the mentoring relationship; and establishment of goals and evaluations of outcomes for mentored children. Mentoring services also will make appropriate referrals to partner organizations when the health and safety of a child is an issue.

Mentoring Support Network: Private non-profit organizations, faith-based organizations, community-based organizations, professional, medical and public service providers in the community that, through referral, will support the health and well-being of the child, caretaker(s) and other siblings.

Evaluation Criteria Section

The following specific criteria will be used. The maximum total score for all criteria is 100 points. The possible score for each criterion is indicated in parentheses.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished. For example, describe the tasks needed to accomplish the proposed project in Phases 2 and 3 and any relevant data source to support the work. When activities and functions cannot be quantified, list them in chronological order to show the schedule of accomplishments and their target dates. If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Results or Benefits Expected

Identify the results and benefits to be derived.

Staff Position Data and Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission.

The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, or by providing a copy of the currently valid IRS tax exemption certificate, or by

providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocation of the proposed costs.

Personnel

Description: Cost of new employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

Description: "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with organization's regular written accounting practices.)Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy, which includes the equipment definition.

Supplies

Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information that supports the amount requested.

Contractual

Description: Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Third-party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant, should be included under this category.

Justification: All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and sub-recipients, other than States that are required to use part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids; independent cost estimates, etc.

Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Indirect Charges

Description: Total amount of indirect costs. The Department of Health and Human Services (HHS) or another cognizant Federal agency should use this category only when the applicant currently has an indirect cost rate approval.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, it should immediately upon notification that an award will be made, develop a tentative indirect cost rate proposal based on its most recently completed fiscal year in accordance with the principles set forth in the cognizant agency's guidelines for establishing indirect cost rates and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. It should be noted that when an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Program Income

Description: The estimated amount of income, if any, expected to be generated from this project.

Justification: Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application that contain this information.

Federal and Non-Federal Resources

Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. For purposes of preparing the budget and budget justification, "Federal resources" refers only to the ACF grant for which you are applying. Non-Federal resources are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: First column, categories; second column, Federal

budget; third column(s), non-Federal budget; and last column, total budget. The budget justification should be in narrative form.

Submission Guidelines

Project Summary Abstract: Provide a one page (or less) summary of the project description with reference to the funding request.

Full Project Description and Evaluation Criteria: Describe the project clearly in 30 pages or less (not counting supplemental documentation, letters of support or agreements) using the following outline and guidelines.

Applicants are required to submit a full project description and must prepare the project description statement in accordance with the following instructions. The pages of the project description must be numbered and are limited to 30 typed pages starting on page 1 of "Objectives and Need for Assistance". The description must be doubled-spaced, printed on only one side, with at least ½ inch margins. Pages over the limit will be removed from the competition and will not be reviewed.

It is in the applicant's best interest to ensure that the project description is easy to read, logically developed in accordance with the evaluation criteria and adheres to page limitations. In addition, applicants should be mindful of the importance of preparing and submitting applications using language, terms, concepts, and descriptions that are generally known to the targeted youth and broader youth services fields. The maximum number of pages for supplemental documentation is 10 pages. The supplemental documentation, subject to the 10-page limit, must be numbered and might include brief resumes, position descriptions, proof of non-profit status (if applicable), news clippings, press releases, etc. Supplemental documentation over the 10-page limit will not be reviewed. Applicants must include letters of support or agreement, if appropriate or applicable, in reference to the project description. Letters of support are not counted as part of the 30-page project description limit or the 10-page supplemental documentation limit. (**Note:** Applicable agreements are those between grantees and sub-grantees or sub-contractors or other cooperating entities which support or complement the provision of mandated services to children of prisoners.)

Objectives and Need for Assistance (15 Points)

In determining the need for assistance for the proposed project, the following factors are considered:

- The conditions and characteristics of youth and families affected by incarceration in the service delivery area. The description must demonstrate an awareness of the special needs of this population, including service delivery gaps and the magnitude of the problem within the service delivery area. (5 points)
- Calculate the number of children with parents in prison and project the number of mentor-child matches proposed to be established and maintained annually under the program. (5 points)
- The extent to which there are existing support services for this population of youth, with specific references to coordination of courts, health and mental health care, social services, school and child welfare. It must be clear that the mentoring program will complement and enhance, not duplicate available services and that the mentoring program will work in conjunction with these services to produce better outcomes for children and families. (5 points)

Results and Benefits Expected (20 Points)

In determining the quality of expected benefits the following factors are considered:

- The extent to which goals, objectives and outcomes to be achieved by the proposed project are clearly specified and measurable. (10 points)
- The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.(5 points)
- The extent to which outcomes reflect gains in positive social behaviors, youth engagement and asset acquisition. (5 points)

Approach (30 Points)

In determining the quality of the project design or approach the following factors are considered:

- The detailed plan designed to identify, screen and recruit mentors. Provide detailed volunteer screening procedures to ensure that the mentor poses no safety risk to the child and has the necessary skills to participate in a mentoring relationship. Preferences will be given to programs that plan to recruit and train mentors within the service delivery area. (10 points)
- The resources that will be dedicated to supporting the needs of caretakers and other children in the family setting. Also, when appropriate, the extent that the program proposes to work with incarcerated parents and addresses their re-entry. (5 points)
- The training process for mentors which will ensure their ability to successfully mentor this special population. The extent that training is based on best practices supported by research. (5 points)
- The quality of the mechanism that will be used to match children with mentors, demonstrating sensitivity to the diverse needs of the children and the support provided for mentors in order to sustain long-term mentoring relationships.(5 points)
- The level of supervision, oversight and monitoring of the child and mentor relationships and activities. State the expected ratio of staff to mentors. Provide a detailed plan for collecting, on a monthly basis, data documenting meetings and activities by trained volunteer coordinators to ensure personal oversight and safety of the children and their mentors. (5 points)

Staff Position Data and Organizational Profiles (25 Points)

In reviewing the required staff and position data and the organizational profile, the following factors are considered:

- A demonstrated history of providing services to youth and families in disadvantaged situations, along with the ability to partner and build coalitions at the community level. (10 points)
- A specific definition of the area where services are to be delivered. (Maps and graphic aids may be attached as part of the supplementary documentation) (5 points)
- The extent to which community stakeholders, including parents, incarcerated parents, local community organizations, schools, government, caretakers and children, have participated in the project design. List and describe how these partners will participate in the mentoring network. Include an organizational chart. (5 points)
- Quality of skills, knowledge and experience of the project director and project staff. Job descriptions should be included, as well as a description of staff training and specific cultural diversity training related to mentoring the target population.(5 points)

Budget and Budget Justification (10 Points)

In determining the soundness of the budget and budget justification, the following factors are considered:

• The extent to which costs of the proposed program are reasonable and justified in terms of numbers of children of prisoners, types and quantities of services to be provided, and the anticipated results and benefits. Discussion should refer to the budget information presented on Standard Form 424 and 424A and the applicant's budget justification. (5 points)

• Identification of fiscal control and accounting procedures that will be used to ensure the prudent use, proper disbursement, and accurate accounting of federal funds received, as well as the accounting of cash and in-kind for the non-federal match. (5 points)

Assurances and Certifications

Forms and Certifications: Fill out Standard Forms 424 and 424A and the associated certifications and assurances in Appendix A based on the instructions on the forms.

Application requesting financial assistance for non-construction projects must file the Standard Form 424B, "Assurances: Non-Construction Programs." Applicants must sign and return the Standard Form 424B with their applications.

Lobbying

Applicants must provide a certification regarding lobbying when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in conjunction with receiving assistance under this announcement shall complete a disclosure form to report lobbying. Applicants must sign and return the disclosure form, if applicable, with their applications.

Drug Free Workplace

Applicants must make the appropriate certification of their compliance with the Drug-Free Workplace Act of 1988. By signing and submitting the application, the applicant is providing the certification and need not mail back the certification with the application.

Certification of Debarment

Applicant must make the appropriate certification that they are not presently debarred, suspended, or otherwise ineligible for an award. By signing and submitting the application, the applicant is providing the certification and need not mail back the certification with the application.

Paperwork Reduction Act of 1995 (Public Law 104–13)

Public reporting burden for this collection of information is estimated to average 20 hours per overall response, including the time for reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information.

The Uniform Project Description is approved under OMB control number 0970–0139, which expires 12/31/2003. 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.

Authorizing Legislation

Grants for Mentoring Children of Prisoners (MCIP) programs are authorized by further amending and by adding at the end of subpart 2 of part B of Title IV (U.S.C. 629–629e) the Safe and Stable Families Act of 2001, (Public Law 107–133). Text of this statute may be found at *http://www.acf.hhs.gov/programs/fysb.*

Notification Under Executive Order 12372

This program is covered under Executive Order (E.O.) 12372, "Intergovernmental Review of Federal Programs", and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities". Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of January 16, 2003, of the most recent SPOC list, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions or for projects administered by Federally-recognized Indian Tribes need take no action in regard to E.O. 12372: Alabama, Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Palau, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington and Wyoming. **Note:** Inquiries about obtaining a Federal grant should not be sent to OMB. The best source for this information is the CFDA. The official list of the jurisdictions elected not to participate in E.O. 12372 can be found at *http://www.whitehouse.gov/omb/grants/spoc.html.*

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs as soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2). A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations, which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., Mail Stop 6C–462, Washington, DC 20447. (**Note:** State/Territory participation in the intergovernmental review process does not signify applicant eligibility for financial assistance under a program. A potential applicant must meet the eligibility requirements of the program for which it is applying prior to submitting an application to its SPOC, if applicable, or to ACF.)

Dated: May 12, 2003.

Wade F. Horn,

Assistant Secretary, Administration for Children and Families.

[FR Doc. 03–12242 Filed 5–15–03; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 03D–0186]

Draft Guidance for Industry: Use of Material From Deer and Elk in Animal Feed; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry (#158) entitled "Use of Material From Deer and Elk in Animal Feed." This draft guidance document, when finalized, will describe FDA's current thinking regarding the use in animal feed of material from deer and elk that are positive for chronic wasting disease (CWD) or are at high risk for CWD.

DATES: Submit written or electronic comments on the draft guidance at any time, however, comments should be submitted by June 16, 2003, to ensure their adequate consideration in preparation of the final document. FDA is requesting comments within 30 days, rather than within a longer period, because of the need to finalize the guidance in late August, prior to the start of the next deer hunting season.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine (CVM), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. Submit electronic comments on the draft guidance to http://www.fda.gov/dockets/ecomments. Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments should be identified with the full title of the draft guidance and the docket number found in brackets in the heading of this document. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Burt Pritchett, CVM (HFV–222), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0177, e-mail: bpritche@cvm.fda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

CWD is a neurological (brain) disease of farmed and wild deer and elk that belong in the cervidae animal family (cervids). CWD belongs to a family of animal and human diseases called transmissible spongiform encephalopathies (TSEs). These include (1) Bovine spongiform encephalopathy (BSE or "mad cow" disease) in cattle; (2) scrapie in sheep and goats; and (3) classical and variant Creutzfeldt-Jakob diseases (CJD and vCJD) in humans. There is no known treatment for these diseases and there is no vaccine to prevent them. In addition, although validated postmortem diagnostic tests are available, there are no validated diagnostic tests for CWD that can be used to test for the disease in live animals.

Under FDA's BSE feed regulation (21 CFR 589.2000), most material from deer and elk is prohibited for use in feed for ruminant animals. This draft guidance document describes FDA's recommendations regarding the use in all animal feed of all material from deer and elk that are positive for CWD or are considered at high risk for CWD.

The potential risks from CWD to humans or noncervid animals such as poultry or swine are not well understood. However, because of recent recognition that CWD is spreading rapidly in white-tailed deer and because CWD's route of transmission is poorly understood, FDA is making recommendations regarding the use in animal feed of rendered materials from deer and elk that are CWD positive or that are at high risk for CWD.

II. Significance of Guidance

This draft level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). This draft guidance, when finalized, will represent the agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate method may be used as long as it satisfies the requirements of applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

FDA tentatively concludes that this draft guidance contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

IV. Comments

This draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments regarding this draft guidance document. Two paper copies of any mailed comments are to be submitted, except that individuals may submit one paper copy. Comments should be identified with the docket number found in brackets in the heading of this document. A copy of the document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

Copies of the draft guidance document entitled "Use of Material From Deer and Elk in Animal Feed" may be obtained from the CVM home page (http://www.fda.gov/cvm) and from the Dockets Management Branch Web site (http://www.fda.gov/ohrms/dockets/default.htm).

Dated: May 6, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–12363 Filed 5–15–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Method of Treating Ischemia/Reperfusion Injury with Nitroxyl Anion Donors

David Wink *et al.* (NCI).

DHHS Reference No. E–175–2002/0

Filed June 14, 2002, and DHHS Reference No. E–076–2003/0

Filed June 17, 2002.

Licensing Contact: Fatima Sayyid; 301/435–4521; *sayyidf@od.nih.gov.*

Ischemia/reperfusion injury refers to tissue damage caused by oxygen deprivation followed by reoxygenation causing oxidative stress.

The present invention relates to the administration of a nitroxyl anion donating compound prior to ischemia to attenuate ischemia/reperfusion injury. Accordingly, nitroxyl anion donating compounds such as Angeli's salt would be useful treatment agents to prevent or protect against such adverse conditions especially since the beneficial effect is a surprising result given that nitroxyl anion was previously reported to increase ischemia/reperfusion injury.

Preparation and Medical Uses of Novel Nitric Oxide Releasing Imidates, Amidines Derived Therefrom, and Enamines

Joseph Hrabie, Ernst Arnold, and Larry Keefer (NCI).

DHHS Reference Nos. E–149–2001

Filed June 13, 2001 and E–276–2002

Filed July 18, 2002.

Licensing Contact: Norbert Pontzer; 301/435–5502; *pontzern@od.nih.gov.*

Nucleophile/nitric oxide adducts (N_2O_2-diazeniumdiolates) spontaneously dissociate at physiological pH to release nitric oxide (NO) by stable first order kinetics. The bulk of the known and patented NIH compositions and methods using diazeniumdiolates are derived from amine nucleophiles. The formation of these amine-derived diazeniumdiolates requires exposure of the nucleophile to NO gas with the attendant occurrence of possible unwanted side reactions, or preparation of O_2 alkylated diazeniumdiolates that may release toxic by-products. Also, amine-derived diazeniumdiolates may dissociate into carcinogenic N-nitroso compounds and the primary amines may decompose into unstable diazotates. These inventors thus developed diazeniumdiolates in which the N_2O_2-functional groups are bonded to carbon atoms. This work has resulted in imidoester-, amidine- and enamine-derived diazeniumdiolates that spontaneously release NO under physiological conditions.

Previous amidine-linked NO releasing compounds were prepared using NO gas after acetamidation of amine groups. This invention provides a simple, robust method of preparing diazeniumdiolated imidates from cyano compounds. As with other imidoesters, these diazeniumdiolated imidoesters react with nucleophiles allowing formation of a wide range of NO releasing derivatives. For example, imidoesters are extensively used as protein crosslinking reagents because they react with primary amines to form amidine bonds. These already diazeniumdiolated and purified imidoesters can thus be used to directly attach amidine NO-releasing groups onto molecules such as peptides and medicinals without exposing them to NO gas or its potentially toxic by-products. Some of these compounds may also release nitroxyl (HNO, NO) in solution under physiological conditions. *See* Arnold *et al.*, Tetrahedron Lett., 41, 8421–8424(2000).

Postnatal Stem Cells and Uses Thereof

Drs. Songtao Shi and Pamela Robey (NIDCR).

DHHS Reference No. E–018–2003/0–PCT–01.

Licensing Contact: Marlene Shinn-Astor; 301/435–4426; *shinnm@od.nih.gov.*

Many individuals with ongoing and severe dental problems are faced with the prospect of permanent tooth loss. Examples of such dental problems include: dentinal degradation due to chronic dental disease (caries or periodontal); mouth injury; or through surgical removal, such as with tumors associated with the jaw. For many, a technology that offers a possible alternative to artificial dentures by designing and transplanting a set of living teeth fashioned from an individual's own pulp cells would greatly improve their quality of life.

The NIH announces a new technology wherein human postnatal deciduous dental pulp stem cells commonly known as "baby teeth", are used to create dentin and have been shown to differentiate into cells of specialized function such as neural cells, adipocytes, and odontoblasts. It is believed that these cells could be manipulated to repair damaged teeth, induce the regeneration of bone, and treat neural injury or disease.

This research is described, in part, in Miura *et al.*, "SHED: Stem cells from human exfoliated deciduous teeth," Proc. Natl. Acad. Sci. USA, vol. 100 (no. 10; May 13, 2003) pp. 5807–5812.

Methanocarba Cycloalkyl Nucleoside Analogues

Dr. Kenneth Jacobson (NIDDK).

Serial No. 10/169,975

Filed July 12, 2002, (and related National Stage patent applications).

Licensing Contact: Marlene Shinn-Astor; 301/435–4426; *shinnm@od.nih.gov.*

Purines such as adenosine and ATP have been shown to play a wide array of roles in biological systems such as inter alia, modulator of vasodilation and hypotension, muscle relaxant, central depressant, inhibitor of platelet aggregation, regulator of energy supply/demand, responder to oxygen availability, neurotransmitter and neuromodulator. All P1 and P2 receptor nucleoside ligands suffer from chemical instability that is caused by the labile glycosidic linkage in the sugar moiety of the nucleoside. However, it has been found that relatively few ribose modifications are tolerated by the presently known agonists and antagonists of P1 and P2 receptors.

The NIH announces a new technology wherein a new class of nucleoside and nucleotide analogs has been identified that serve as selective agonists or antagonists for P1 and P2 receptors. The technology relates to a chemical modification of purines and pyrimidines, which provide enhanced therapeutic profile and potentially greater in vivo stability, because of the absence of a glycosidic bond. The P2Y receptor agonists and antagonists could potentially be used in immune modulation, inflammation, cardiovascular diseases, neurodegeneration, diabetes, and cancer. In addition, the A3 receptor agonists and antagonists could be useful in cardioprotection, neuroprotection, and asthma.

This research is described, in part, in J. Med. Chem., 2000, 43:2196–2203 and J. Med. Chem., 2002, 45:208–218.

Orally Active Derivatives of 1,3,5(10)-estratriene

H.K. Kim, *et al.* (NICHD).

U.S. Patent 5,554,603

Issued Sep. 10, 1996.

Licensing Contact: Marlene Shinn-Astor; 301/435–4426; *shinnm@od.nih.gov.*

The utility of estrogenic substances in the practice of medicine is well documented. Estrogens may be used for the replacement of the natural hormone, estradiol, in hypogonadism, and following the removal of the ovaries or cessation of ovarian activity during menopause. They are also widely employed as a component of oral contraceptives. However, the orally active synthetic estrogens are associate with a number of side effects such as enhanced risk of endometrial carcinoma; induction of malignant carcinoma especially in the cervix, breast, vagina and liver; promotion of gallbladder disease, thromboembolic and thrombotic diseases, myocardial infarction, hepatic adenoma, elevated blood pressure, and hypercalcemia; and a worsening of glucose tolerance can occur.

The NIH announces a new family of novel, active estrogens that are esters of estradiol. These esters possess enhanced estrogenic activity following oral administration in the absence of a 17-

ethynyl alcohol which has been implicated in many side effects. It is anticipated that these esters could be used in all instances where estrogen is prescribed as a treatment.

Additional information about these esters may be found in U.S. Patent 5,554,603.

Dated: May 9, 2003.

Steven M. Ferguson,

Acting Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 03–12277 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Methods and Apparatus for Performing Multiple Simultaneous Manipulations of Biomolecules in a Two-Dimensional Array

Michael Emmert-Buck, *et al.* (NCI).

DHHS Reference No. E–339–2002/0

Filed Nov. 25, 2002.

Licensing Contact: Susan Ano; 301/435–5515; *anos@od.nih.gov.*

This technology concerns a method and apparatus for accomplishing and/or facilitating the analysis of multiple biomolecules separated in a two-dimensional array, such as gel, membrane, tissue biopsy, etc. The invention employs a separator, termed an External Movement Inhibitor Device, that allows biomolecules to be transferred from an array such as those listed above to another support system while maintaining the two-dimensional spatial relationship of the biomolecules as in the array. The biomolecules can subsequently be subjected to various manipulations such as amplification, reverse transcription, labeling, cloning, etc., after which multiple well-established methods for quantitative and qualitative analysis can be used. The technology allows detection/analysis of all molecules regardless of their abundance.

Methods for Assessing the Ability of HIV Patients to Restrict HIV Replication

Mark Connors, Stephen Migueles (NIAID).

DHHS Reference No. E–260–2002/0

Filed Sep. 20, 2002.

Licensing Contact: Susan Ano; 301/435–5515; *anos@od.nih.gov.*

One of the current obstacles for the design and testing of effective vaccines and immunotherapies of HIV is the lack of in vitro correlates that will predict the ability to restrict virus replication. This invention relates to methods for evaluating the effectiveness of HIV therapies and vaccines and methods for assessing the ability of HIV patients to restrict virus replication. Upon restimulation of $CD8^+$ T cells, the expression of perforin in these cells, and the cell cycle stage of these cells may be measured and used as in vitro markers for monitoring the patient's ability to restrict HIV replication and the effectiveness of the therapies and vaccines applied. Significant proliferation of $CD8^+$ T cells, the presence of perforin in these cells, and the ability of these cells to progress beyond the G_1 stage signify the patient's ability to restrict HIV replication and a favorable effect of the therapies or vaccines. These methods may be advantageously applied in conjunction with other measurements of HIV specific immune response such as HLA tetramers.

Safer Attenuated Virus Vaccines with Missing or Diminished Latency of Infection

Jeffrey Cohen (NIAID), Edward Cox (FDA), Lesley Pesnicak (NIAID).

DHHS Reference No. E–250–2002/0

Filed Nov. 5, 2002.

Licensing Contact: Susan Ano; 301/435–5515; *anos@od.nih.gov.*

This technology describes viruses that have weakened ability to establish and/or maintain latency and their use as live vaccines. The viruses have one or more genetic mutations that allow for continued replication but that inhibit latency. The vaccine materials and methods for their construction are exemplified with the virus that causes chickenpox and whose latent infection results in shingles, a condition that affects up to an estimated 1 million people per year in the United States alone. Specific examples of gene deletion are described. Furthermore, replacement of these deleted genes with other desirable viral antigen encoding sequence(s) and/or cytokine genes in order to enhance a desired immunological response is also described. Aspects of this technology are relevant to other live virus vaccines, thus increasing the safety of such vaccines.

HTLV–1 Cell Binding and Inhibition

Bishop Hague, Tong Mao Zhao, Thomas Kindt (NIAID).

DHHS Reference No. E–240–2002/0

Filed Oct 30, 2002.

Licensing Contact: Susan Ano; 301/435–5515; *anos@od.nih.gov.*

This technology describes methods for inhibiting human T-cell lymphotropic virus type I (HTLV–I) infection in cells and for reducing viral load or titer in infected individuals. As many as 20 million people worldwide are infected with HTLV–I, and approximately 1 million will develop adult T-cell leukemia/lymphoma, myelopathy, or tropic spastic paraparesis (a condition similar to multiple sclerosis) as a result of infection. Previous treatments have proven ineffective. The current invention relates to the surprising results that adenosine receptor antagonists specific for type A2A and A2B adenosine receptors prevent binding of HTLV–I to cells. Such antiviral use of adenosine receptor antagonists has not been suggested elsewhere. This technology also has veterinary application, as such treatment methods could be used against feline leukemia virus infections.

Flp-in T-Rex Jurkat Cell Line

Steven Zeichner, Naoto Yoshizuka (NCI).

DHHS Reference No. E–161–2003.

Licensing Contact: Michael Shmilovich; 301/435–5019; *mish@codon.nih.gov.*

This Flp-in T-Rex Jurkat cell line offers rapid and efficient generation of cell lines containing a gene of interest

by FRT-Flp recombinase mediated integration.

A cell line can be stably transformed with both the pFRT/lacZeo (already in the parental Flp-in Jurkat cell line) and the pcDNA6/TR plasmids. A gene of interest is cloned into plasmid, pcDNA5/FRT/TO. When pcDNA5/FRT/TO, including the gene of interest, is co-transfected along with a plasmid supplying a source of Flp recombinase into the cell line, the recombinase mediates the insertion of the gene of interest into the Flp recombination target (FRT) site in the pFRT/lacZeo plasmid that becomes integrated into the DNA of the cell line. The gene of interest can then be expressed in a tetracycline inducible fashion.

Method of Assessing Ischemia in a Patient

Steven Warach and Lawrence Latour (NINDS).

DHHS Reference No. E–082–2002 Filed Mar. 17, 2002.

Licensing Contact: Michael Shmilovich; 301/435–5019; *mish@codon.nih.gov.*

Hyperintense acute reperfusion marker (HARM) is well correlated with reperfusion and is a precursor to or concomitant with reperfusion injury and hemorrhagic transformation. The inventors have developed a novel technique of assessing early blood brain barrier disruption associated with ischemic stroke in a patient by administering a contrast agent to the patient, acquiring a fluid-attenuated inversion-recovery (FLAIR) image, and observing the presence or absence of HARM on the acquired image. The technique can also be used to determine the effectiveness of a therapeutic protocol for the treatment or prevention of reperfusion injury or hemorrhagic transformation in a patient that has suffered an ischemic event.

Dated: May 9, 2003.

Steven M. Ferguson,

Acting Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 03–12278 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; 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 Fogarty International Center Advisory Board.

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: Fogarty International Center Advisory Board.

Date: May 20, 2003.

Closed: 9 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Lawton Chiles International House, Bethesda, MD 20892.

Open: 11 a.m. to 12 p.m.

Agenda: A Report of the FIC Director on updates and overviews of new FIC initiatives.

Place: National Institutes of Health, Lawton Chiles International House, Bethesda, MD 20892.

Contact Person: Irene W. Edwards, Information Officer, Fogarty International Center, National Institutes of Health, Building 31, Room B2C08, 31 Center Drive MSC 2220, Bethesda, MD 20892, 301–496–2075.

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.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/fic/about/advisory.html.* where an agenda and any additional information for the meeting will be posed when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12274 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council for Human Genome Research.

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 constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Human Genome Research.

Date: May 19, 2003.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.

Closed: 1:30 p.m. to adjournment at 5 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Mark S. Guyer, Director for Extramural Research, Assistant Director for Scientific Coordination, National Human Genome Research Institute, 31 Center Drive, MSC 2033, Building 31, Room B2B07, Bethesda, MD 20892–2033, 301–435–5536, *guyerm@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12275 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research 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 Human Genome Research Institute Initial Review Group, Genome Research Review Committee.

Date: June 6, 2003.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH. 31, B2B32, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ken D. Nakamura, PhD, Scientific Review Administrator, Office of Review, National Human Genome Research Institute, National Institutes of Health, Bethesda, MD 20892, 301–402–0838.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS).

Dated: May 12, 2003.

LaVerne Y. Springfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12276 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Macrophages, Oxidation and Endometriosis.

Date: June 2, 2003.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Jon M. Ranhand, PhD, Scientist Review Administrator, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Blvd., Room 5E03, Bethesda, MD 20892, (301) 435–6884.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12267 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed 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 constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Initial Review Group, Interventions Research Review Committee.

Date: June 10–11, 2003.

Time: June 10, 2003, 9 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Time: June 11, 2003, 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: David I. Sommers, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6144, MSC 9606, Bethesda, MD 20892–9606. 301–443–6470. *dsomnmers@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Women's Mental Health.

Date: June 10, 2003.

Time: 4 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: David I. Sommers, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6144, MSC 9606, Bethesda, MD 20892–9606. 301–443–7861. *dsommers@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS.)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12268 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 03–53, Review of R13s.

Date: May 27, 2003.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892. (Telephone conference call).

Contact Person: H. George Hausch, PhD, Acting Director, 4500 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892. (301) 594–2372.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 03–70, Review of K22 Grants.

Date: June 19, 2003.

Time: 10 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Lynn M. King, PhD, Scientific Review Administrator, Scientific Review Branch, 45 Center Dr., Rm 4AN–38K, National Institute of Dental & Craniofacial Research, National Institutes of Health, Bethesda, MD 20892–6402. (301) 594–5006.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 03–73, Review of K22s.

Date: June 19, 2003.

Time: 11:30 a.m. to 12:30 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: Lynn M King, PhD, Scientific Review Administrator, Scientific Review Branch, 45 Center Dr., Rm 4AN–38K, National Institute of Dental & Craniofacial Research, National Institutes of Health, Bethesda, MD 20892–6402. (301) 594–5006.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 03–67, Review of R44s.

Date: July 16, 2003.

Time: 2 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892. (Telephone conference call.)

Contact Person: Philip Washko, PhD, DMD, Scientific Review Administrator, 45 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892. (301) 594–2372.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Disease and Disorders Research, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12269 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Diffusion of HIV Infection through Sexual Risk Behaviors of Drug Users.

Date: June 5, 2003.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Key Bridge, 1401 Lee Highway, Arlington, VA 22209.

Contact Person: William C. Grace, PhD, Deputy Director, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 443–2755.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Medication Development Research Subcommittee.

Date: June 9, 2003.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin Grand, 2350 M Street, NW, Washington, DC 20037.

Contact Person: Khursheed Asghar, PhD, Chief, Basic Sciences Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, 6001 Executive Boulevard, Room 3158, Msc 9547, Bethesda, MD 20892–9547, (301) 443–2755.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Health Services Research Subcommittee.

Date: June 10–11, 2003.

Time: 9 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: Marina L. Volkov, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1433.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Treatment Research Subcommittee.

Date: June 10–11, 2003.

Time: 9 a.m to 12 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: Kesinee Nimit, MD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Neuroscience Center, Rm. 3158, MSC 9547, 6001 Executive Boulevard, Bethesda, MD 20892–9547, (301) 435–1432.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Member Conflict A.

Date: June 10, 2003.

Time: 2 p.m. to 4:30 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: Mark R. Green, PhD, Chief, CEASRB, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, Room 3158, MSC 9547, 6001 Executive Boulevard, Bethesda, MD 20892–9547, (301) 435–1431.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Member Conflict B.

Date: June 11, 2003.

Time: 8:30 a.m. to 9 a.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mark R. Green, PhD, Chief, CEASRB, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, Room 3158, MSC 9547, 6001 Executive Boulevard, Bethesda, MD 20892–9547, (301) 435–1431.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Centers Review Committee.

Date: July 1, 2003.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Rita Liu, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435—1388.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Training and Career Development Subcommittee.

Date: July 14–16. 2003.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Mark Swieter, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1389.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12270 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel "Virtual Reality-Enhanced Therapy System for Treating Joint Pain" (Topic 048).

Date: June 18, 2003.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Eric Zatman, Contract Review Specialist, Office of Extramural Affairs, National Institutes on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1438.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12271 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with 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 a 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 Nursing Research Initial Review Group.

Date: June 17–18, 2003.

Time: 8:15 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Jeffrey M. Chernak, PhD, Scientific Review Administrator, Office of Review, National Institute of Nursing Research, 6701 Democracy Plaza, Suite 712, MSC 4870, Bethesda, MD 20817, (301) 402–6959, *chernak@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institute of Health, HHS)

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12272 Filed 5–12–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of The Board of Scientific Counselors of the Warren Grant Magnuson Clinical Center, June 9, 2003, 8 a.m. to June 10, 2003, 5 p.m., National Institutes of Health, Building 10, 10 Center Drive, Medical Board Room 2C116, Bethesda, MD 20892 which was published in the **Federal Register** on May 6, 2003, 66 87 24010.

The meeting will be closed in accordance with the provisions set forth is section 552b(c)(6), Title 5 U.S.C. as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the Clinical Center. The meeting is closed to the public.

Dated: May 12, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–12273 Filed 5–15–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1462–DR]

Kansas; Major Disaster and Related Determinations

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

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Kansas (FEMA–1462–DR), dated May 6, 2003, and related determinations.

EFFECTIVE DATE: May 6, 2003.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated May 6, 2003, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Kansas resulting from severe storms, tornadoes, and flooding on May 4, 2003, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the State of Kansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal (Category A) and emergency protective measures (Category B) under the Public Assistance program in the designated areas, and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act you may deem appropriate subject to completion of Preliminary Damage Assessments. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Undersecretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael J. Hall, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Kansas to have been affected adversely by this declared major disaster:

Cherokee, Crawford, Labette, Leavenworth, Miami, Neosho and Wyandotte Counties for Individual Assistance.

Cherokee, Crawford, Labette, Leavenworth, Miami, Neosho and Wyandotte for debris removal (Category A) and emergency protective measures (Category B) under the Public Assistance program.

All counties within the State of Kansas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.556, Fire Management Assistance; 83.558, Individual and Household Housing; 83.559, Individual and Household Disaster Housing Operations; 83.560 Individual and Household Program-Other Needs, 83.544, Public Assistance Grants; 83.548, Hazard Mitigation Grant Program.)

Michael D. Brown,

Undersecretary, Emergency Preparedness and Response.

[FR Doc. 03–12281 Filed 5–15–03; 8:45 am]

BILLING CODE 6718–02–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1463–DR]

Missouri; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, EmergencyPreparedness and Response Directorate, Department of HomelandSecurity.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1463–DR), dated May 6, 2003, and related determinations.

EFFECTIVE DATE: May 6, 2003.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated May 6, 2003, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Missouri, resulting from severe storms, tornadoes, and flooding on May 4, 2003, and continuing is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). I, therefore, declare that such a major disaster exists in the State of Missouri.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal (Category A) and emergency protective measures (Category B) under the Public Assistance program in the designated areas, and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act you may deem appropriate subject to completion of Preliminary Damage Assessments. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Undersecretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael L. Karl, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Missouri to have been affected adversely by this declared major disaster:

Barry, Barton, Bates, Benton, Buchanan, Camden, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, Dallas, Douglas, Greene, Henry, Hickory, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, McDonald, Miller, Morgan, Newton, Pettis, Platte, Polk, Pulaski, Ray, Saline, St. Clair, Stone, Taney, Vernon, and Webster Counties for Individual Assistance Program.

Barton, Camden, Cass, Cedar, Christian, Clay, Dallas, Greene, Jackson, Jasper, Johnson, Lawrence, Platte, and Polk Counties for debris removal (Category A) and emergency protective measures (Category B) under the Public Assistance Program.

All counties within the State of Missouri are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.556, Fire Management Assistance; 83.558, Individual and Household Housing; 83.559, Individual and Household Disaster Housing Operations; 83.560 Individual and Household Program-Other Needs, 83.544, Public Assistance Grants; 83.548, Hazard Mitigation Grant Program.)

Michael D. Brown,

Undersecretary, Emergency Preparedness and Response.

[FR Doc. 03–12282 Filed 5–15–03; 8:45 am]

BILLING CODE 6718–02–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Reports, Forms, and Record Keeping Requirements: Agency Information Collection Activity Under OMB Review; Security Programs for Indirect Air Carriers

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice.

SUMMARY: This notice announces that TSA has forwarded the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and clearance of an extension of the currently approved collection under the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on December 20, 2002.

DATES: Send your comments by June 16, 2003. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Address your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: DOT-TSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Rafael H. Ramos, Aviation Operations, Transportation Security Administration HQ, West Tower, Floor 11, TSA–7, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone (571) 227–2227; facsimile (571) 227–1947; e-mail *rafael.ramos1@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Transportation Security Administration (TSA)

Title: Indirect Air Carrier Security.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0004.

Forms(s): NA.

Affected Public: A total of 3,760 Indirect Air Carriers.

Abstract: This rule prescribes aviation security rules governing each person (including air freight forwarder and any cooperative shippers' association) engaged, or who intends to be engaged indirectly in the air transportation of package cargo that is intended for carriage aboard a passenger-carrying air carrier aircraft inside the United States.

Estimated Annual Burden Hours: An estimated 1,323 hours annually.

TSA is soliciting comments to—

(1) evaluate whether the proposed information requirement 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;

(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, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Issued in Arlington, Virginia, on May 8, 2003.

Susan T. Tracey,

Deputy Chief Administrative Officer.

[FR Doc. 03–12214 Filed 5–15–03; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4809–N–20]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where

property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Shirley Kramer, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: ARMY: Ms. Julie Jones-Conte, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, Attn: DAIM–MD, Room 1E677, 600 Army Pentagon, Washington, DC 20310–600; (703) 692–9223; COE: Ms. Shirley Middleswarth, Army Corps of Engineers, Civil Division, Directorate of Real Estate, 441 G Street, NW., Washington, DC 20314–1000; (202) 761–7425; GSA: Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; INTERIOR: Ms. Linda Tribby, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS5512, Washington, DC 20240; (202) 219–0728; NAVY: Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: May 8, 2003.

Mark R. Johnston,

Deputy Director, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 5/16/03

Suitable/Available Properties

Buildings (by State)

California

Bell Federal Service Center
5600 Rickenbacker Road
Bell Co: Los Angeles, CA 90201–
Landholding Agency: GSA
Property Number: 54200320009
Status: Excess
Comment: 9 bldgs., various sq. ft., need repair, portion occupied, restricted access, presence of asbestos/lead paint/PCBs, most recent use—warehouse/office
GSA Number: 9–G–CA–1575

Illinois

8 Bldgs.
various locations
Bolingbrook Co: Will IL 48730–
Landholding Agency: GSA
Property Number: 54200320010
Status: Excess
Comment: 4 frame duplex structures and 4 frame single family homes, 1300 to 1500 sq. ft. each, possible lead paint
GSA Number: 1–U–IL–728

12 Residences
various locations
Prairie View Twp Co: Lake IL 48730–
Landholding Agency: GSA
Property Number: 54200320011
Status: Excess
Comment: 1150 sq. ft. each, possible asbestos/lead paint
GSA Number: 1–U–IL–727

West Virginia

Buckland/Tract 104–01
New River Gorge National River
Hinton Co: Raleigh WV 25951–
Landholding Agency: Interior
Property Number 61200320007
Status: Excess
Comment: 522 sq. ft. dwelling, needs major rehab, off-site use only

Weaver/Tract 102–17
New River Gorge National River
Hinton Co: Raleigh WV 25951–
Landholding Agency: Interior
Property Number: 61200320008
Status: Excess
Comment: 4036 sq. ft. dwelling w/ deteriorated shed, needs major rehab, off-site use only

Hobbs/Tract 108–25
New River Gorge National River
Hinton Co: Summers WV 25951–
Landholding Agency: Interior
Property Number: 61200320009
Status: Excess
Comment: 1295 sq. ft. dwelling w/ deteriorated garage and sheds, needs major rehab, off-site use only

Virginia

1.0 acre
Naval Station
St. Juliens Creek Annex
Portsmouth Co: VA
Landholding Agency: Navy
Property Number: 77200320033
Status: Unutilized
Comment: Grassy field, restricted access

Alaska

Warehouse
Naval Arctic Research Lab
Point McIntyre Co: AK
Landholding Agency: Navy
Property Number: 77200320019
Status: Excess
Reason: Extensive deterioration

Garage
Naval Arctic Research Lab
Point McIntyre Co: AK
Landholding Agency: Navy
Property Number: 77200320020
Status: Excess
Reason: Extensive deterioration

Operations Bldg.
Naval Arctic Research Lab
Point McIntyre Co: AK
Landholding Agency: Navy
Property Number: 77200320021
Status: Excess
Reason: Extensive deterioration

California

Bldg. 2203
Marine Corps Base
Camp Pendleton Co: CA
Landholding Agency: Navy
Property Number: 77200320022
Status: Excess
Reason: Extensive deterioration

Bldg. 2683
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320023
Status: Excess
Reason: Extensive deterioration

Bldg. 2685
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320024

Status: Excess
Reason: Extensive deterioration

Bldg. 2692
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320025
Status: Excess
Reason: Extensive deterioration

Bldg. 20735
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320026
Status: Excess
Reason: Extensive deterioration

Bldg. 21546
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320027
Status: Excess
Reason: Extensive deterioration

Bldg. 26034
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200320028
Status: Excess
Reason: Extensive deterioration

Kansas

Bldg. M37
Minooka Park
Sylvan Grove Co: Russell KS 67481–
Landholding Agency: COE
Property Number: 31200320002
Status: Excess
Reason: Extensive deterioration

Bldg. M38
Minooka Park
Sylvan Grove Co: Russell KS 67481–
Landholding Agency: COE
Property Number: 31200320003
Status: Excess
Reason: Extensive deterioration

Bldg. L19
Lucas Park
Sylvan Grove Co: Russell KS 67481–
Landholding Agency: COE
Property Number: 31200320004
Status: Unutilized
Reason: Extensive deterioration

North Carolina

Bldg. 13
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320034
Status: Unutilized
Reason: Secured Area

Bldg. 74, 75
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320036
Status: Unutilized
Reason: Secured Area

Bldgs. 478
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320035
Status: Unutilized
Reason: Secured Area

Bldg. 933
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320037
Status: Unutilized
Reason: Secured Area

Bldg. 1024
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320038
Status: Unutilized
Reason: Secured Area

Bldg. 1198
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320039
Status: Unutilized
Reason: Secured Area

Bldg. 1228
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320040
Status: Unutilized
Reason: Secured Area

Bldg. 1390
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320041
Status: Unutilized
Reason: Secured Area

Bldg. 1647
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320042
Status: Unutilized
Reason: Secured Area

Bldg. 1655
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320043
Status: Unutilized
Reason: Secured Area

Bldg. 1902
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320044
Status: Unutilized
Reason: Secured Area

Bldg. 3669
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320045
Status: Unutilized
Reason: Secured Area

Bldgs. 3761, 3763
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320046
Status: Unutilized
Reason: Secured Area

Bldg. 4000
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320047
Status: Unutilized
Reason: Secured Area

Bldg. 4063
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320048
Status: Unutilized
Reason: Secured Area

Bldg. 4263
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320049
Status: Unutilized
Reason: Secured Area

Bldg. 4329
Marine Corps Air Station
Cherry Point
Havelock Co: Craven NC 28533–
Landholding Agency: Navy
Property Number: 77200320050
Status: Unutilized
Reason: Secured Area

Tennessee

Bldg. 119
Holston Army Amo Plant
Kingsport Co: Hawkins TN 37660–
Landholding Agency: Army
Property Number: 21200320176
Status: Underutilized
Reasons: Within 2000 ft. of flammable or explosive material—Secured Area

Texas

Facility 13
Naval Air Station
Corpus Christi Co: Nueces TX 78419–5021
Landholding Agency: Navy
Property Number: 77200320051
Status: Excess
Reason: Extensive deterioration

Facility 94
Naval Air Station
Corpus Christi Co: Nueces TX 78419–5021
Landholding Agency: Navy
Property Number: 77200320052
Status: Excess
Reason: Extensive deterioration

Facility 1777
Naval Air Station
Corpus Christi Co: Nueces TX 78419–5021
Landholding Agency: Navy
Property Number: 77200320053
Status: Excess
Reason: Extensive deterioration

Washington

Bldg. 1707
102 Hwy Heights
Mesa Co: Franklin WA 99343–
Landholding Agency: Interior
Property Number: 61200320002
Status: Unutilized
Reason: Extensive deterioration

Bldg. 1702
102 Hwy Heights
Mesa Co: Franklin WA 99343–
Landholding Agency: Interior
Property Number: 61200320003
Status: Unutilized
Reason: Extensive deterioration

Bldg. 1806
Mesa Pumping Plant
Mesa Co: Franklin WA 99343–
Landholding Agency: Interior
Property Number: 61200320004
Status: Unutilized
Reason: Extensive deterioration

Bldg. 1202
508 S. Mample
Warden Co: Grant WA 98857–
Landholding Agency: Interior
Property Number: 61200320005
Status: Unutilized
Reason: Extensive deterioration

Bldg. 1203
512 S. Mample
Warden Co: Grant WA 98857–
Landholding Agency: Interior
Property Number: 61200320006
Status: Unutilized
Reason: Extensive deterioration

West Virginia

Thompson/Tract 112–23
New River Gorge
Meadow Creek Co: Summers WV 25977–
Landholding Agency: Interior
Property Number: 61200320010
Status: Excess
Reason: Extensive deterioration

Bowles/Tract 128–01
New River Gorge National River
Prince Co: Fayette WV 25907–
Landholding Agency: Interior
Property Number: 61200320011
Status: Excess
Reason: Extensive deterioration

Kessler/Tract 128–01
New River Gorge National River
Prince Co: Fayette WV 25907–
Landholding Agency: Interior
Property Number: 61200320012
Status: Excess
Reason: Extensive deterioration

Plumley/Tract 128–01
New River Gorge National River
Prince Co: Fayette WV 25907–
Landholding Agency: Interior
Property Number: 61200320013
Status: Excess
Reason: Extensive deterioration

Willis/Tract 128–01
New River Gorge National River
Prince Co: Fayette WV 25907–
Landholding Agency: Interior
Property Number: 61200320014
Status: Excess
Reason: Extensive deterioration

Land (by State)

Puerto Rico

Site 1
Naval Station Roosevelt Roads
Ceiba Co: PR 00735–
Landholding Agency: Navy
Property Number: 77200320029
Status: Unutilized
Reason: Secured Area

Site 2
Naval Station Roosevelt Roads
Ceiba Co: PR 00735–
Landholding Agency: Navy
Property Number: 772003230030
Status: Unutilized
Reason: Secured Area

Site 3
Naval Station Roosevelt Roads
Ceiba Co: PR 00735–
Landholding Agency: Navy
Property Number: 77200320031
Status: Unutilized
Reason: Secured Area

Site 4
Naval Station Roosevelt Roads
Ceiba Co: PR 00735–
Landholding Agency: Navy
Property Number: 77200320032
Status: Unutilized
Reason: Secured Area

Tennessee

Tract 2321
J. Percy Priest Dam and Reservoir
Murfreesboro Co: Rutherford TN 37130–
Location: South of Old Jefferson Pike
Landholding Agency: COE
Property Number: 31199010935
Status: Excess
Reason: landlocked

[FR Doc. 03–12125 Filed 5–15–03; 8:45 am]

BILLING CODE 4210–29–m

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4732–N–05]

Modification of the Statutory and Regulatory Waivers Granted to New York State for Recovery From the September 11, 2001 Terrorist Attacks

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of waivers granted.

SUMMARY: This notice advises the public of modifications of the waivers of regulations and statutory provisions granted to the State of New York for the purpose of assisting in the recovery from the September 11, 2001, terrorist attacks on New York City. This notice describes an eligibility waiver and a change to alternative requirements related to public benefit documentation for the Empire State Development Corporation's bridge loan program; describes an eligibility waiver related to special entities under the Community Development Block Grant program; describes a waiver of a regulatory application fee provision; and applies the waivers and alternate requirements to a third grant.

DATES: *Effective Date:* May 21, 2003.

FOR FURTHER INFORMATION CONTACT: Jan C. Opper, Senior Program Officer, Office of Block Grant Assistance, Department of Housing and Urban Development, Room 7286, 451 Seventh Street, SW., Washington, DC 20410, telephone number (202) 708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. FAX inquiries may be sent to Mr. Opper at (202) 401–2044. (Except for the "800" number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Authority to Grant Waivers

Section 434 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002 (Pub. L. 107–73, approved November 26, 2001) provides for the use of the disaster recovery supplemental appropriations of CDBG funds for grants to New York State for properties and businesses damaged by, and economic revitalization related to, the September 11, 2001 terrorist attacks on New York City.

The 2002 Supplemental Appropriations Act For Further Recovery From And Response To Terrorist Attacks On The United States (Pub. L. 107–206, approved August 2, 2002) provides for the use of the disaster recovery funds appropriated under it for assistance for properties and businesses (including the restoration of utility infrastructure) damaged by, and for economic revitalization directly related to, the terrorist attacks on the United States that occurred on September 11, 2001, in New York City and for reimbursement to the State and City of New York for expenditures incurred from the regular Community Development Block Grant formula allocation used to achieve these same purposes.

The third proviso of section 434 of Pub. L. 107–73 and Pub. L. 107–206 under the title of "COMMUNITY DEVELOPMENT FUND" authorizes the Secretary to "waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds (except for requirements related to fair housing,

nondiscrimination, labor standards, and the environment)."

The Department finds that the following waivers and alternative requirements (together with previously granted waivers and alternative requirements) are necessary to facilitate the use of the $700 million awarded to New York State's Empire State Development Corporation (ESDC) and the $2.0 billion awarded and $783 million awaiting award to New York State's Lower Manhattan Development Corporation (LMDC) (collectively, the grantees).

The Department also finds that such uses of funds, as described below, are not inconsistent with the overall purpose of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*), or the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12701 *et seq.*).

Except as noted by published waivers and alternative requirements, statutory and regulatory provisions governing the Community Development Block Grant program for states, including those at 24 CFR part 570, subpart I, shall apply to the use of these funds.

In **Federal Register** notices of March 18, 2002, at 67 FR 12042 (effective March 25, 2002) and May 22, 2002, at 67 FR 36017 (effective May 28, 2002), the Department promulgated waivers and alternative requirements necessary to facilitate the use of both $700 million in disaster recovery funds awarded to New York State's Empire State Development Corporation and $2.0 billion awarded to New York State's Lower Manhattan Development Corporation.

This notice waives requirements at 42 U.S.C. 5305(a)(15) to the extent necessary to allow a national for-profit community development institution that otherwise meets CDBG eligibility requirements to qualify as a local development corporation. The entity seeking to participate in the ESDC business recovery loan program does not qualify because it is both national and for-profit. This waiver is necessary to support the unique circumstances of this grant: ESDC is a state grantee carrying out activities in an entitlement jurisdiction. The law permits states to select national nonprofits to carry out activities under this provision. The CDBG entitlement regulation, which serves as a guide for state grantees, permits either non- or for-profit local development corporations and neighborhood based organizations to qualify, if they otherwise meet regulatory qualification requirements. ESDC competitively selected several organizations to carry out community development lending activities under this provision. All but one of the organizations qualify under either the state approach or the entitlement approach. This waiver permits ESDC to fund one organization that is similar in purpose and function to the other groups and has a similar scope of activities.

This notice also modifies the published alternate requirements related to reports and documentation for the bridge loan program implemented by ESDC in the immediate wake of the disaster. The bridge loan program is unlike the other activities because ESDC is not providing assistance directly to affected businesses; lending institutions are. What ESDC provides is a loss reserve account, designed to support private sector lenders that wished to take more risks in the wake of the disaster than would otherwise be permitted such institutions by oversight regulatory agencies. These lenders collected information sufficient to meet core CDBG requirements related to a special economic development activity undertaken under the urgent need national objective, but the program was implemented so rapidly that it predated the additional requirements of the referenced notices related to documentation of salary ranges and job types. HUD approved the action plan containing the bridge loan activity and is now clarifying in this notice what documentation requirements apply.

This notice also waives the CDBG regulations at 24 CFR 570.489(a)(2) to allow the grantees to charge registration fees where such fees are nominal and intended to discourage frivolous applications. The provision in the regulations banning fees for applications is intended to keep states from charging fees to units of general local government seeking to participate in the CDBG program. Such local governments carry out activities directly and may charge application fees. A previously granted waiver allows the state to carry out activities directly under these grants. This waiver is a companion to the previously granted waiver and it allows the state the same opportunity to charge application fees allowed other entities carrying out state CDBG activities directly.

Finally, this notice makes the waivers and requirements of this notice and of the previous notices cited above applicable to funds appropriated under the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States (Pub. L. 107–206, approved August 2, 2002). This law provides an additional $783 million to the state of New York through the LMDC for the same uses as the previous CDBG disaster appropriations to New York, including restoration of utility infrastructure, of which $33 million is directed by the relevant conference report to assist World Trade Center firms that suffered a disproportionate loss of their workforce and that intend to reestablish operations in New York City.

The text below indicates the paragraph being updated.

Description of Modifications

1. Paragraph 12 of the notice published at FR 67 FR 36017 (May 22, 2002) is amended to read as follows:

12. Public benefit standards for economic development activities. Currently, grantees are limited in the amount of CDBG assistance they may spend per job retained or created (or per low- and moderate-income person to whom goods or services are provided by the activity) that will be considered to meet public benefit standards. Public benefit standards at 42 U.S.C. 5305(e)(3) and 24 CFR 570.482(f)(1), (2), (3), (4)(i), (5), and (6) are waived, except that, the grantee shall report and maintain documentation on the creation and retention of (a) total jobs, (b) number of jobs within certain salary ranges, and (c) types of jobs. For the bridge loan program included in the Empire State Development Corporation's January 30, 2002, Action Plan, the grantee shall report and maintain public benefit documentation only on the total number of jobs created and retained. Paragraph (g) of 24 CFR 570.482, regarding amendments to economic development projects after review determinations, is also waived to the extent its provisions are related to public benefit.

Paragraph 16 of the notice published at 67 FR 36017 (May 22, 2002) is amended to read as follows:

16. Performance reports. Generally, grantees submit an annual performance report ninety days after the jurisdiction's program year. The conferees for Pub. L. 107–73 directed that HUD submit reports to the Committees on Appropriations quarterly on the obligation and expenditure of the CDBG funds appropriated under the Emergency Response Fund. Therefore, 42 U.S.C. 12708(a)(1) and 24 CFR 91.520 are waived with respect to these funds, and HUD is establishing an alternative requirement that the State must submit a quarterly report, as HUD prescribes, no later than 30 days following each calendar quarter, beginning after the first full calendar quarter after grant award and continuing until all funds have been expended and the

expenditures reported. Each quarterly report will include information on the project name, activity, location, national objective, funds budgeted and expended, Federal source and funds (other than CDBG disaster funds), numbers and North American Industry Classification System (NAICS) codes of businesses assisted by activity, total number of jobs created and retained by activity, numbers of such jobs by salary ranges (to be defined by HUD), and number of properties and housing units assisted; for activities benefiting low- and moderate income persons, the number of jobs taken by persons of low- and moderate-income, and the number of low- and moderate-income households benefiting. For the bridge loan program included in the Empire State Development Corporation's January 30, 2002, Action Plan, the grantee is not required to report by salary ranges on the number of created and retained jobs. Quarterly reports must be submitted using HUD's web-based Disaster Recovery Grant Reporting system. Annually (*i.e.*, with every fourth submission), the report shall include a financial reconciliation of funds budgeted and expended, and calculation of the status of administrative costs.

3. Provisions of 42 U.S.C. 5305(a)(15) are hereby waived solely to allow a national for-profit community development institution that otherwise meets eligibility requirements under that provision and is participating in Empire State Development Corporation's business recovery loan fund program to qualify as an eligible local development corporation under that provision.

4. The regulation at 24 CFR 570.489(a)(2) is waived to allow the grantees to charge registration or application fees to entities seeking to participate in grant-funded activities where such fees are nominal and intended to discourage frivolous applications.

5. The requirements of this notice and previous **Federal Register** notices at 67 FR 12042 (March 18, 2002) and at 67 FR 36017 (May 22, 2002) apply to the $783 million grant funded under the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States (Pub. L. 107–206, approved August 2, 2002).

Section 434 of Public Law 107–73 requires HUD to publish these waivers in the **Federal Register** no later than five days before their effective date. The effective date of these waivers is May 21, 2003.

Dated: May 12, 2003.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 03–12207 Filed 5–15–03; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft Environmental Assessment on the Proposal To Establish Operational/Experimental General Swan Hunting Seasons in the Pacific Flyway

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that a Draft Environmental Assessment on the Continuation of General Swan Hunting Seasons in Portions of the Pacific Flyway is available for public review. Comments and suggestions are requested.

DATES: You must submit comments on the Draft Environmental Assessment by June 16, 2003.

ADDRESSES: Copies of the Draft Environmental Assessment (DEA) can be obtained by writing to Robert Trost, Pacific Flyway Representative, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181. The DEA may also be viewed via the Fish and Wildlife Service Home Page at *http://migratorybirds.fws.gov*. Written comments can be sent to the address above. All comments received, including names and addresses, will become part of the public record. You may inspect comments during normal business hours at the same address.

FOR FURTHER INFORMATION CONTACT: Robert Trost, Pacific Flyway Representative, (503) 231–6162.

SUPPLEMENTARY INFORMATION: The DEA includes a review of the 5-year experimental general swan hunting seasons that took place from 1995 to 2000, as well as a summary of the results of subsequent 2000–02 hunting seasons. Information from the most recent breeding and wintering populations surveys is also included in the new DEA. Three alternatives are proposed to address the future of operational swan hunting seasons in Utah, Nevada, and the Pacific Flyway portion of Montana. The issuance of a new DEA fulfills the Service commitment to assess the Pacific Flyway swan seasons at the end of the 2002–03 hunting season as established in the most recent DEA on the issue, the availability of which was announced in the April 25, 2001, **Federal Register** (66 FR 20828). The DEA focuses on the issue of whether or not to establish an operational approach for swan hunting. Related efforts to address population status and distributional concerns regarding the Rocky Mountain Population of trumpeter swans are also discussed. Three alternatives, including the proposed action, are considered.

Dated: April 30, 2003.

Matt Hogan,

Acting Director, Fish and Wildlife Service.

[FR Doc. 03–12343 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–050–02–5101–ER–F331; N–75493, N–75471, N–75472, N–75474, N–75475,N–75476, N–75477]

Notice of Availability of the Final Environmental Impact Statement for Ivanpah Energy Center

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability (NOA) of the Final Environmental Impact Statement (FEIS) for Ivanpah Energy Center (Ivanpah); and to announce locations where copies of the FEIS can be obtained for reading.

SUMMARY: Pursuant to Section 102 (2)(C) of the National Environmental Policy Act (NEPA) of 1969, a FEIS has been prepared by the Bureau of Land Management (BLM), Las Vegas Field Office for Ivanpah. Western Area Power Administration (WAPA) is a cooperating agency. The FEIS was prepared to analyze the impacts of issuing rights-of-way for a gas-fired electric power plant and ancillary facilities (including, electric transmission lines, interconnection at WAPA's Mead substation, electric substations, water pipeline, access roads, and telecommunication facilities).

DATES: A 30-day availability period will start when the Environmental Protection Agency publishes their NOA and filing of the FEIS in the **Federal Register**. Upon completion of the 30-day availability period, the BLM will respond to all comments received on the FEIS and then will issue a Record of Decision (ROD). The local media will announce the ROD. Copies of the ROD will be sent to those who requested a copy, made substantive comments, or those known to have expressed a strong interest in the project.

ADDRESSES: Public reading copies of the FEIS will be available for reading at public libraries located at the following addresses:

- 650 West Quartz Avenue, Sandy Valley, NV
- 365 West San Pedro, Goodsprings, NV
- 4280 South Jones Blvd., Las Vegas, NV

A limited number of copies of the document will be available at the following BLM and WAPA offices:

- Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., Reno, NV
- Bureau of Land Management, Las Vegas Field Office, 4701 Torrey Pines Drive, Las Vegas, NV
- Western Area Power Administration, Corporate Service Office, A7400, 12155 West Alameda Parkway, Lakewood, CO
- Western Area Power Administration, Desert Southwest Regional Office, 615 South 43rd Avenue, Phoenix, AZ

FOR FURTHER INFORMATION CONTACT: Jerry Crockford, Project Manager, Bureau of Land Management, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130–2301 or Bureau of Land Management, Farmington Field Office, 1235 La Plata Highway, Suite A, Farmington, NM 87401; telephone (505) 599–6333, cellular telephone (505) 486–4255.

SUPPLEMENTARY INFORMATION: The FEIS addresses the proposed action and two alternatives.

The proposed action can be summarized as: Constructing, operating, and maintaining a 500 megawatt gas-turbine combined-cycle power plant in the Ivanpah Valley, approximately 20 miles south of Las Vegas, Nevada. Except for a related electric transmission line, the proposed generating facility and most ancillary facilities are located on 30-acres of public land administered by the BLM, in the MDBM, T. 25 S., R. 58 E., sec. 1, and T. 25 S., R. 59 E., sec. 6. The facility would use a refrigerated air system to reduce cooling water requirements normally associated with combined-cycle power plants. Power generated from Ivanpah would enter the southern Nevada power grid through WAPA's Mead Substation, in Eldorado Valley.

The proposed plant site is located 2.5-miles southeast of the town of Goodsprings, Nevada. The proposed action includes the following ancillary facilities: a 12-inch diameter gas pipeline interconnection to the adjacent Kern River Gas Transmission (KRGT) gas pipeline; a four-inch diameter water pipeline originating from the Southern Nevada Correctional Center (SNCC) in Jean, Nevada, to supply water processed through a planned water treatment facility to provide process water for plant operations; a telecommunications line; a 230 kilovolt (kV) substation; the following 230 kV transmission lines: (1) Two 230 kV lines from the proposed Ivanpah Substation to the Pahrump-Mead 230 kV line corridor; (2) a 43-mile 230 kV line from the Ivanpah Substation to the WAPA Mead Substation, in Eldorado Valley, Nevada; and (3) two 230 kV lines from the Ivanpah Substation to the Table Mountain Substation and Valley Electric Association's Pahrump-Mead Transmission Line; and the following fiber optic lines: (1) An optical-fiber ground wire (OPGW) shield wire as an integral part of the Ivanpah-Mead #2 transmission line; and (2) an OPGW as an integral part of the Table Mountain-Ivanpah #1 transmission line. Access to Ivanpah would be via an existing, unimproved road connected to State Highway 161.

An alternative plant site, located in Primm, Nevada, would be co-located with the Reliant Bighorn Power Plant (Bighorn), on a 30-acre parcel on private property. Ancillary facilities to the alternative plant site includes: An 11 mile long water supply pipeline from SNCC to the power plant; a 40-mile long transmission line to interconnect the plant to the WAPA Mead Substation; approximately 14 miles of transmission lines to interconnect the facility to the proposed Table Mountain Substation and the Valley Electric Association's Pahrump-Mead transmission line; a 3.2-mile natural gas pipeline connecting to KRGT natural gas pipeline; use of existing access roads; and telecommunications facilities. This is the Agencies' Preferred Alternative. However, this site is presently unavailable due to some business considerations that the owners of the Bighorn site have yet to make.

The plant will require approximately 22 months for construction. The plant will be built to operate continuously, except for semi-annual maintenance shutdowns, with a projected 40-year life. Power will be sold into the commercial power markets of Nevada, California, and Arizona.

Under the No Action Alternative, BLM would not issue right-of-way grants for the Ivanpah Energy Center and ancillary facilities. The project including the power plant, electric transmission lines, substation interconnection, electric substations, water pipeline, access road, telecommunication facilities, and temporary use areas would not be constructed. The area proposed for Ivanpah Energy Center would remain undeveloped. An identified energy need would not be met by this alternative.

Public participation is encouraged throughout processing of this project. Comments presented throughout the process will be considered.

Dated: March 5, 2003.

Mark T. Morse,

Field Manager.

[FR Doc. 03–12131 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–014–6350–DS; GP–2–0236]

Notice of availability for the Draft Upper Klamath River Management Plan/ Environmental Impact Statement and Resource Management Plan Amendments

ACTION: Notice of availability for the Draft Upper Klamath River Management Plan/ Environmental Impact Statement and Resource Management Plan Amendments (River Plan/DEIS).

SUMMARY: In accordance with the Federal Land Policy and Management Act and the National Environmental Policy Act (NEPA), this document provides notice that the Bureau of Land Management (BLM) intends to make the River Plan/DEIS available for public review and comment. This plan encompasses portions of the upper Klamath River in southern Oregon and northern California. This plan will provide direction for management of the public lands within the planning area for at least 15 to 20 years after the plan is completed. A decision on this DEIS will be signed by the State Directors of Oregon/Washington and California, and will amend both the BLM Klamath Falls Resource Area (Oregon), and the Redding (California) Resource Management Plans.

The Wild and Scenic Rivers Act requires a management plan be completed for a designated wild and scenic river, and State Scenic Waterway. Within Oregon, the State of Oregon designated an 11-mile segment of the Klamath River a State Scenic Waterway in 1988. In addition, at the request of the Governor of Oregon, the Klamath River was designated as a Scenic River (part of the Wild and Scenic Rivers system), by the Secretary of the Interior in 1994. In California, the segment of the Klamath River within the planning

area was determined to be eligible for inclusion as a scenic river under the Wild and Scenic River Act, and is currently under interim protective management until a designation decision is made. This plan considers management of land both within and adjacent to the scenic river corridor. The plan is being developed jointly by the BLM Lakeview District (Klamath Falls Resource Area), Oregon, and the Redding Resource Area, California. The Oregon Parks and Recreation Department is a cooperating agency in the development of this DEIS and has developed proposed administrative rules in the river management plan for private lands that occur within the State Scenic Waterway.

The BLM has coordinated closely with numerous interested parties to identify the various management actions and alternatives that are best suited to the needs of the resources and has considered the input from the public. This notice initiates the public review process on the River Plan/DEIS. The public is invited to review and comment on the range and adequacy of the draft alternatives and associated environmental effects.

DATES: The comment period will end 90 days after publication of the Environmental Protection Agency's Notice of Availability of this River Management Plan and Draft Environmental Impact Statement in the **Federal Register**. All individuals, organizations, agencies, and tribes with a known interest in this planning effort have been offered a copy of the document for review. Documents may also be examined at the Klamath Falls Resource Area office, 2795 Anderson Avenue, Building 25, Klamath Falls, Oregon, 97603, at local libraries, and on the Web site: *http://www.or.blm.gov/Lakeview/kfra/index.htm.*

Public Participation

Public meetings will be held during the comment period. In order to ensure local community participation and input, public meetings will be held in Klamath Falls, Oregon, Yreka, California, and Copco, California. Specific dates and locations of meetings and comment deadlines will be announced through the local news media, newsletters and the BLM web site. At least 15 days public notice will be given for activities where the public is invited to attend.

Comments on the River Plan/DEIS should be received on or before the end of the comment period at the address listed below. For comments to be most helpful, they should relate to specific concerns or conflicts that can be addressed by the BLM. These concerns must also be able to be resolved through this planning process. Comments, including names and street addresses of respondents, will be available for public review at the above address during regular business hours (8 a.m. to 5 p.m.), Monday through Friday, except holidays, and may be published as part of the EIS, or other related documents. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

ADDRESSES FOR COMMENTS: Written comments should be sent to Teresa A. Raml, Field Manager, Bureau of Land Management, 2795 Anderson Ave., Building 25, Klamath Falls, Oregon 97603. Comments may also be e-mailed to: *krmp@or.blm.gov.*

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Larry Frazier, Project Leader (541–883–6916), or email your request to: *krmp@or.blm.gov.*

SUPPLEMENTARY INFORMATION: The total planning area encompasses approximately 20,000 acres of land in Oregon and California. At the written request of PacifiCorp, the major private landowner within the river corridor, approximately 6,000 acres of their private lands, primarily located within the California portion of the planning area, have been considered in this plan. PacifiCorp is considering several management options for the lands that are surplus to their needs for power production. Among these options are a long-term cooperative management agreement with BLM, and sale or other form of disposal of their lands.The River Plan/DEIS considers and analyzes four alternatives including the No Action alternative. These alternatives have been developed based on public input during and following initial scoping, and numerous meetings with local governments, tribes and the Upper Basin Subcommittee of the Klamath Provincial Advisory Committee (Klamath PAC). The alternatives provide for variable levels of maintenance or enhancement of resource values and propose a wide array of alternative land management actions. The "Preferred" Alternative proposes actions to enhance the values identified in the Wild and Scenic River designation and restore natural resources that are in a degraded condition, while minimizing resource management conflicts with recreation use. A final environmental impact statement and proposed Klamath River Management Plan is expected to be available for public review in mid-2003.

Dated: May 5, 2003.

Teresa A. Raml,

Field Manager, Klamath Falls Resource Area.

[FR Doc. 03–11630 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–169–1610–DU]

Notice of Public Meeting, Carrizo Plain National Monument AdvisoryCommittee

ACTION: Meeting notice.

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) National Monument Advisory Committee for the Carrizo Plain National Monument will meet as indicated below.

DATES: The meeting will be held Saturday, June 7, 2003 at the Carrisa Plains Elementary School, State Highway 58, near California Valley and Simmler, CA, beginning at 10 a.m. and continuing until 5 p.m. There will be a public comment period from 3 p.m. until 4 p.m.

SUPPLEMENTARY INFORMATION: The nine-member Carrizo Plain National Monument Advisory Committee advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of public land issues associated with public land management in the Carrizo Plain National Monument in central California. At this meeting, monument staff will be presenting a progress report on the new Carrizo Plain National Monument Resource Management Plan, including alternatives. The meeting is open to the public. The public may present written comments to the committee and time will be allocated for hearing public comments. Depending on the number of persons wishing to comment and the time available, the time for individual oral comments may be limited. Individuals who plan to attend and

need special assistance such as sign language interpretation or other reasonable accommodations should contact the BLM as indicated above.

FOR FURTHER INFORMATION CONTACT: Marlene Braun, Carrizo Plain National Monument Manager, 3801 Pegasus Drive, Bakersfield, CA 93308, telephone (661) 391–6119.

Dated: May 9, 2003.

John Dearing,

Public Affairs Specialist.

[FR Doc. 03–12212 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Environmental Impact Statement, Personal Watercraft Rule-Making, Glen Canyon National Recreation Area, Arizona and Utah

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement, Personal Watercraft Rule-Making, Glen Canyon National Recreation Area.

SUMMARY: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub L. 91–190, as amended) and the Council on Environmental Quality Regulations (40 CFR part 1500–1508), the National Park Service (NPS), Department of the Interior, announces the availability of the Final Environmental Impact Statement (FEIS), Personal Watercraft (PWC) Rule-Making, Glen Canyon National Recreation Area (NRA), Arizona and Utah. The FEIS assesses the potential impacts of PWC use for Glen Canyon NRA. The FEIS describes and analyzes three alternatives to manage PWC on Lake Powell to provide for the long-term protection of park resources while allowing a range of recreational opportunities to support visitor needs. Each alternative identifies proposed actions related to visitor use zones and accessible developed areas, facilities and recreational services, visitor safety and conflicts, resource protection, and park operations.

The FEIS will be used to make reasoned decisions about whether to continue PWC use at Glen Canyon NRA. The NPS determination will be based on the unit's enabling statute, mission, management objectives, resources, values, and other uses, as well as impacts from PWC on the unit. Consistent with *Bluewater Network* v. *Stanton*, No. CV002093 (D.D.C. 2000) and the settlement agreement approved by the court on April 11, 2001, the FEIS includes an evaluation of various PWC use alternatives to determine their effects on water quality, air quality, the soundscape, wildlife, wildlife habitat, shoreline vegetation, visitor conflicts, safety, and other appropriate topics.

Public meetings were initiated in August 2001 to solicit early input into the scope and range of issues to be analyzed. A notice of intent announcing the decision to prepare the environmental impact statement was published in the **Federal Register** on August 1, 2001. Scoping comments continued to be accepted and considered within the planning process.

During this comment period, the NPS facilitated several hundred discussions and briefings with congressional delegations, local elected officials, tribal representatives, public service organizations, educational institutions, and other interested members of the public. Over 3,500 letters and e-mail messages concerning PWC use on Lake Powell were received. The major issues raised during this period are summarized in Chapter 1, Purpose of and Need for Action.

The FEIS includes two "action" alternatives and one "no action" (existing conditions) alternative. Under each of the action alternatives, a Special Regulation would be promulgated to address the continued use of PWC in the NRA, in accordance with the settlement agreement signed by the United States District Court for the District of Columbia on April 11, 2001. This agreement between the NPS and Bluewater Network requires all park units wishing to continue PWC use to promulgate special regulations after an environmental analysis is conducted in accordance with the 1969 National Environmental Policy Act.

The alternatives presented in the draft environmental impact statement (DEIS) were modified in the FEIS in response to over 30,000 public and agency comments received on the DEIS. The primary modifications to Alternatives A and B include conducting a 3-year pilot study to identify and develop conflict resolution techniques and preparing a comprehensive lake management plan to address all uses of Lake Powell. Additionally, Alternative B was modified to include compliance with 2006 emission standards (described below) and with more geographic restrictions. The alternatives in the FEIS are summarized as follows.

Alternative A, Continue PWC Use as Currently Managed under a Special Regulation, would allow PWC use identical to that before September 2002 under a special regulation. PWC use would be authorized for all areas of the recreation area above Glen Canyon Dam except where prohibited by the Superintendent's Compendium, 2002. Alternative A would also include a 3-year pilot study to identify the techniques and area restrictions that would be most effective in reducing visitor conflicts. The pilot study would support the development of a comprehensive lake management plan which would consider all activities on Lake Powell, including the potential impacts of all watercraft, to better protect recreation area resources, improve visitor safety, and reduce conflicts.

Alternative B (the modified preferred alternative), Promulgate a Special Regulation to Continue PWC Use with Additional Management Restrictions, would be similar to Alternative A. However, it would include additional geographic restrictions on PWC use in portions of the Colorado, Escalante, Dirty Devil, and San Juan Rivers to increase protection of environmental values and reduce visitor conflict and would implement a flat wake zone. This alternative would also require that PWC in the recreation area meet the 2006 U.S. Environmental Protection Agency emissions standards by the end of 2012 and in subsequent years. PWC not meeting the standards would no longer be permitted to operate within Glen Canyon NRA beginning in 2013. In addition, Alternative B also would include strategies to better protect recreation area resources, improve visitor safety, and reduce conflicts. These strategies would include conducting a 3-year pilot study to identify the techniques and area restrictions that would be most effective in reducing conflicts and preparing a comprehensive lake management plan addressing all uses.

Under Alternative C, No Action (PWC Use Eliminated), the NPS would not take action to promulgate a special regulation that would allow PWC use. Therefore, under the provisions of the March 21, 2000 final rule, all PWC use would be permanently eliminated from the recreation area.

DATES: The National Park Service will execute a Record of Decision (ROD) no sooner than 30 days following publication of the notice of availability of the Final Environmental Impact Statement in the **Federal Register** by the Environmental Protection Agency.

ADDRESSES: Information will be available for public review at the Carl Hayden Visitor Center, Glen Canyon Dam, 1000 Hwy. 89, Page, Arizona 86040, (928) 608–6404, in the office of

the Superintendent, Park Headquarters, 691 Scenic View Drive, Page, Arizona 86040, (928) 608–6200, and at the following Web site, *http://www.nps.gov/glca/plan.htm.*

FOR FURTHER INFORMATION CONTACT: Brian Wright, Glen Canyon National Recreation Area, (928) 608–6272.

Dated: May 1, 2003.

Karen Wade,

Director, Intermountain Region, National Park Service.

[FR Doc. 03–12341 Filed 5–15–03; 8:45 am]

BILLING CODE 4312–EF–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore; South Wellfleet, Massachusetts; Cape Cod National Seashore Advisory Commission Two Hundred Forty-Second Meeting; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, section 10), that a meeting of the Cape Cod National Seashore Advisory Commission will be held on May 30, 2003.

The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The Commission members will meet at 1 p.m. at Headquarters, Marconi Station, Wellfleet, Massachusetts for the regular business meeting to discuss the following:

1. Adoption of Agenda
2. Approval of minutes of previous meeting (April 4, 2003)
3. Reports of Officers
4. Reports of Subcommittees
   Nickerson Fellowship Subcommittee
5. Superintendent's Report
   Salt Pond Visitor Center
   Sustainable Practices
   Wetlands Restoration
   Highlands Center
   UMass/NPS Outer Cape Study
   News from Washington
6. Old Business
   Invasive Species
   Dune Shack Subcommittee Report
7. New Business
8. Date and agenda for next meeting
9. Public comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: May 6, 2003.

Maria Burks,

Superintendent.

[FR Doc. 03–12320 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–WV–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 April 26, 2003.

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 June 2, 2003.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ARKANSAS

Woodruff County

Augusta Memorial Park Historic Section,Bounded by Iris, Rose, Hough Drives and AR 33B,Augusta, 03000507

FLORIDA

Gulf County

Port Theatre, 314 Reid Ave.,Port St. Joe, 03000508

Leon County

Greenwood Cemetery,Old Bainbridge Rd.,Tallahassee, 03000510

Orange County

1890 Windermere School,113 W. Seventh Ave.,Windermere, 03000509

NEW YORK

Livingston County

Kellogg, J. Francis, House,255 Genesee St.,Avon, 03000511

OKLAHOMA

Cherokee County

Tahlequah Carnegie Library,120 S. College.Tahlequah, 03000516

Grady County

New Hope Baptist Church,1202 S. Shepherd St.,Chickasha, 03000515

Payne County

Cushing American Legion Building,212 S. Noble,Cushing, 03000514

Pittsburg County

OKLA Theater,18 E. Choctaw,McAlester, 03000513

Stephens County

Foreman, W.T., House,814 W. Oak Ave.,Duncan, 03000512

RHODE ISLAND

Kent County

Briggs, Richard, Farm,830 South Rd.,East Greenwich, 03000517

A request for REMOVAL has been made for the following resources:

MISSOURI

Lafayette County

Eneberg, John F., House(Lexington MRA)157 N. 10th St.Lexington, 93000551

[FR Doc. 03–12342 Filed 5–15–03; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services FY 2003 Community Policing Discretionary Grants

AGENCY: Office of Community Oriented Policing Services, U.S. Department of Justice.

ACTION: Notice of funding availability.

SUMMARY: The U.S. Department of Justice Office of Community Oriented Policing Services (COPS) announces the availability of Homeland Security Overtime Program (HSOP) grants to pay up to 75 percent of anticipated overtime costs and appropriate fringe benefits for non-supervisory sworn personnel (above and beyond what is currently budgeted, or will be budgeted for overtime during the grant period). Funds may be used for a period of one year, and will cover up to 75 percent of a department's anticipated overtime costs up to the maximum allowable

based on the following funding criteria. Law Enforcement agencies can apply for funding based on the size of the population they serve or the size of their current budgeted sworn strength at the time of application.

Agency serving populations:	or	*An actual sworn force:*	*Can apply for:* (dollars)
Under 24,999		1–49	25,000
From 25,000 to 49,999		50–99	50,000
From 50,000 to 99,999		100–199	100,000
From 100,000 to 249,999		200–499	250,000
From 250,000 to 499,999		500–999	500,000
From 500,000 to 999,999		1,000–1,999	1,000,000
Over 1,000,000		Above 2,000	3,000,000

A minimum 25 percent local cash match, paid with state or local funds, is required. To qualify for funding, overtime must be accrued after the grant award start date and must supplement the agency's state or locally-funded officer overtime budgets. Funding may be used once the anticipated overtime begins on or after the date of the award, and will be paid over the course of the grant. HSOP grants cannot be used to reimburse grantees for overtime expenditures that occur prior to the award start date. All policing agencies with primary law enforcement authority are eligible to apply for this program.

DATES: The priority consideration deadline for Homeland Security Overtime Program (HSOP) funding is postmarked June 13, 2003. The second and final deadline date for all HSOP applications is postmarked June 27, 2003. All HSOP applications must be postmarked by the final deadline date to be eligible. Applications postmarked after the final deadline date will not be considered. All grant awards are subject to the availability of funds. In the event that HSOP funding requests exceed available grant funds, applications may be considered in subsequent fiscal years subject to the availability of funding. Since funding is limited under HSOP, we encourage interested agencies to apply early.

ADDRESSES: To obtain a copy of an application or for additional information, call the U.S. Department of Justice Response Center at 1–800–421–6770. The HSOP application kit and information on the COPS Office are also available on the Internet via the COPS Web site at: *www.cops.usdoj.gov*.

SUPPLEMENTARY INFORMATION:

Overview

The Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322) authorizes the Department of Justice to make grants to increase deployment of law enforcement officers devoted to community policing on the streets and rural routes of this nation.

The Homeland Security Overtime Program (HSOP) enables interested agencies to supplement their current overtime budget through federal grants for one year. HSOP grants can be used to pay officer overtime during homeland security training sessions and other law enforcement activities that are designed to assist in the prevention of acts of terrorism and other violent and drug-related crimes. All policing agencies possessing primary law enforcement authority are eligible to apply for this program.

Grants will be made for up to 75 percent of the overtime and appropriate fringe benefits for anticipated overtime for one year, up to the maximum based on the aforementioned funding categories, with a required minimum 25 percent local cash match to be paid with state or local funds. The use of federally funded overtime can not begin until on or after the award start date. Waivers of the local match will not be available for grants awarded under this particular program.

COPS grant funds may not be used to replace funds that eligible agencies otherwise would have budgeted and expended for overtime in the absence of the grant. Agencies may not rely on the availability of HSOP grant funding to reduce the amount of state or local funds budgeted and expended for officer overtime in their current or future budget cycle. In other words, any federally funded overtime must be in addition to, and not in lieu of, overtime that otherwise would have been locally budgeted and expended.

An award under the COPS Homeland Security Overtime Program will not affect the consideration of an agency's eligibility for a grant under other COPS programs.

The Catalog of Federal Domestic Assistance (CFDA) reference for this program is 16.710.

Dated: April 25, 2003.

Carl R. Peed,

Director, Office of Community Oriented Policing Services.

[FR Doc. 03–12213 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–AT–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—GE Osmonics, Inc.

Notice is hereby given that, on April 22, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), GE Osmonics, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) The identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are GE Osmonics, Inc., Minnetonka, MN; and SmithKline Beecham Corporation, King of Prussia, PA. The nature and objectives of the venture are to develop solvent-compatible membranes and membrane systems for separations in the food, pharmaceutical, and petrochemical industries. The activities of this Joint Development project are partially funded by an award from the Advanced Technology Program, National Institute of Standards and Technology, U.S. Department of Commerce, Award # 70NANB8H4028.

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 03–12218 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Inter Company Collaboration for Aids Drug Development

Notice is hereby given that, on April 4, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Inter Company Collaboration for AIDS Drug Development ("the Collaboration") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, although there are no other changes in the membership, Collaboration member Gilead Sciences, Inc. of Foster City, CA, has acquired Collaboration member Triangle Pharmaceuticals, Inc. of Durham, NC by merging Triangle with a wholly-owned subsidiary of Gilead.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Inter Company Collaboration for AIDS Drug Development intends to file additional written notification disclosing all changes in membership.

On May 27, 1993, Inter Company Collaboration for AIDS Drug Development filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 6, 1993 (58 FR 36223).

The last notification was filed with the Department on November 8, 2001. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act of February 15, 2002 (67 FR 7201).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 03–12219 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Open Mobile Alliance

Notice is hereby given that, on April 7, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), The Open Mobile Alliance ("OMA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specific circumstances. Specifically, 3G LAB Limited, Cambridge, United Kingdom; 724 Solutions, Inc., Toronto, Ontario, Canada; Actix Ltd., London, United Kingdom; Ad Vitam, Pont-Du-Chateau, France; AePona Ltd., Belfast, United Kingdom; Appium Technologies AB, Malmo, Sweden; Appload Nordic AB, Stockholm, Sweden; Bechtel Telecommunications, Frederick, MD; Beep Science AS, Oslo, Norway; British Telecommunications PLC, London, United Kingdom; Cap Gemini Ernst & Young, Paris, France; Cash-U Mobile Technologies Ltd., Netanya, Israel; CELLon France S.A.S., Le mans Cedex 9, France; CellVision AS, Lysaker, Norway; Coremedia AG, Hamburg, Germany; Enea Data AB, Taby, Sweden; Fast Link Communication Corp., Taipei, Taiwan; FastMobile Ltd, Kent, United Kingdom; fg microtec GmbH, Munich, Germany; Huawei Technologies Co.,Ltd, Shenzhen, People's Republic of China; IGEL Co., Ltd., Tokyo, Japan; Innoace Co., Ltd., Seoul, Republic of Korea; InterGrafx, Pasadena, CA; M-Spatial Limited, Cambridge, United Kingdom; Mapinfo Corporation, Troy, NY; Microcell SA, Baar, Switzerland; Miranet AB, Stockholm, Sweden; MobiLab Co., Ltd, Daegu, Korea; Mobile Cohesion, Belfast, United Kingdom; Mobitel D.D., Ljubljana, Slovenia; MontaVista Software, Sunnyvalle, CA; Musiwave, Paris, France; Northstream AB, Solna, Sweden; P-Cube Ltd., Herzliya, Israel; Red Bend, Rosh Ha' ayin, Israel; SBC Technology Resources, Inc., Austin, TX; Smartner Information Systems, Ltd., Helsinki, Finland; Starhub Pte Ltd, Singapore, Singapore; Synthesis AG, Zurich, Switzerland; Telecordia Technologies, Inc., Morristown, NJ; Teltier Technologies, Clark, NJ; Telus Mobility, Scarborough, Ontario, Canada; Tira Wireless, Toronto, Ontario, Canada; Ubiquity Software Corporation, Newport South Wales, United Kingdom; Ulticom, Inc., Mt. Laurel, NJ; VengiTech, Oulu, Finland; Viair, Inc., Seattle, WA; Yomi PLC, Jyvaskyla, Finland; ZTE Corporation, Shenzhen, People's Republic of China; Inventec Electronics (Nanjing) Co., Ltd., Nanjing, People's Republic of China; and Infobank Corporation, Seoul, Republic of Korea have been added as parties to this venture. Ericsson AB, Research Triangle Park, NC has changed its name to Ericsson. FolloWAP, Inc., New York, NY has changed its name to Followap. Logica, Dublin, Ireland has changed its name to LogicaCMG. T-Motion PLC, London, United Kingdom has changed its name to T-Mobile International UK Limited.

The following companies had their memberships cancelled: ACL Wireless Limited, New Delhi, India; Aether Systems, Inc., Owings Mills, MD; ATI Technologies Inc., Thornhill, Ontario, Canada; BlueLabs South AB, Malmo, Sweden; Captaris, Owings Mills, MD; CellPoint AB, Kista, Sweden; Comsys Communications and Signal, Herzelia, Israel; Cybiko Advanced technologies, Bloomingdale, IL; CycleLogic Mobile Solutions, Miami, FL; Denso Corporation, Kariya-shi, Aichi-Ken, Japan; dmates as, Oslo, Norway; Documentum, Inc., Pleasanton, CA; EverInTouch, LTD, Old Coulsdon, Surrey, United Kingdom; EWAP Digital Systems Co., LTD, Beijing, People's Republic of China; Exomi Oy, Herndon, VA; Hillcast Technologies Inc., Austin, TX; ICONA s.p.a., Milan, Italy; Insignia Solutions Inc., Fremont, CA; Locus Portal Corporation, Helsinki, Finland; Malibu Telecom Oy, Espoo, Finland; MediaSolv.com, Inc., San Jose, CA; Mercator Partners, LLC, Concord, MA; Mermit Business Applications Oy, Espoo, Finland; Mobilespring, New York, NY; Niragongo Inc., Herzliya, Israel; Nissan Motor Co., Ltd, Kanagawa, Japan; Racal Instruments, Slough, Berkshire, United Kingdom; Rogers Wireless Inc., Toronto, Ontario, Canada; Softbank Mobile Corp., Tokyo, Japan; Starfish Software, Inc., Scotts Valley, CA; Tahoe Networks, San Jose, CA; Taral Networks, Inc., Kanata, Ontario, Canada; TeleMessage Ltd., Petach Tikvah, Israel; Tircomtek Co., Ltd., Seoul, Republic of Korea; Turkcell, Istanbul, Turkey; Unisys Corporation, Plano, TX; VerdiSoft Corporation, Palo Alto, CA; Vimatix, Inc., Wilmington, DE; WDC Solutions Pvt Ltd., Banagalore, India; whereonearth, London, United Kingdom; and

YesMobile Taipei Ltd, Taipei City, Taiwan.

The following companies have resigned: Aspiro AB, Malmo, Sweden; BSQUARECorporation, Bellevue, WA; Cellnext Solutions Limited, New Delhi, India; Commtag Limited, Cambridge, United Kingdom; Cosilient Technologies Corporation, St. John's Newfoundland, Canada; J-Phone Co., Ltd., Tokyo, Japan; Kalador Entertainment Inc., Delta, British Columbia, Canada; M.I.M.T. AB, Malmo, Sweden; Metrowalker Ltd., Quarry Bay, Hong Kong, Hong Kong-China; NTRU Cryptosystems, Inc., Burlington, MA; Oksijen, Teknoloji Gelistirme ve Bilisim, Istanbul, Turkey; Spirent Communications, Inc., Eatontown, NJ; T-Mobile International UK Limited, London, United Kingdom; T-Mobile UK, Borehamwood, Hertfordshire, United Kingdom; T-Mobile USA, Bellevue, WA; Varetis AG, Munich, Germany; and Vizzavi—Europe, London, United Kingdom.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OMA intends to file additional written notification disclosing all changes in membership.

On March 18, 1998, OMA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on January 16, 2003. A notice for this filing has not yet been published in the **Federal Register**.

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 03–12220 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open SystemC Initiative (OSCI)

Notice is hereby given that, on April 22, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Open SystemC Initiative (OSCI) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Matsushita Electric Industrial Co., Ltd., Osaka, JAPAN has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OSCI intends to file additional written notification disclosing all changes in membership.

On October 9, 2001, OSCI filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 3, 2002 (67 FR 350).

The last notification was filed with the Department on January 10, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on February 14, 2003 (68 FR 7613).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 03–12216 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Service Creation Community (SCC)

Notice is hereby given that, on February 4, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Service Creation Community (SCC) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties are Accenture, Dallas, TX; ADC Telecommunications, Rumson, NJ; AirFiber, San Diego, CA; American Management Systems, Fairfax, VA; Array Networks, Campbell, CA; BT, Billericay, United Kingdom; Convedia Corporation, Vancouver, British Columbia, Canada; Eureka Soft, Cedex, France; Infonautics Consulting, Inc., Ramsey, NJ; Juniper Networks, Sunnyvale, CA; Kabira Technologies, San Rafael, CA; Maranti Networks, San Jose, CA; Microsoft Corporation, Redmond, WA; Net.com, Fremont, CA; Olsen Consulting, Staten Island, NY; Oracle, St. Louis, MO; Paradyne, Largo, FL; Pingtel, Woburn, MA; Polycom Inc., Pleasanton, CA; Telechoice, Dallas, TX; Siemens, Boca Raton, FL; Tony Fisch Consulting, Los Angeles, CA; and Yipes, San Francisco, CA.

The nature and objectives of the venture are to rapidly build and deliver revenue-generating applications, content, and network services to business and residential consumers, enabling the service provider to achieve a faster return on investment.

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 03–12217 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Meeting of the Compact Council for the National Crime Prevention and Privacy Compact

AGENCY: Federal Bureau of Investigation.

ACTION: Meeting notice.

SUMMARY: The purpose of this notice is to announce a meeting of the Compact Council created by the National Crime Prevention and Privacy Compact Act of 1998 (Compact). Thus far, the federal government and 16 states are parties to the Compact which governs the exchange of criminal history records for licensing, employment, and similar purposes. The Compact also provides a legal framework for the establishment of a cooperative federal-state system to exchange such records.

The United States Attorney General appointed 15 persons from federal and state agencies to serve on the Compact Council. The Council will prescribe system rules and procedures for the effective and proper operation of the Interstate Identification Index system.

Matters for discussion are expected to include: (1) Discussion on Noncriminal Justice Outsourcing Initiatives and the Development of a Security and Management Control Outsourcing Standard; (2) Release of Expunged Record Data from State Central Repositories; (3) Utilizing the Delayed Fingerprint Submission Rule for Hazardous Material Endorsement Criminal History Record Checks; (4) Critique on the Draft Compliance (Sanctions) Rule; (5) Comments from the November 2002 **Federal Register**

Publication—Proposed Dispute Adjudication Rule; (6) Searching Federal Civil Fingerprint Records on Applicants in Positions of Trust; (7) Extending Federal Civil Criminal Justice Applicant Background Investigation to include criminal records checks of Friends, Relatives and Associates.

The meeting will be open to the public on a first-come, first-seated basis. Any member of the public wishing to file a written statement with the Compact Council or wishing to address this session of the Compact Council should notify Mr. Todd C. Commodore at (304) 625–2803, at least 24 hours prior to the start of the session. The notification should contain the requestor's name and corporate designation, consumer affiliation, or government designation, along with a short statement describing the topic to be addressed, and the time needed for the presentation. Requestors will ordinarily be allowed up to 15 minutes to present a topic.

DATES AND TIMES: The Compact Council will meet in open session from 9 a.m. until 5 p.m., on June 24–25, 2003.

ADDRESSES: The meeting will take place at the Holiday Inn Sunspree Resort, 315 Yellowstone Avenue, West Yellowstone, Montana, telephone (406) 646–7365.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to Mr. Todd C. Commodore, FBI Compact Officer, Compact Council Office, Module C3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306–0148, telephone (304) 625–2803, facsimile (304) 625–5388.

Dated: April 4, 2003.

Monte C. Strait,

Section Chief, Programs Development Section, Criminal Justice Information Services Division, Federal Bureau of Investigation.

[FR Doc. 03–12287 Filed 5–15–03; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

May 5, 2003.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King on 202–693–4129 (this is not a toll-free number) or E-Mail: *King.Darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Departmental Manager, Office of Management and Budget, Room 10235, Washington, DC 20503 (202–395–7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Type of Review: Extension of a currently approved collection.

Agency: Office of the Assistant Secretary for Administration and Management, Departmental Management.

Title: Customer Satisfaction Surveys and Conference Evaluations Generic Clearance.

OMB Number: 1225–0059.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions; Farms; Federal Government; State, Local, or Tribal government;

Total Respondents: Varies by survey/evaluation; may range from as few as 10 to over 78,000 for an estimated total of 198,503.

Frequency: On occasion.

Annual Responses: Varies by survey/evaluation; may range from as few as 10 to over 78,000 for an estimated total of 198,503.

Average Time Per Response: Varies by survey/evaluation with an average of 3 minutes per customer survey or conference evaluation.

Total Burden Hours: 9,925.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Description: The Department of Labor is seeking OMB approval to continue conducting a variety of voluntary customer satisfaction surveys and conference evaluations, which will be specifically designed to gather information from a customer's perspective as prescribed by E.O. 12862, Setting Customer Satisfaction Standards, September 11, 1993.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 03–12292 Filed 5–15–03; 8:45 am]

BILLING CODE 4510–23–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

May 5, 2003.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain, contact Darrin King on 202–693–4129 (this is not a total-free number) or E-Mail: *King.Darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Mine Safety and Health Administration, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395–7316), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Mine Safety and Health Administration (MSHA).

Type of Review: Revision of a currently approved collection.

Title: Qualification and Certification Program.

OMB Number: 1219–0069.

Type of response: Reporting.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Number of Respondents: 684.

Annual Responses: 684.

Average Response Time: 10 minutes.

Total Burden Hours: 114.

Total Annualized Capital/startup Costs: $0.

Total Annual (operating/maintaining): $253.

Description: 30 CFR 75.100, 75.155, 77.100, and 77.105 require persons performing tasks and certain required examinations at coal mines which are related to miner safety and health, and which required specialized experience, are required to be either "certified" or "qualified." The regulations recognize State certification and qualification programs. However, where state programs are not available, under the Mine Act and MSHA standards, the Secretary may certify and qualify persons for as long as they continue to satisfy the requirements needed to obtain the certification or qualification, fulfill any applicable retraining requirements, and remain employed at the same mine or by the same independent contractor. MSHA Forms 5000–4 and 5000–7 provide the coal mining industry with a standardized reporting format that expedites the certification process while ensuring compliance with the regulation. The information provided on the forms enables the Secretary of Labor's delegate—MSHA, Qualification and Certification Unit—to determine if the applicants satisfy the requirements to obtain the certification or qualification.

MSHA is presently in the process of streamlining its Forms. Forms 5000–4 and 5000–7 will be combined into one form 5000–41 for future use by coal mine operators. MSHA is requesting approval of this form.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 03–12293 Filed 5–15–03; 8:45 am]

BILLING CODE 4510–43–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than May 27, 2003.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than May 27, 2003.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 9th day of May 2003.

Terrence Clark,

Acting Director, Division of Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted Between 04/28/2003 and 05/02/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
51,612	Gillette (Wrks)	Boston, MA	04/28/2003	04/25/2003
51,613	Autoliv ASP, Inc. (Comp)	Ogden, UT	04/28/2003	04/28/2003
51,614	Nevamar Company (Comp)	Hampton, SC	04/28/2003	04/25/2003
51,615	Honeywell Airframe Systems (Comp)	Torrance, CA	04/28/2003	04/25/2003
51,616	Chandlers (ME)	Portland, ME	04/28/2003	04/14/2003
51,617	Ebara Solar, Inc. (Wkrs)	Belle Vernon, PA	04/28/2003	04/23/2003
51,618	Velan Valve Corporation (IAM)	Williston, VT	04/28/2003	04/27/2003
51,619	Sterling and Adams Bentwood (Wkrs)	Lenoir, NC	04/28/2003	04/25/2003
51,620	Fishing Vessel (F/V) Misty Dawn (Comp)	King Cove, AK	04/28/2003	04/22/2003
51,621	Stora Enso North America (Comp)	Wisc. Rapids, WI	04/29/2003	04/02/2003
51,622	Casco Products (IUE)	Bridgeport, CT	04/29/2003	04/28/2003
51,623	Harman Wisconsin, Inc. (Comp)	Prairie du Chie, WI	04/29/2003	04/25/2003
51,624	Stream International (Wkrs)	Silver City, NM	04/29/2003	04/22/2003
51,625	Motorola, Inc. (Wkrs)	Elgin, IL	04/29/2003	04/28/2003
51,626	Avaya (CO)	Westminster, CO	04/29/2003	04/25/2003
51,627	Reliant Manufacturing (CO)	Longmont, CO	04/29/2003	04/25/2003
51,628	Boeing Aerospace Operations (CA)	Long Beach, CA	04/29/2003	04/28/2003
51,629	Ridgeway Clocks (Comp)	Ridgeway, VA	04/29/2003	04/28/2003
51,630	J.C. Viramontes, Inc. (Comp)	El Paso, TX	04/29/2003	04/08/2003
51,631	Teleflex Automotive (MI)	Hillsdale, MI	04/29/2003	04/24/2003
51,632	Fishing Vessel (F/V) Capt'n Jay (Wkrs)	Chignik, AK	04/29/2003	04/28/2003
51,633	Fishing Vessel (F/V) Jackie (Comp)	Metlakatla, AK	04/29/2003	04/23/2003
51,634	Ronald Wassillie (Comp)	New Halen, AK	04/29/2003	04/21/2003

APPENDIX—Continued

[Petitions Instituted Between 04/28/2003 and 05/02/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
51,635	Rustler Fish Company (Comp)	Haines, AK	04/30/2003	04/29/2003
51,636	Hess-Armaclad, Inc. (Comp)	Quincy, PA	04/30/2003	04/28/2003
51,637	Mell Trimming Co., Inc. (Comp)	New York, NY	04/30/2003	04/15/2003
51,638	Keystone Powdered Metal Co. (Comp)	St. Mary's, PA	04/30/2003	04/21/2003
51,639	Samuel Strapping (USWA)	Winchester, TN	04/30/2003	03/11/2003
51,640	Gupta Permold Corporation (Wkrs)	Pittsburgh, PA	04/30/2003	04/24/2003
51,641	TMD Friction, Inc. (Comp)	Dublin, VA	04/30/2003	04/29/2003
51,642	Sweet-Orr (Wkrs)	Anniston, AL	04/30/2003	04/24/2003
51,643	JLG Industries, Inc. (Wkrs)	McConnellsburg, PA	04/30/2003	04/01/2003
51,644	Nichrin Coupler Tec. (Wkrs)	El Paso, TX	04/30/2003	04/10/2003
51,645	Koch Nitrogen (PACE)	Sterlington, LA	04/30/2003	04/21/2003
51,646	Viasystems Wire Harness Industries, Inc. (Comp).	Bucyrus, OH	04/30/2003	04/30/2003
51,647	Sanmina-SCI Corporation (Wkrs)	Woburn, MA	04/30/2003	04/30/2003
51,648	US Steel (ICWUC)	Granite City, IL	04/30/2003	04/24/2003
51,649	Pur Water Purification (Comp)	Brooklyn Park, MN	04/30/2003	04/28/2003
51,650	Markwins Beauty Products, Inc. (UFCW)	N. Arlington, NJ	04/30/2003	04/10/2003
51,651	Solectron Global Services (OR)	Hillsboro, OR	04/30/2003	04/29/2003
51,652	Siegel-Roberts (Wkrs)	Portageville, MO	04/30/2003	04/03/2003
51,653	Aid Temporary Services (Wkrs)	Oscelo, AR	04/30/2003	04/29/2003
51,654	Tubelite, Inc. (Comp)	Reed City, MI	05/01/2003	04/22/2003
51,655	Timeplex LLC (Wkrs)	Hackensack, NJ	05/01/2003	04/28/2003
51,656	Springs Industries (Wkrs)	Lancaster, SC	05/01/2003	04/26/2003
51,657	Lucent Technologies (MA)	N. Andover, MA	05/01/2003	05/01/2003
51,658	Ellis Hosiery (Wkrs)	Hickory, NC	05/01/2003	04/30/2003
51,659	Brookline, Inc. (Comp)	Charlotte, NC	05/01/2003	04/30/2003
51,660	Leonard Kunkin Associates (Comp)	Sanderton, PA	05/01/2003	04/30/2003
51,661	Preco Electronics, Inc. (Comp)	Boise, ID	05/01/2003	04/30/2003
51,662	SDS Services (Wkrs)	Danville, KY	05/01/2003	04/23/2003
51,663	Anderson Pattern, Inc. (IAMAW)	Muskegon Hts., MI	05/01/2003	04/20/2003
51,664	Parker-Keeper Inc. (Wkrs)	Springfield, KY	05/01/2003	03/17/2003
51,665	Cord Master Engineering (Comp)	North Adams, MA	05/02/2003	05/01/2003
51,666	International Terra Cotta, Inc. (Comp)	Los Angeles, CA	05/02/2003	05/01/2003
51,667	American Candy Co. (Wkrs)	Selma, AL	05/02/2003	04/11/2003
51,668	Creative Dyeing Inc. (Comp)	Mt. Holly, NC	05/02/2003	04/28/2003
51,669	Premcor (Wkrs)	Hartford, IL	05/02/2003	03/01/2003
51,670	Honeywell (Comp)	El Paso, TX	05/02/2003	04/30/2003
51,671	Hebron Apparel (Wkrs)	Cades, SC	05/02/2003	04/23/2003
51,672	GE Industrial Systems (Comp)	Shreveport, LA	05/02/2003	05/01/2003
51,673	Suntron Corporation (Comp)	Phoenix, AZ	05/02/2003	05/01/2003
51,674	Celeste Industries (MD)	Easton, MD	05/02/2003	05/01/2003
51,675	Aero-Motive Company (Wkrs)	Kalamazoo, MI	05/02/2003	05/01/2003
51,676	F/V Eileen J II (Wkrs)	Bethel, AK	05/02/2003	04/24/2003

[FR Doc. 03–12291 Filed 5–15–03; 8:45 am]
BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request in filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than May 27, 2003.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than May 27, 2003.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 28th day of April, 2003.

Terrence Clark,

Acting Director, Division of Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted Between 04/22/2003 and 04/25/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
51,543	Rexnord Industries (Comp)	Morganton, NC	04/22/2003	04/21/2003
51,544	Paramount Apparel International, Inc. (Wkrs)	Winona, MO	04/22/2003	04/15/2003
51,545	Temple-Inland Forest Products Corp. (Comp)	Mt. Jewett, PA	04/22/2003	04/14/2003
51,546	Farley's and Sathers Candy Co., Inc. (Comp)	New Orleans, LA	04/22/2003	04/18/2003
51,547	Datacard Corporation (Wkrs)	Minnetonka, MN	04/22/2003	04/18/2003
51,548	Cypress Semiconductor (Wkrs)	Colorado Spgs., CO	04/22/2003	04/15/2003
51,549	Virtual Magic Animation, Inc. (Comp)	N. Hollywood, CA	04/22/2003	04/18/2003
51,550	Square D Company (Comp)	Asheville, NC	04/22/2003	04/21/2003
51,551	Comp-U-Solve International, Inc. (Comp)	Elgin, IL	04/22/2003	04/15/2003
51,552	Celestica (Comp)	Westminster, CO	04/22/2003	04/21/2003
51,553	Arvin Meritor (Comp)	Loudon, TN	04/22/2003	04/09/2003
51,554	Greensboro Apparel (Wkrs)	Greensboro, AL	04/22/2003	04/21/2003
51,555	BASF Corporation (Comp)	Anderson, SC	04/22/2003	04/21/2003
51,556	Sylvan America, Inc. (Wkrs)	Kittanning, PA	04/22/2003	04/15/2003
51,557	Agilent Technologies (Comp)	Colorado Spgs., Co	04/22/2003	04/21/2003
51,558	Lexington Fabrics, Inc. (Comp)	Florence, AL	04/22/2003	04/15/2003
51,559	Providence Steel, Inc. (Comp)	Providence, RI	04/22/2003	04/18/2003
51,560	Brazeway, Inc. (Wkrs)	Dewitt, IA	04/22/2003	04/15/2003
51,561	Motorola (Comp)	Tewksbury, MA	04/22/2003	04/18/2003
51,562	Interflex Group (The) (Wkrs)	Ashland, VA	04/22/2003	04/16/2003
51,563	Omnglow Corporation (Comp)	W. Springfield, MA	04/22/2003	04/21/2003
51,564	Alphabet (Comp)	Mebane, NC	04/23/2003	04/08/2003
51,565	ThyssenKrupp Budd (UAW)	Philadelphia, PA	04/23/2003	04/22/2003
51,566	Silver Bay Logging, Inc. (Wkrs)	Wrangell, AK	04/23/2003	04/22/2003
51,567	BGF Industries, Inc. (Comp)	South Hill, VA	04/23/2003	04/22/2003
51,568	Wellington Home Products (Comp)	Washington, GA	04/23/2003	04/22/2003
51,569	Arris Group (Wkrs)	Rockfalls, IL	04/23/2003	04/11/2003
51,570	Lydall Composite Materials (Wkrs)	Covington, TN	04/23/2003	04/21/2003
51,571	Shoals Graphics (Comp)	Florence, AL	04/23/2003	04/14/2003
51,572	Lonestar Cutting Services (Wkrs)	El Paso, TX	04/24/2003	04/14/2003
51,573	Agilent Technologies (Comp)	Loveland, CO	04/24/2003	04/21/2003
51,574	Gator Industries (Wkrs)	Hialeah, FL	04/24/2003	04/11/2003
51,575	C P Shades (Wkrs)	Sausalito, CA	04/24/2003	04/15/2003
51,576	Galt Black Warehouse (Comp)	Bangor, ME	04/24/2003	04/09/2003
51,577	ACS (Comp)	El Paso, TX	04/24/2003	04/29/2003
51,578	Earthlink, Inc. (Wkrs)	Pasadena, CA	04/24/2003	04/23/2003
51,579	Peavey Electronics, Inc. (Wkrs)	Leaksville, MS	04/24/2003	04/15/2003
51,580	Plexus (Wkrs)	San Diego, CA	04/24/2003	04/16/2003
51,581	Keykert USA, Inc. (Comp)	Webberville, MI	04/24/2003	04/24/2003
51,582	Jagger Brothers (Comp)	Springvale, ME	04/24/2003	04/14/2003
51,583	Lear Corporation (Comp)	Traverse City, MI	04/24/2003	04/23/2003
51,584	General Electric Power Systems (Wkrs)	Bangor, ME	04/24/2003	04/26/2003
51,585	Masonite International (Wkrs)	Lisbon Falls, ME	04/24/2003	04/11/2003
51,586	Solutia (Wkrs)	Trenton, MI	04/24/2003	04/20/2003
51,587	Nestle Confections and Snacks (RWDSU)	Fulton, NY	04/24/2003	04/14/2003
51,588	Zachry Construction Corp. (Wkrs)	Natchez, MS	04/24/2003	04/04/2003
51,589	Oxford Wire and Cable Services (Comp)	Oxford, MS	04/24/2003	04/17/2003
51,590	Ansell Protective Clothing (Comp)	Thomasville, NC	04/24/2003	04/15/2003
51,591	Fayscott (Comp)	Dexter, ME	04/24/2003	04/16/2003
51,592	Woodard, LLC (Comp)	Salisbury, NC	04/24/2003	04/24/2003
51,593	Draka USA (Wkrs)	Schulkill Haven, PA	04/24/2003	04/16/2003
51,594	Jacobs Textiles (NJ)	Fervington, NJ	04/24/2003	04/23/2003
51,595	Paradise Fisheries (Comp)	Kodiak, AK	04/25/2003	04/21/2003
51,596	State of Alaska Commercial Fisheries (Comp)	Nondalton, AK	04/25/2003	04/18/2003
51,597	F/V Melina (Comp)	Old Harbor, AK	04/25/2003	04/24/2003
51,598	PCS (Wkrs)	North Brook, IL	04/25/2003	04/25/2003
51,599	TekSystems (Wkrs)	Edina, MN	04/25/2003	04/22/2003
51,600	Wheatland Tub Co. (USWA)	Wheatland, PA	04/25/2003	04/22/2003
51,601	Schroder Boards (Comp)	Bingen, WA	04/25/2003	04/18/2003
51,602	Sara Lee Intimate Apparel (Comp)	Woolwine, VA	04/25/2003	04/28/2003
51,603	Sony Semiconductor (Wkrs)	San Antonio, TX	04/25/2003	04/23/2003
51,604	Nortel Networks (Wkrs)	Bohemia, NY	04/25/2003	04/25/2003
51,605	Daws Manufacturing Co., Inc. (Comp)	Parsons, TN	04/25/2003	04/23/2003
51,606	Descartes US Holdings (Wkrs)	Pittsburgh, PA	04/25/2003	04/24/2003
51,607	Spicer Drivershaft Mfg., Inc. (UAW)	Lima, OH	04/25/2003	04/22/2003
51,608	Precision Components Corp. (Comp)	York, PA	04/25/2003	04/25/2003
51,609	Motorola (FLA)	Sunrise, FL	04/25/2003	04/28/2003
51,610	Asyst Technologies (Comp)	Williston, VT	04/25/2003	04/22/2003
51,611	National Steel Corp. (Comp)	Mishawaka, IN	04/25/2003	04/08/2003

[FR Doc. 03–12290 Filed 5–15–03; 8:45 am]
BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning revisions to the collection of data contained in the Workforce Investment Act (WIA) National Emergency Grant (NEG) application procedures and project oversight and reporting requirements (OMB approval no. 1205–0439, expiring 5/30/03).

OMB granted emergency approval for the use of the forms (ETA 9103, 9014, and 9106) for Trade Health Insurance Coverage Assistance NEGs. Those approved forms have been revised to enable their use for Regular, Disaster and Trade-WIA Dual Enrollment NEGs and two proposed additional forms have been added to this request.

Attached is a copy of the proposed application procedures and project application review process, and project oversight and reporting requirements for the Workforce Investment Act (WIA)National Emergency Grants (NEG).

A copy of this information collection request, with applicable supporting documentation and application procedures, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King on 202–693–4129 or e-mail: *king.darrin@doleta.gov*.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before July 15, 2003.

ADDRESSEE: Shirley M. Smith, Administrator, Office of National Response, Employment and Training Administration, United States Department of Labor, 200 Constitution Avenue, NW., Room N–5426, Washington, DC 20210, 202–693–3500 (this is not a toll-free number)

SUPPLEMENTARY INFORMATION:

I. Background

Authorized by section 173 of the Workforce Investment Act (WIA), as amended, National Emergency Grants (NEG) are discretionary grants awarded by the Secretary of Labor(the Secretary) intended to complement the resources and service capacity at the state and local area levels by providing supplemental funding for workforce development and employment services and other adjustment assistance for dislocated workers and other eligible individuals as defined in sections 101, 134 and 173 of WIA; sections 113, 114 and 203 of the Trade Act of 2002; and 20 CFR 671.140.

Funds are available for obligation by the Secretary under sections 132 and 173 of the WIA, and section 203 of the Trade Act of 2002. Applications will be accepted on an ongoing basis as the need for funds arises at the state and local level.

The provisions of WIA and the Regulations define four NEG project types:

- *Regular,* which encompasses plant closures, mass layoffs, and multiple layoffs in a single community.
- *Disaster,* which includes all eligible FEMA-declared natural and manmade disaster events.
- *Trade-WIA Dual Enrollment,* which provides funding to ensure that a full range of services is available to trade-impacted individuals eligible under the Trade Adjustment Assistance program provisions of the Trade Act of 2002.
- *Trade Health Insurance Coverage Assistance,* which provides specialized health coverage, support services, and income assistance to targeted individuals defined in the Trade Adjustment Assistance Reform Act of 2002.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Actions

The Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) is announcing proposed application and reporting procedures to enable eligible entities to access funds for National Emergency Grant (NEG) programs under section 173 of the Workforce Investment Act (WIA), as amended. Applications will be accepted on an ongoing basis as the need for funds arises at the state and local level.

The application procedures, application review process, and project oversight and reporting requirements described in this notice are issued under the WIA regulations at 20 CFR 671.125.

Applications for NEG funds may be submitted at any time. The maximum allowable project performance periods are defined by the months remaining in the Program Year in which the grant award is made plus the subsequent two Program Years. The Program Year for these projects is the twelve month period July 1–June 30.

USDOL/ETA expects that the project performance period in any NEG application will reflect a time efficient approach to returning eligible individuals to appropriate employment consistent with the performance goals that apply to NEG projects.

Consistent with the Government Paperwork Elimination Act, the information collection including the application and the reporting form is fully in an electronic format. Electronic applications are intended to provide ease of completion as well as timely processing. The information in the grant application collection will provide the grant officer with the necessary information during the application review process in order to be able to make consistent and objective funding decisions based on the stated funding request evaluation criteria. The quarterly reports information collection will assure accountability and measure actual project performance to date.

USDOL/ETA is committed to making a decision to approve or disapprove all submitted applications within 15 working days from receipt of a complete and responsive application.

Type of Review: Revision.
Title: Workforce Investment Act: National Emergency Grants (NEG)—Application and Reporting Procedures.
OMB Number: 1205–0439.
Affected Public: State, local, or tribal government.
Burden Hours: 1,171.

ESTIMATED TOTAL ANNUALIZED HOUR BURDEN

Reference	Expected total respondents*	Frequency	Expected total responses*	Avg. time per response	Expected burden* (hours)
SF 424	150	1 per project	150	45 minutes	113.0
Narrative Summary	150	1 per project	150	1.0 hour	150.0
ETA 9103	150	1 per project	150	90 minutes	225.0
ETA 9105	75	1 per project	75	30 minutes	38
ETA 9106	150	1 per project	150	1.0 hour	150.0
ETA 9107	100	1 per project	100	30 minutes	50.0
Expenditure Status Report	50	1 per project	50	1.0 hour	50.0
TAA Certification Report	50	1 per project	50	30 minutes	25.0
Reports: ETA 9104	150	quarterly per project	600	30 minutes	300.0
Grant Modifications	140	1 per project	140	30 minutes	70.0
Total			1615		1126

*Actual number will vary based on state and local needs.

Total Burden Cost (capital/startup): 0.
Total Burden Cost (operating/maintaining): 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: May 12, 2003.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

ATTACHMENT

Workforce Investment Act: Application Procedures for National Emergency Grants

Overview

The Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) is announcing policies and procedures for accessing funds to implement National Emergency Grant (NEG) programs under section 173 of the Workforce Investment Act (WIA), as amended. Funds are available for obligation by the Secretary of Labor (the Secretary) under sections 132 and 173 of the WIA, and section 203 of the Trade Adjustment Assistance Reform Act of 2002. Applications will be accepted on an ongoing basis as the need for funds arises at the state and local level. Applicants are strongly encouraged to submit applications as early as possible following notice of an eligible dislocation event. Grant awards will be made only to the extent that funds remain available.

This application package provides information and procedures by which eligible entities can apply for National Emergency Grant funds to provide workforce development and employment services, and other adjustment assistance for dislocated workers and other eligible individuals as defined in sections 101, 134 and 173 of WIA; sections 113, 114 and 203 of the Trade Adjustment Assistance Reform Act of 2002; and 20 CFR 671.140. It consists of the following eight parts and two appendices:

- Part I provides background about the purpose and use of NEGs.
- Part II describes eligibility, including eligible circumstances for funding, eligible entities for grant awards, and eligible individuals for assistance.
- Part III identifies the policies governing administrative and project design requirements on NEGs.
- Part IV provides an overview of the application submission requirements for each type of NEG project;
- Part V identifies the elements in the application review process including the criteria that will be used to determine the appropriateness of the request for funds.
- Part VI describes alternative approaches to grant funding and the requirements associated with partial funding requests and actions.
- Part VII describes the follow-up planning, oversight and reporting requirements for awarded grants.
- Part VIII describes the grant modification process.

Appendix A contains copies of the required grant application forms. The forms are in an electronic format to facilitate easy completion and timely submission of the application. The Department seeks to establish a process that provides both timely submission of applications for funding, in relation to worker eligibility for assistance, and timely processing of such applications. The electronic formats have been developed to facilitate accomplishment of this objective.

Appendix B contains a directory of Regional Office contacts.

Applications for NEG funds may be submitted at any time. The maximum allowable project performance periods are defined by the months remaining in the Program Year in which the grant award is made plus the subsequent two Program Years. The Program Year for these projects is the 12 month period July 1—June 30. The Employment and Training Administration expects that the project performance period in any NEG application will reflect a time efficient approach to returning eligible individuals to appropriate employment consistent with the performance goals that apply to NEG projects.

The application procedures, application review process, and project oversight and reporting requirements described in this notice are issued under the WIA regulations at 20 CFR 671.125.

Applications must be filed electronically using the Web site *http://testetareports.doleta.gov*. To submit an application electronically, applicants will need to use a PIN # that has been assigned to them by ETA. A PIN # can be obtained by contacting the appropriate Regional Office.

For further information you may contact Shirley M. Smith, Administrator, Office of National Response at (202) 693–3501. (This is not a toll-free number.) A user's guide on preparing and submitting an application electronically and technical assistance on application requirements are available from Regional Offices of ETA and from the Office of National Response, Employment and Training Administration, U.S. Department of Labor, Room N–5426, 200 Constitution Avenue, NW., Washington, DC 20210.

Part I: Background

National Emergency Grants are discretionary awards by the Secretary of Labor and are intended to complement resources and service capacity at the State and local area levels by providing supplemental funding for workforce development and employment services and other adjustment assistance for dislocated workers and other eligible individuals, as defined in sections 101, 134 and 173 of WIA: sections 113, 114 and 203 of the Trade Adjustment Assistance Reform Act of 2002: and 20 CFR 671.140. To be effective, NEG funding actions must be timely in relation to

the need for assistance. At the same time, effective use of NEG funds requires reasonable, informed estimates of the amount of funds needed to respond to eligible events AND responsive implementation plans for assisting the affected workers.

Responsive and responsible use of NEG funds requires a system-based collaboration between the State and local entities that are charged with providing assistance to workers affected by significant dislocation events, and the Federal agency that manages the national fund account. This collaboration must operate in a manner that "puts the right amount of money in the right place at the right time." Inefficiencies in this collaboration are defined by both delayed funding actions (*i.e.*, in relation to the time at which services are needed by eligible workers) and unexpended funds caused by inaccurate estimates of the amount of funding needed to respond to the dislocation event. Correcting these inefficiencies is a shared responsibility by the applicant/grantee and ETA.

The approach to NEG grant awards will be based on quick turnaround initial funding actions where the following can be demonstrated:

- There is an eligible circumstance for funding, with a group of workers who are currently eligible to receive assistance.
- An early intervention strategy has been initiated.*
- Per-participant expenditure levels are consistent with the formula program experience in the proposed project area.*
- There is a plan for timely enrollment of eligible workers into assistance and expenditure of requested funds.
- Overall project performance goals are consistent with the Secretary's goals for dislocated worker assistance.
- Other available funding sources are inadequate to fully fund the level of assistance needed.*

(**Note:** *These do not apply to Disaster and Trade Health Coverage Assistance projects. In addition, the early intervention requirement does not apply to Trade-WIA Dual Enrollment projects.)

ETA is committed to making a decision to approve or disapprove all submitted applications within 15 working days from receipt of a complete and responsive application. Note, however, that if the applicant chooses to submit an unrequested revision to a previously submitted application that is undergoing review, the 15-day processing time period starts over. Additionally, because experience with worker dislocations has consistently demonstrated that actual project requirements often vary from initial planning assumptions (*i.e.*, on factors such as participation levels and intensity of reemployment assistance needs), most NEG requests will be funded incrementally.

Grant recipients will be expected to develop a more complete project operational plan, including project operator agreements and participant registration and assessment information, which should be available for review at the state or grantee level approximately 90 days after the grant award decision. This plan and project implementation experience to date will help verify the full amount of NEG funding needed to adequately respond to the dislocation event.

Part II

A. Eligible Circumstances for Funding

NEG funds may be used to provide assistance in the following circumstances:

- Plant closures and mass layoffs affecting 50 or more workers at a single site of employment;
- Closures and realignments of military installations;
- Multiple layoffs in a single local community that have significantly increased the total number of unemployed individuals in the community; *
- Emergencies or disasters that have been declared eligible for public assistance by the Federal Emergency Management Agency (FEMA); and
- Special assistance, including health coverage assistance, to trade-impacted workers and other individuals eligible under the Trade Adjustment Assistance Reform Act of 2002.

The Secretary may determine that other circumstances are appropriate for NEG funding.

(*In order to qualify under this criterion, the applicant must demonstrate that there is significant economic impact upon the community by indicating such conditions as:

—The "community" is a local area labor market or, if smaller, another geographical entity for which monthly unemployment information is available.

Note: This criterion cannot be applied at the state level although the state may be the grant applicant.

—The total layoffs in the community occurring during the reference period have resulted in an increase in the unemployment rate by at least one percentage point (*e.g.*, from 4% to 5%).

(In order to assure the timely nature of these applications, the "Reference Period" should be a period of time of no less than three months and no greater than six months for which monthly unemployment information is publicly available. The months included in the "Reference Period" cannot overlap with any months included in the time period used in calculating the current program year's formula funding state allotments. The percentage point increase calculation will be based on the unemployment rate of the last month in the "Reference Period" and the month immediately prior to the first month in the "Reference Period.")

—The request includes only those layoffs that have occurred within the reference period used for the unemployment rate computation or later.

—The level of formula funds usage, as described in part IV, section A.7, for both the local area and the state's reserve exceeds 50% in the first quarter of the program year, 70% in the second quarter and 85% in the last two quarters of the program year.)

The provisions of WIA and the Regulations define four NEG project types:

- *Regular,* which encompasses plant closures, mass layoffs, and multiple layoffs in a single community.
- *Disaster,* which includes all eligible FEMA-declared natural and manmade disaster events.
- *Trade-WIA Dual Enrollment,* which provides funding to ensure that a full range of services is available to individuals eligible through a certification under the provisions of the Trade Adjustment Assistance Reform Act of 2002.
- *Trade Health Coverage Assistance,* which provides special health coverage assistance through partial payment of health insurance premium costs under approved plans, support services, and income assistance to targeted individuals defined in the Trade Adjustment Assistance Reform Act of 2002.

B. Eligible Entities for Grant Awards

Entities that are eligible to receive a NEG grant for a Regular Project are:

- For Intrastate Projects:

—The designated state WIA program grantee agency.

—A Local Area Workforce Investment Board (or its fiscal agent).

—A designated organization receiving WIA funding through the Native American Program provision of the Act;

- For Interstate Projects:

—A consortium of states.

—A consortium of local Boards.

For interstate projects, one state must be designated to serve as the grant applicant and recipient. The Secretary may consider applications from other entities where it can be demonstrated that the entity will provide the most effective response to the applicable dislocation(s).

Because NEG grants are a source of supplemental funding to the existing dislocated worker service structure, DOL expects that states, as the entities responsible for ensuring the effective use of all dislocated worker funds within the State, will assume the role of grantee in most instances.

Eligible applicants for Disaster projects and projects to provide special assistance to trade-impacted workers are limited to States. In those cases where the State is the grantee but the project will operate in one or more designated local areas, the State may want to consult with applicable local area Workforce Investment Boards in the development of applications for NEG funds.

C. Eligible Individuals for Assistance

Individuals who are eligible for assistance vary by type of NEG project. The categories of eligible individuals are:

1. A dislocated worker: a. An individual who:

(1) Has been terminated or laid off, or has received a notice of termination or layoff, from employment;

(2) Is eligible for or has exhausted entitlement to unemployment compensation, or has been employed for a duration sufficient to demonstrate to appropriate staff of the One-Stop Center attachment to the workforce but is not eligible for unemployment compensation due to insufficient earnings or having performed

services for an employer not covered under the state's unemployment compensation law; and

(3) Is unlikely to return to a previous industry or occupation.

b. An individual who:

(1) Has been terminated or laid off, or has received a notice of termination or layoff, from employment as a result of any permanent closure of, or any substantial layoff at, a plant, facility or enterprise; or

(2) Is employed at a facility at which the employer has made a general announcement that such facility will close within 180 days; or is employed at a facility at which the employer has made a general announcement that such facility will close. (**Note:** Eligibility for other than Core Services requires an announcement by the employer that the facility will close within 180 days.)

c. An individual who was self-employed but is unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters.

d. An individual who has been providing unpaid services to family members in the home and who:

(1) Has been dependent on the income of another family member but is no longer supported by that income; and

(2) Is unemployed or underemployed and is experiencing difficulty in obtaining or upgrading employment.

2. A civilian employee of the Department of Defense or the Department of Energy employed at a military installation that is being closed, or that will undergo realignment, within the next 24 months.

3. An individual who is employed in a nonmanagerial position with a Department of Defense contractor, and who is determined to be at risk of termination from employment as a result of reductions in defense expenditures, and whose employer is converting operations from defense to non-defense applications in order to prevent worker layoffs.

4. A member of the Armed Forces who:

a. Was on active duty or full-time National Guard duty;

b. Is involuntarily separated from active duty or full-time National Guard duty, or is separated from active duty or full-time National Guard duty pursuant to a special separation benefits program or voluntary separation incentive program;

c. Is not entitled to retired or retained pay incident to the separation described in (b); and

d. Applies for employment and training assistance before the end of the 180 day period beginning on the date of separation.

5. An individual who is temporarily or permanently laid off as a consequence of a disaster event qualifying for public assistance through a FEMA declaration.

6. An individual who is long-term unemployed.

7. For Trade-WIA Dual Enrollment Projects, an individual covered by a certification under the Trade Adjustment Assistance Reform Act of 2002 who also qualifies as an eligible dislocated worker.

8. For Trade Health Coverage Assistance Projects:

a. An individual who is eligible for a trade readjustment allowance (TRA) under the TAA program, or would be eligible for TRA except that he/she has not yet exhausted his/her unemployment insurance (UI) benefits;

b. A qualified family member of an eligible individual under "a";

c. Recipients of pension benefits through the Pension Benefit Guaranty Corporation.

Not all of these groups are eligible for each type of NEG project assistance. The following table summarizes the relationship between eligible individuals and eligible NEG project types.

	Regular	Disaster	Trade Adjustment Assistance	
			Dual enrollment	Health coverage & related
Dislocated Worker	X	X		
DoD/DoE Civilian Employee	X			
DoD Contractor Employee	X			
Member of Armed Forces	X			
Laid off as result of Disaster		X		
Long-term Unemployed		X		
Trade-impacted			X	X
Qualified Dependent of Eligible Trade-Impacted Worker				X
PBGC Pension Recipient				X

Part III: Administrative and Project Design Requirements

A. General

Grantee organizations, administrative entities, project operators and service providers are subject to the WIA law, regulations, grant application instructions, the terms and conditions of the grant and any subsequent modifications, and to all other applicable Federal laws (including provisions in Federal appropriations laws). Since eligible applicants are generally limited to State, Native American tribal entities, and local Boards that are established through WIA, NEG grantees will be subject to all administrative system requirements that apply to the use of WIA formula funds for dislocated workers, except as otherwise provided in these instructions. Any other entity that seeks to apply for NEG funds will be required to demonstrate its ability to meet these same administrative system requirements.

B. Cost Limitations

Administrative cost limitations shall apply to all NEG grant awards. Cost limitations shall apply to actual expenditures. In general, a 10 percent (10%) limit will apply to all NEG projects.

On projects where the state is the grantee, but services are being provided through one or more local area project operators, the 10 percent cost limit will apply to local area expenditures. In these grants the state may retain an additional amount to perform state-level management and oversight functions in support of the grant. This amount should not exceed 1.5 percent of the total local area funding.

Any costs associated with administering a system of needs-related or health coverage payments must be separately identified in the application budget and justified in the narrative.

Although administrative cost limits on NEG projects are subject to negotiation with the Grant Officer, ETA expects that most projects will be able to be implemented within the above cited limits. Any request for a higher limit will have to be clearly and fully justified in terms of unusual project operating circumstances. Applicants should recognize that any such request will have to be negotiated with the Grant Officer and will delay the timing of the funding action.

C. Indirect Costs

If an indirect cost rate is applied in calculating administrative costs, the applicant must include information from the most recent approval document that identifies the approved indirect cost rate and base, the cognizant approval agency, and the date of the approval. Generally, indirect costs will only be approved at the grantee level. If an application includes indirect costs at the project operator level, the grantee will be responsible for verifying the appropriate documentation to support the costs.

D. Early Intervention

For Regular projects, all NEG applications are expected to be the result of an early intervention process that has been activated through the State's Rapid Response system. As appropriate, the early intervention

process may include the use of formula funds to initiate core and intensive, and even training services. In cases where formula funds have been used to provide services (excluding Rapid Response) to the eligible target group prior to grant award and the availability of formula funds in the state is limited, the Grant Officer may authorize the use of grant funds to reimburse the cost of such services. However, approval for using grant funds for such costs will be limited to costs incurred within the 90-day period preceding the date of receipt of the application. For Regular projects, ETA expects that applications for NEG funding will be submitted within 90 days of the dislocation event(s) or the date on which the target group of workers included in the application become eligible for assistance.

In general, the initiation of early intervention activities will be a pre-condition for the award of NEG funds for Regular projects. If early intervention through Rapid Response has not been feasible, the applicant must document the circumstances that prevented initiation of early intervention in the application.

E. Allowable Activities and Services

NEG funds may be used to provide services of the type described in section 134(d)(2), (3), (4) and (e)(2) and (3) of WIA. For Disaster projects, NEG funds may also be used for temporary employment assistance to provide food, clothing, shelter and related humanitarian assistance; and to perform demolition, cleaning, repair, renovation and reconstruction of damaged and destroyed structures, facilities and lands located within the designated disaster area. For Trade Health Coverage Assistance projects, funds may also be used for the activities and services described in WIA sections 173 (f) and (g). Additional guidance on the use of funds for these activities and services will be provided through Training and Employment Guidance Letters (TEGLs).

F. Project Design and Service Operations

Project operations should be consistent with the established policies and procedures of the State and/or local Board(s) in the area in which the project is to operate. ETA expects that such policies and procedures are flexible enough to respond to the needs of any eligible dislocated worker, including those who are eligible for assistance through NEG funding. Where variations may be appropriate to respond to the needs of special populations (*e.g.*, limited English speaking) who comprise the target group, these will have to be explained and justified in the application.

G. Temporary Employment (Disaster Projects ONLY)

Temporary job creation is limited to public and private non-profit agencies. An individual participant on a Disaster project may be employed for a maximum of six months, or 1,040 hours, whichever is longer. The maximum level of wages paid to a participant is limited to $12,000 excluding the cost of fringe benefits. Fringe benefits should be paid in accordance with the policies of the employer of record for temporarily employed workers. If a higher wage level for some participants is critical to the success of clean-up efforts on the project, the applicant may request a higher limit from the Grant Officer.

H. Integration With Other Resources

The services provided to eligible workers in the large majority of Regular and Trade Adjustment Assistance projects should be financed from multiple sources, including WIA formula, One-Stop partner and other public and private (*e.g.*, employer) funds. In addition, grantees will be expected to make a maximum effort to assist each project participant to apply and qualify for available sources of financial assistance, consistent with the provisions of § 663.320 of the WIA Regulations.

I. Coordination With Trade Act Funds

ETA expects that states will have in place efficient procedures for dual enrollment of eligible workers in both the TAA and WIA programs. Receipt of NEG funds to provide services to TAA eligible workers will be predicated on the existence of such procedures.

J. Performance Outcomes

ETA expects that NEG-funded projects will achieve quality employment and earnings outcomes for the individuals who are served. Each NEG project will be required to achieve performance outcomes for eligible workers that are at least as high as the higher of the corresponding goals set by the Secretary and those negotiated with the applicable state or local Board.

Employment-related performance measures will not apply to Trade Health Coverage Assistance projects.

K. Project Management

ETA expects that NEG-funded projects will be organized to provide the most responsive services from the perspective of the customer (*i.e.*, the dislocated worker). There may be instances in which a project will operate in multiple local workforce areas. Except in the limited cases where projects may span large areas of the state and involve workers from widely dispersed areas and different labor market conditions, the projects should be designed and managed to operate under a consistent set of service policies and procedures that are agreed to by all of the local Boards involved.

Where a single project will operate in multiple local areas, ETA will award the grant to the state or to one of the local Boards that has been designated as grant recipient through an agreement executed by all of the local Boards involved. The grant will be structured to operate on a full service area basis, and the grantee will have full authority to move funds between designated project operators consistent with where eligible workers are seeking services. In these cases, the service policies and procedures applying to the project can be those of the state, of the local Board designated as grant recipient, or ones jointly developed by all of the local Boards as part of the agreement. This principle will also apply to projects that will operate on an interstate basis, that is, an agreement will have to be executed among all of the involved states and the agreement will need to designate one of the states to be the grant recipient, as well as identify the service policies and procedures that will apply.

Part IV: Application Submission Requirements

To be considered for funding, an application must include the information identified in this section. The information requirements are organized by type of NEG project since the requirements vary by project type.

A. Regular Projects

1. Completed and signed *SF 424–Application for Federal Assistance.* This form is the required application for Federal funds. The authorized signatory of the applicant will be issued a unique Personal Identification Number (PIN). The entry of this PIN on the SF 424 constitutes the authorized signature.

2. *Project Synopsis Form (ETA 9106).* This form summarizes key aspects of the proposed project such as project type, type of eligible event, key contact information, planned number of participants, performance measures, and explanation of why requested funds are needed.

3. *Employer Data Form (ETA 9105).* This form provides employer and dislocation site-specific information needed to validate the eligibility of the dislocation event(s) and the target group of workers for NEG assistance. Information includes name and location of employer, date and type of worker notification, date(s) of layoff and number of workers affected, date(s) and types of Rapid Response activities.

4. *Project Operator Data Form (ETA 9107).* This form includes key contact and project scope information (*e.g.*, number of participants, total budget, service area) for each project operator. This form must be completed and submitted only to the degree that Project Operators have been identified at the time of application. This information should be submitted as Project Operators are identified and agreements executed. However, if the applicant is submitting a full funding request, it is expected that Project Operators will have been identified and the contact information on the form should be completed.

5. *Planning Form (ETA 9103).* This form provides cumulative quarterly estimates on project scope (*e.g.*, number of participants, exits), design (*e.g.*, mix of activities), and budget (*e.g.*, costs by type of activity, administrative costs).

6. *Narrative Summary.* This form allows the applicant to provide any explanations/justifications needed for entries in the above forms. Narrative explanations are required in the following instances:

—A notification was made by the employer but no Rapid Response activities have been initiated.

—Some of the affected layoffs have occurred more than 4 months prior to the date of submission of the application.

—The application is being submitted to address "community impact layoffs." The narrative must provide specific information in relation to the specific requirements for meeting this criterion (*see* definition in part II.A of these guidelines).

—The number of planned participants is greater than 50% of the total number of affected workers.
—Either the planned entered employment rate or the planned average wage replacement rate is less than the higher of the corresponding goals set by the Secretary and those negotiated with the applicable State or local Board.
—The planned cost per participant on the project is greater than the cost per participant in the applicant's formula program for dislocated workers.
—There are participants receiving NRPs, which requires explaining how the planned number of recipients and the NRP cost per participant were determined.
—Indirect costs are included in the budget, which requires identifying the following: cognizant approval agency, approved cost rate and base, and date of approval.
—"Other" costs—at either the State or local level—are included in the budget, which requires identifying the specific cost items and amounts.
—Administrative costs related to NRPs are included in the budget, which requires explaining how the administrative cost estimate was derived (*i.e.*, based on number of check payments and check processing costs).
—Administrative expenses at the local/project level, excluding NRPs, are greater than 10% of total expenses.
--In projects where the state is the grantee but the project is implemented through local project operators, State-level management and oversight expenses are greater than 1.5% of total local expenses.

The applicant is free to include narrative explanations of other special factors, but the narrative should not exceed five pages.

7. *Current Obligation and Expenditure Status Report.* The applicant must include, as an attachment to its grant submission, information which presents the current status (*i.e.*, through the most recent month for which information is available) of accrued expenditures and obligations, both for available WIA formula funds in the current Program Year and for each active NEG grant in the applicant's service area. The status report must address the following factors:

—Total available funds;
—Total accrued expenditures;
—Total unexpended but obligated funds in ITAs for currently enrolled participants;
  —Amount for this PY;
  —Amount for next PY;
—Total unexpended but obligated funds for fixed staff costs;
  —Total unexpended but obligated funds for fixed facilities costs;
  —Total unexpended but obligated funds for other (identify) fixed costs.

For formula funds, available funds and obligations for fixed costs are for the current Program Year. For active NEG projects, the available funds and obligations for fixed costs are for the approved budget and project period.

B. Disaster Projects

1. Completed and signed *SF 424–Application for Federal Assistance.* This form is the required application for Federal funds. The authorized signatory of the applicant will be issued a unique Personal Identification Number (PIN). The entry of this PIN on the SF 424 constitutes the authorized signature.

2. *Project Synopsis Form (ETA 9106).* This form summarizes key aspects of the proposed project such as project type, type of eligible event, key contact information, types of eligible individuals to be included in the target group for the project, planned number of participants, performance measures, and contact information. This form includes an entry for the FEMA declaration that qualifies the event as eligible for NEG assistance. This may not be available at the time the application is submitted and, if not, will be entered by DOL/ETA.

3. *Project Operator Data Form (ETA 9105).* This form includes key contact and project scope information (*e.g.*, number of participants, total budget, service area) for each project operator. This form must be completed and submitted only to the degree that ProjectOperators have been identified at the time of application. This information should be submitted as Project Operators are identified and agreements executed. However, if the applicant is submitting a full funding request, it is expected that Project Operators will have been identified and the contact information on the form should be completed.

4. *Planning Form (ETA 9103).* This form provides cumulative quarterly estimates on project scope (*e.g.*, number of participants, exits), design (*e.g.*, mix of activities), and budget (*e.g.*, costs by type of activity, administrative costs).

5. *Narrative Summary.* This form allows the applicant to provide any explanations/justifications needed for entries on the above forms. Narrative explanations will be required in the following instances:

—Dislocated workers and long-term unemployed are included in the target group, but no workforce development services are proposed beyond temporary job creation.
—Either the planned entered employment rate or the planned average wage replacement rate for participants receiving workforce development services is less than the higher of the corresponding goals set by the Secretary and those negotiated with the applicable state or local Board.
—There are participants receiving NRPs, which requires explaining how the planned number of recipients and the NRP cost per participant were determined.
—Indirect costs are included in the budget, which requires identifying the following: cognizant approval agency, approved cost rate and base, and date of approval.
—"Other" costs—at either the State or local level—are included in the budget, which requires identifying the specific cost items and amounts.
—Administrative costs related to NRPs are included in the budget, which requires explaining how the administrative cost estimate was derived (*i.e.*, based on number of check payments and check processing costs).
—Administrative expenses excluding NRPs are greater than 10% of total expenses.
—In projects where the state is the grantee but the project is implemented through local project operators, State-level management and oversight expenses are greater than 1.5% of total local expenses.

The applicant is free to include narrative explanations of other special factors, but the narrative should not exceed five pages.

C. Trade Adjustment Assistance Projects

These projects are limited to assistance to eligible individuals as identified in the Trade Adjustment Assistance Reform Act of 2002. NEG funds can be used in two ways:

—To provide funding to ensure that a full range of services is available to trade-impacted individuals eligible under the provisions of the Trade Adjustment Assistance Reform Act of 2002.
—To pay for costs of health insurance premiums, supportive services (*e.g.*, transportation, child care, dependent care), and income assistance (*e.g.*, needs-related payments) for eligible individuals under the provisions of section 173(g) of the Workforce Investment Act, as amended by the Trade Adjustment Assistance Reform Act of 2002.

Each of these uses is supported by a separate appropriation. Therefore, a separate NEG application will be required for each use for which an applicant is seeking funds. Instructions for applying for NEG funds to pay the costs of allowable system-building activities under section 173(f) have been separately issued.

1. Trade-WIA Dual Enrollment Project

a. Completed and signed *SF 424–Application for Federal Assistance.* This form is the required application for Federal funds. The authorized signatory of the applicant will be issued a unique Personal Identification Number (PIN). The entry of this PIN on the SF 424 constitutes authorized signature.

b. *Project Synopsis Form (ETA 9106).* This form summarizes key aspects of the proposed project such as project type, key contact information, planned number of participants, performance measures, and explanation of why the requested funds are needed.

c. *Project Operator Data Form (ETA 9107).* This form includes key contact and project scope information (*e.g.*, number of participants, total budget, service area) for each project operator. This form must be completed and submitted only to the degree that Project Operators have been identified at the time of application. This information should be submitted as Project Operators are identified and agreements executed. However, if the applicant is submitting a full funding request, it is expected that Project Operators will have been identified and the contact information on the form should be completed.

d. *Planning Form (ETA 9103).* This form provides cumulative quarterly estimates on project scope (*e.g.*, number of participants, exits), design (*e.g.*, mix of activities), and budget (*e.g.*, costs by type of activity, administrative costs).

e. *Narrative Summary.* This form allows the applicant to provide any explanations/justifications needed for entries on the above

forms. Narrative explanations will be required in the following instances:

—Either the planned entered employment rate or the planned average wage replacement rate is less than the higher of the corresponding goals set by the Secretary and those negotiated with the applicable state or local Board-Indirect costs are included in the budget, which requires identifying the following: cognizant approval agency, approved cost rate and base, and date of approval.
—"Other Program" costs—at either the state or local level--are included in the budget, which requires identifying the specific cost items and amounts.
—Administrative expenses are greater than 10% of total expenses.
—In projects where the state is the grantee but the project is implemented through local project operators, State-level management and oversight expenses are greater than 1.5% of total local expenses.

The applicant is free to include narrative explanations of other special factors, but the narrative should not exceed five pages.

f. *TAA Certification Report.* The applicant must include, as an attachment to its grant submission, information which identifies by employer the TAA Trade Certification numbers and the number of workers covered in the certifications. In cases where a petition has been filed but the certification is pending, identify the TAA Trade Petition number, the date the petition was filed, and the number of workers covered in the petition.

g. *Current Obligation and Expenditure Status Report.* The applicant must include, as an attachment to its grant submission, information which presents the current status (*i.e.*, through the most recent month for which information is available) of accrued expenditures and obligations, for both available WIA formula and Trade Act funds in the current Program Year. The status report must address the following factors:

—Total available funds;
—Total accrued expenditures;
—Total unexpended but obligated funds in ITAs for currently enrolled participants;
—Amount for this PY;
—Amount for next PY;
—Total unexpended but obligated funds for fixed staff costs;
—Total unexpended but obligated funds for fixed facilities costs;
—Total unexpended but obligated funds for other (identify) fixed costs.

For formula funds, available funds and obligations for fixed costs are for the current Program Year. For active NEG projects, the available funds and obligations for fixed costs are for the approved budget and project period.

2. Trade Health Coverage Assistance

a. Completed and signed *SF 424—Application for Federal Assistance.* This form is the required application for Federal funds. The authorized signatory of the applicant will be issued a unique Personal Identification Number (PIN). The entry of this PIN on the SF 424 constitutes the authorized signature.

b. *Project Synopsis form (ETA 9106).* This form summarizes key aspects of the proposed project such as project type, planned number of participants, and contact information. It also includes identification of the types of health insurance coverage options that will be available to project participants.

c. *Planning Form (ETA 9103).* This form provides cumulative quarterly estimates on project scope (*e.g.*, number of participants, exits), design (*e.g.*, mix of services), and budget (*e.g.*, costs by type of activity, administrative costs).

d. *Narrative Summary.* Describe steps taken to consult and coordinate with appropriate state executive agencies and other appropriate parties in order to ensure that the use of NEG funds to provide health coverage assistance to eligible individuals will be consistent with the policies and procedures of those agencies. A narrative explanation must also be provided in cases where one or more of the following are reflected in the project plan:

—There are participants receiving NRPs, which requires explaining how the planned number of recipients and the NRP cost per participant were determined.
—Indirect costs are included in the budget, which requires identifying the following: Cognizant approval agency, approved cost rate and base, and date of approval.
—"Other" costs are included in the budget, which requires identifying the specific cost items and amounts.
—Administrative costs related to processing payments for qualified health insurance coverage and NRPs are included in the budget, which requires explaining how the administrative cost estimate was derived (*i.e.*, based on number of check payments and check processing costs).
—Administrative expenses excluding NRPs and health insurance coverage assistance are greater than 10% of total expenses.

The applicant is free to include narrative explanations of other special factors, but the narrative should not exceed five pages.

e. *TAA Certification Report.* The applicant must include, as an attachment to its grant submission, information that identifies by employer the TAA Trade Certification numbers and the number of workers covered in the certifications. In cases where a petition has been filed and certification is pending, identify the TAA Trade Petition number, the date the petition was filed, and the number of workers covered in the petition.

Part V: Application Review Process

To be considered for funding, an application must demonstrate that the proposed project meets the purpose of and is consistent with the Act and Regulations and provides all of the information required by these guidelines. Applications that are not completely in accordance with the requirements or do not contain all required submission forms will not be considered as submitted and will not be evaluated for funding until all required information and documentation is provided. Complete applications will be evaluated for responsiveness to the criteria identified in this part. Just as with the submission requirements, the criteria are generally similar for each type of NEG project but there are variations. The specific criteria by type of project are itemized in the following sections.

A. Regular Projects

1. *Eligibility:* To ensure that NEG funds are only awarded to eligible dislocation events and where there is a verifiable target group that is both eligible and in need of assistance.

a. Information demonstrates that the dislocation events cited are eligible for NEG funding.

b. Information demonstrates that identified workers in the target group are currently eligible for assistance.

c. Information indicates that the affected workers are still in need of assistance.

2. *Early Intervention:* To ensure that required Rapid Response is being implemented.

a. Information indicates that timely and appropriate Rapid Response actions have been taken.

b. Information indicates that some effort has been made to contact affected workers and/or their representatives.

3. *Reasonableness of Proposed Services and Costs:* To ensure that NEG projects are designed and operated in accordance with the Federal requirements and the State and local policies that apply to formula-funded dislocated worker programs in the proposed project area, OR, if different, that they are fully justified in terms of target group and reemployment barriers.

a. The planned average cost per participant for the project is within a reasonable range of the state's actual average cost per participant reported for the prior Program Year.

b. The percentage of planned participants receiving needs-related payments (NRPs) in the project is justified in terms of formula program experience or target group characteristics and reemployment barriers.

c. The indirect costs are justified by identifying: (1) The approved indirect cost rate and base; (2) the cognizant approval agency; (3) the date of the approval.

d. "Other" expenditures that are included in the budget—at either the State or local level -are identified and justified in the narrative.

e. The ratio of planned participants to affected workers is reasonable in light of prior experience with NEG projects and with the results of Rapid Response/early intervention activities.

f. Total administrative costs are within the cost limitations at both the state and local project levels, OR are explained and justified.

4. *Timeliness of Assistance:* To ensure that project implementation will reflect timely assistance to affected workers, consistent with the initiation of Rapid Response and other early intervention activities; and to ensure that the rate of expenditures is consistent with rate of on-board participants by service type (*e.g.*, core/intensive, training).

a. All planned participants are enrolled in services in a timely manner and consistent with availability of funds to complete services.

b. Rates of expenditure for Core/Intensive and Supportive Services are consistent with the rates of enrollment in those services quarter-to-quarter.

c. Rates of expenditure for Training Services and NRPs (if applicable) are consistent with the rates of enrollment in those services quarter-to-quarter.

5. *Adequacy of Planned Performance:* To verify that planned performance on NEG projects is appropriate.

a. The planned levels of performance on each applicable performance measure equal to or greater than the higher of the negotiated state goal or the Secretary's goal. OR

b. The application includes specific employment barriers-related information on the project's target group to justify a lower level of performance.

6. *Need for Funds:* To ensure that other funds are not available and/or have not been committed to meet the needs of the workers covered in the application.

a. No other funding exists which provides the same services to the same target group.

b. Available information on expenditures of other dislocated worker funds in the state indicates the need for the requested funds.

B. Disaster Projects

1. *Eligibility:* To ensure that NEG funds are only awarded to eligible dislocation events and where there is a verifiable target group that is both eligible and in need of assistance.

a. FEMA has issued a public declaration that the event is eligible for public assistance.

2. *Reasonableness of Proposed Services and Costs:* To ensure that NEG projects are designed and operated in accordance with the Federal requirements and the State and local policies that apply to formula-funded dislocated worker programs in the proposed project area, OR, if different, that they are fully justified in terms of target group and reemployment barriers.

a. If long-term unemployed and dislocated workers are part of the target group, then the project design includes workforce development services designed to move them into permanent employment.

b. If workforce development services are included in the project design, then:

(1) The planned average cost per participant for the project is within a reasonable range of the state's actual average cost per participant reported for the prior Program Year.

(2) The percentage of planned participants receiving needs-related payments (NRPs) in the project is justified in terms of formula program experience or target group characteristics and reemployment barriers.

c. The indirect costs are justified by identification of: (1) The approved indirect cost rate and base; (2) the cognizant approval agency; (3) the date of the approval.

d. "Other" expenditures that are included in the budget—at either the State or local level—are identified and justified in the narrative.

e. Total administrative costs are within the cost limitation, or are explained and justified.

3. *Timeliness of Assistance:* To ensure that project implementation will reflect timely response to the emergency situation.

a. All planned temporary jobs are filled within the first three quarters of project operation.

b. Information indicates that participants are completing temporary jobs prior to substantially undertaking workforce development activities.

4. *Adequacy of Planned Performance:* For participants receiving workforce development services, to verify that planned performance on NEG projects appropriate.

a. The planned levels of performance on each applicable performance measure equal to or greater than the higher of the negotiated state goal or the Secretary's goal, or

b. The application includes specific employment barriers-related information on the project's target group to justify a lower level of performance.

5. *Need for Funds:* To ensure that other funds are not available and/or have not been committed to meet the needs of the workers covered in the application.

a. There are no other NEG disaster projects in the state that are underexpended according to their approved Implementation Plan and where the funds could be redirected to this project.

C. Dual Enrollment Projects

1. *Eligibility:* To ensure that NEG funds are only awarded to eligible dislocation events and where there is a verifiable target group that is both eligible and in need of assistance.

a. TAA certifications and/or other appropriate documentation to demonstrate eligibility is provided in the application or can be accessed from other sources in DOL/ETA.

2. *Reasonableness of Proposed Services and Costs:* To ensure that NEG projects are designed and operated in accordance with the applicable Federal requirements and the State and local policies in the proposed project area.

a. The average cost per participant for the project is within a reasonable range of the state's actual average cost per participant reported for the prior Program Year.

b. The indirect costs are justified by identifying: (1) The approved indirect cost rate and base; (2) the cognizant approval agency; (3) the date of the approval.

c. "Other" expenditures that are included in the budget—at either the State or local level—are identified and justified in the narrative.

d. Total administrative costs are within the cost limitation, OR are explained and justified.

3. *Adequacy of Planned Performance:* to verify that planned performance on NEG projects appropriate.

a. The planned levels of performance on each applicable performance measure equal to or greater than the higher of the negotiated state goal or the Secretary's goal, or

b. The application includes specific employment barriers-related information on the project's target group to justify a lower level of performance.

4. *Need for Funds:* To ensure that other funds are not available and/or have not been committed to meet the needs of the workers covered in the application.

a. No other funding exists which provides the same services to the same target group.

b. A state verification of the need for the requested funds is provided.

c. Available information on expenditures of other dislocated worker funds, including Trade Act funds, in the state indicates the need for the requested funds.

D. Health Coverage Assistance Projects

1. *Eligibility:* To ensure that NEG funds are only awarded to provide health coverage assistance and supportive services to eligible trade-impacted workers and other eligible individuals, as specified in the Trade Adjustment Assistance Reform Act of 2002.

a. TAA certifications and/or other appropriate documentation to demonstrate eligibility is either provided in the application or can be accessed from other sources in DOL/ETA.

2. *Reasonableness of Proposed Services and Costs:* To ensure that NEG funds are utilized in a manner consistent with the Federal requirements and the State and local policies that apply to trade assistance programs in the proposed project area.

a. The indirect costs are justified by identifying: (1) The approved indirect cost rate and base; (2) the cognizant approval agency; (3) the date of the approval.

b. "Other" expenditures that are included in the budget are identified and justified in the narrative.

c. Total administrative costs, exclusive of health coverage payment processing costs, are within the cost limitation, OR are explained and justified.

d. The basis for administrative costs to process health coverage payments is justified.

Part VI: Funding Approaches

Applications for NEG funds can be funded in whole or in part. Full or partial funding can be at the applicant's request or at the Secretary's discretion. The applicant may request partial funding when the dislocation event is an emergency (*i.e.*, regular projects where there was no advance notification of the layoffs, or any disaster projects) and there is insufficient time to develop an appropriate estimate of the amount of funding that will be needed to respond to the event. In cases where the applicant requests partial funding, the applicant should only request a partial amount of project funding needed in the initial application. After the project design uncertainties have been resolved and the initial partial funding application has been approved, the applicant must complete a new application for the remaining amount of project funding needed.

Where the applicant is submitting a partial funding request due to an emergency situation, the application must be submitted within 15 calendar days of the emergency, unless logistical barriers (*e.g.*, damaged communication systems resulting from a natural disaster) prevent submission within this timeframe.

The following minimum submission requirements shall apply to a partial funding request:

For Regular Projects

—SF 424;
—Project Synopsis Form (ETA 9106) (entries are not required for Planned Cost per Participant, Planned Entered Employment Rate, Planned Wage Replacement Rate and Project Operator Listing);
—Employer Data Form (ETA 9105).

For Disaster Projects

—SF 424;
—Project Synopsis Form (ETA 9106) (entries are not required for Planned Cost per Participant, Planned Entered Employment Rate, Planned Wage Replacement Rate and Project Operator Listing).

As noted previously, most NEG grant awards will be funded incrementally at the Secretary's discretion, with the multiple disbursements of funds all based on the single application. In these cases, a maximum funding level will be approved by the Secretary, but a lesser amount will be initially awarded. The grantee will be required to submit, at a later date, supplemental information in order to request the balance of funds. This information will be specified in the grant award letter, but will include, at a minimum, current information on actual participant levels, performance outcomes, and expenditures.

Part VII: Post-Grant Award Requirements

A. Follow-Up Planning Requirements

Recipients of a NEG will be required to develop a more complete project operational plan as follow-up to the grant award. This plan should be completed within 90 days of grant award and be available for review at the office of the grant recipient. The information in this plan will be used to verify the feasibility of the project design and planned levels of performance based on actual project implementation experience. The content of the plan will vary by type of project but, in general, will need to address factors such as status of Rapid Response activities (for Regular projects), participant enrollments, needs of participants for specific services, implementation schedules, project operator agreements and budgets, and project management and staffing structure.

B. Project Oversight

In addition to the review of the Project Operational Plan, each project will be reviewed at the project midpoint. The purpose of this review will be to verify core compliance factors such as participant eligibility and adequate financial management, assess the effectiveness of participant service policies and processes in achieving project performance goals, and evaluate the need for funds to complete the project.

C. Project Performance Reporting

Each grant recipient will be required to submit to the Grant Officer a Quarterly Report Form (ETA 9104) on actual performance to-date. The report will include the same factors as the Cumulative Quarterly Planning Form (ETA 9103) in the grant document. A copy of this form is included in Appendix A.

Part VIII: Grant Modifications

Grant modifications will be required in the following circumstances:

—To increase or change the approved Project Operators.
—When end-of-project performance is expected to vary by more than 10% from the approved plan regarding: Total participants, participants to be enrolled in training, or expenditures for training.
—To increase the number of participants receiving NRPs/health coverage assistance and/or the amount of expenditures for NRPs/health coverage assistance.
—To increase the approved amounts of administrative costs.
—To change the performance period for the project.
—When actual end-of-project expenditures will be less than the amount of awarded funds.

Grant modifications must be submitted to the Grant Officer. They must be submitted electronically.

Grant modifications will not be accepted within 90 days prior to the scheduled expiration date of the project.

Where there is a need to increase the amount of approved funding a new application for NEG funds must be submitted. To expand the layoff dates, and number of eligible workers, at a dislocation site already included in the approved grant without increasing the amount of approved funding, the grantee may submit a modification that would include additional Employer Data Form(s) for the applicable layoffs and, if needed, a revised Planning Form. A new application is required for the addition of new dislocation sites and target groups of eligible workers.

BILLING CODE 4510–30–P

Appendix A

Appendix A – e-Application and Reporting Forms

Application for Federal Assistance Form (SF 424)

B.

OMB Approval No. 1205-0439
Expiration date: 05/31/2003

Project Synopsis Form

State of ___	Amount of Funding Request $_____	Amount Approved by DOL $_____
Project Name:		
Project Type: __Regular __Disaster __Trade Dual Enrollment __Trade Act Health Insurance		
Eligible Event: __Plant Closure __Mass Layoff __Community Impact Layoffs __Disaster __Military Installation		
Application Type: __Full Funding __Partial (reason:_____)		
For Disaster Project Application ONLY: Name/Description of Disaster Event: _____ Date of FEMA Declaration of Eligibility for Public Assistance: _____ Target Groups (check all that apply): __Unemployed due to Disaster __Long-Term Unemployed __Dislocated Workers		
For Trade Act Health Coverage Project Application ONLY: State-based Qualified Health Insurance Coverage Programs Selected by State __Continuation Provision __High-Risk Pool __State Employees __State Employee-Comparable __Joint State-Private Nonpool __Joint State-Private Pool __Nonfederally Financed		
Applicant Contact Person:		
Street Address 1:		
Street Address 2:		
City: _____ State: ___ Zip Code: _____		
Telephone:		
FAX:		
Email:		
Planned Number of Participants: _____	Planned Entered Employment Rate: ____%	
Planned Cost per Participant: $_____	Planned Wage Replacement Rate: ____%	
% of Planned Participants Receiving NRPs: ____%		
Counties included in Project Service Area:		
Requested Funds Needed because:		
Project Operator Listing:		

ETA 9106
(January 2003)

The reporting requirements are approved by OMB according to the Paperwork Reduction Act of 1995 under OMB approval No. 1205-0439. NOTE: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's obligation to reply to these reporting requirements are mandatory (PL: 107-210). Public reporting burden for this collection of information is estimated at one hour.
Send comments regarding this burden or any other aspect of this collection, including suggestions for reducing the burden to the U.S. Department of Labor, Office of National Response, Room N-5422, Washington, D.C. 20210
(Paperwork Reduction Project 1205-0439).

C.

OMB Approval No. 1205-XXXX
Expiration date: xx/xx/xx

Employer Data Form

Company/Industry	Location of Facility	Notification Issued?	Date of Notification	Layoff Date(s)	Number of Affected Workers
		__WARN __Public Announcement by Employer __Other(specify) __None			__ Check if Closure

Company/Industry	Date(s) of Rapid Response Actions	# of Workers Contacted	TAA Petition	Labor Organization Representation
(should be same as above)	Contact with Employer: _____ Contact with Workers: _____ __None		Date Filed: _____ __Number of Workers Covered __Not applicable	

Type of Business	

ETA 9105
(February 2003)

The reporting requirements are approved by OMB according to the Paperwork Reduction Act of 1995 under OMB approval No. 1205-XXXX. NOTE: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's obligation to reply to these reporting requirements are mandatory (PL: 107-210). Public reporting burden for this collection of information is estimated at 30 minutes.
Send comments regarding this burden or any other aspect of this collection, including suggestions for reducing the burden to the U.S. Department of Labor, Office of National Response, Room N-5422, Washington, D.C. 20210
(Paperwork Reduction Project 1205-XXXX).

D.

OMB Approval No. 1205-XXXX
Expiration date: xx/xx/xx

Project Operator Data Form

Project Operator:
Street Address 1:
Street Address 2:
City: State: Zip Code:
Contact Person:
Telephone:
FAX:
Email:
Project Duration: Start End
Funding Level: $
Number of Participants:
Counties included in Service Area:

ETA 9107
(February 2003)

The reporting requirements are approved by OMB according to the Paperwork Reduction Act of 1995 under OMB approval No. 1205-XXXX. NOTE: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's obligation to reply to these reporting requirements are mandatory (PL: 107-210). Public reporting burden for this collection of information is estimated at 30 minutes.
Send comments regarding the burden estimate or any other aspect of this collection, including suggestions for reducing this burden to the U.S. Department of Labor, Office of National Response, Room N-5422, Washington D.C. 20210.
(Paperwork Reduction Project 1205-XXXX).

E.

OMB Approval No. 1205-0439
Expiration date: 05/31/2003

Planning Form

1. Regular Projects

All quarterly entries are CUMULATIVE over all previous quarters.

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
IMPLEMENTATION SCHEDULE								
TOTAL PARTICIPANTS								
Enrolled in Core Services								
Enrolled in Intensive Services								
Enrolled in Training								
Receiving Support Services								
Rec. Needs-Related Payments								
Exits								
Entering Employment at Exit								
EXPENDITURE SCHEDULE								
TOTAL EX-PENDITURES: STATE/GRANTEE LEVEL								
NRPs								
Other								
Total Admin., excl. NRPs								
- Indirect								
NRP Admin.								
TOTAL EXPENDI-TURES: LOCAL/ PROJECT OP-ERATOR LEVEL								
Core Services								
Intensive Services								
Training								
Support Services								
NRPs								
Other								
Total Admin. excl. NRPs								
- Indirect								
NRP Admin.								
TOTAL EXPENDI-TURES: STATE AND								

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
LOCAL								

2. Disaster Projects

All quarterly entries are CUMULATIVE over all previous quarters.

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
IMPLEMENTATION SCHEDULE								
TOTAL PARTICIPANTS								
Enrolled in Core Services								
Enrolled in Intensive Services								
Enrolled in Training								
Receiving Support Services								
Rec. Needs-Related Payments								
Employed in Temp. Disaster Relief Asst.								
Exits								
Entering Employment at Exit								
EXPENDITURE SCHEDULE								
TOTAL EXPENDI-TURES: STATE/ GRANTEE LEVEL								
Support Services								
NRPs								
Other								
Total Admin., excl. NRPs								
- Indirect								
NRP Admin.								
TOTAL EXPENDI-TURES: LOCAL/ PROJECT OPERA-TOR LEVEL								
Participant Wages								
Participant FBs								
Core Services								
Intensive Services								
Training								
Support Services								
NRPs								
Other								
Total Admin., excl.								

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
NRPs								
- Indirect								
NRP Admin.								
TOTAL EXPENDITURES: STATE AND LOCAL								

3. Trade-WIA Dual Enrollment

All quarterly entries are CUMULATIVE over all previous quarters.

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
IMPLEMENTATION SCHEDULE								
TOTAL PARTICIPANTS								
Enrolled in Core Services								
Enrolled in Intensive Services								
Enrolled in Training								
Receiving Support Services								
Exits								
Entering Employment at Exit								
TOTAL EXPENDITURES: STATE/ GRANTEE LEVEL								
Support Services								
Other								
Total Admin								
- Indirect								
EXPENDITURE SCHEDULE								
TOTAL EXPENDITURES: LOCAL/ PROJECT OPERATOR LEVEL								
Core Services								
Intensive Services								
Training								
Support Services								
Other								
Total Admin.								
- Indirect								
TOTAL EXPENDITURES: STATE AND LOCAL								

4. Trade Health Insurance Coverage Assistance

All quarterly entries are CUMULATIVE over all previous quarters.

PERFORMANCE FACTOR	PROGRAM YEAR QUARTER							
IMPLEMENTATION SCHEDULE								
TOTAL PARTICIPANTS								
Receiving Support Services								
Rec. Needs-Related Payments								
Rec. Health Coverage Payments								
EXPENDITURE SCHEDULE								
TOTAL EXPENDI-TURES								
NRPs								
Support Services								
Other								
Health Coverage Payments								
Total Admin. excl. NRPs/Health Coverage Payments								
- Indirect								
NRP Admin.								
Health Coverage Payment. Admin.								

ETA 9103
(January 2003)

The reporting requirements are approved by OMB according to the Paperwork Reduction Act of 1995 under OMB approval No. 1205-0439. NOTE: 'Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's obligation to reply to these reporting requirements are mandatory (PL: 107-210). Public reporting burden for this collection of information is estimated at 90 minutes.
Send comments regarding the burden estimate or any other aspect of this collection, including suggestions for reducing this burden to the U.S. Department of Labor, Office of National Response, Room N-5422, Washington D.C. 20210.
(Paperwork Reduction Project 1205-0439).

F.
0439

OMB Approval No. 1205-

Expiration date:

05/31/2003

Quarterly Report Form

Grantee:
Grant Number:
Project Number:
Performance Period Covered by this Report: _____ through _____

PERFORMANCE FACTOR	REGULAR	DISASTER	DUAL ENROLLMENT	TRADE ACT HEALTH INSURANCE
TOTAL PARTICIPANTS				
Enrolled in Core Services				
Enrolled in Intensive Services				
Enrolled in Training				
Receiving Support Services				
Rec. Needs-Related Payments				
Employed in Temp. Disaster Relief Asst.				
Rec. Health Coverage Payments				
Exits				
Entering Employment at Exit				
TOTAL EXPENDITURES: STATE/GRANTEE LEVEL				
NRPs				
Support Services				
Health coverage Payments				
Other				
Total Admin., excl. NRPs/Health Coverage Payments				
- Indirect				
NRP Admin.				
Health Coverage Payment Admin.				
TOTAL EXPENDITURES: LOCAL/ PROJECT OPERATOR LEVEL				
Participant Wages				
Participant FBs				
Core Services				
Intensive Services				
Training				
Support Services				
NRPs				
Other				
Total Admin. excl. NRPs				
- Indirect				
NRP Admin.				
TOTAL EXPENDITURES: STATE AND LOCAL				

ETA 9104
(January 2003)

The reporting requirements are approved by OMB according to the Paperwork Reduction Act of 1995 under OMB approval No. 1205-0439. NOTE: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's obligation to reply to these reporting requirements are mandatory (PL: 107-210). Public reporting burden for this collection of information is estimated at 30 minutes.
Send comments regarding the burden estimate or any other aspect of this collection, including suggestions for reducing this burden to the U. S. Department of Labor, Office of National Response, Room N-5422, Washington D.C. 20210.
(Paperwork Reduction Project 1205-0439)

Appendix B – Directory of Regional Offices of USDOL/ETA

REGION 1 – BOSTON

Joseph F. Stoltz
Regional Administrator
U.S. Department of Labor/ETA
JFK Federal Building
Room E-350
Boston, MA 02203
(617) 788-0170
FAX: 617-788-0101

REGION 1 – NEW YORK

Patrick Rowe
Acting Regional Administrator
U.S. Department of Labor/ETA
201 Varick Street, Room 755
New York, NY 10014
(212) 337-2139
FAX: 212-337-2144

REGION 2 – PHILADELPHIA

Lenita Jacobs-Simmons
Regional Administrator
U.S. Department of Labor/ETA
The Curtis Center
170 S. Independence Mall West, Suite 825 East
Philadelphia, PA 19106-3315
(215) 861-5205
FAX: 215-861-5260

REGION 3 – ATLANTA

Helen Parker
Regional Administrator
U.S. Department of Labor/ETA
Atlanta Federal Center
61 Forsyth Street, SW, Room 6M12
Atlanta, GA 30303
(404) 562-2092
FAX: 404-562-2149

REGION 4 – DALLAS/DENVER

Joseph C. Juarez
Regional Administrator
U.S. Department of Labor/ETA
Federal Building
525 Griffin Street, Room 317
Dallas, TX 75202
(214) 767-8263
FAX: 214-767-5113

REGION 5 – CHICAGO/KANSAS CITY

Byron Zuidema
Regional Administrator
U.S. Department of Labor/ETA
230 S. Dearborn Street, Room 628
Chicago, IL 60604
(312) 596-5403
FAX: 312-596-5402

REGION 6 – SANFRANCISCO/SEATTLE

Armando Quiroz
Regional Administrator
U.S. Department of Labor/ETA
71 Stevenson Street, Room 830
San Francisco, CA 94119-3767
(415) 975-4610
FAX: 415-975-4612

[FR Doc. 03–12248 Filed 5–15–03; 8:45 am]
BILLING CODE 4510–30–C

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

None

Volume II

None

Volume III

None

Volume IV

None

Volume V

None

Volume VI

None

Volume VII

None

General Wage Determinations Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed in Washington, DC this 7th day of May, 2003.

Carl Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 03–11887 Filed 5–15–03; 8:45 am]
BILLING CODE 4510–27–M

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, will conduct a public meeting on Monday and Tuesday, June 9–10, 2003, at Coolfont Resort and Conference Center, Cold Run Valley Road, Berkeley Springs, West Virginia. The meeting will occur from 8 a.m. to approximately 3 p.m. on June 9, and from 8 a.m. to approximately 2 p.m. on June 10.

Members of the public may attend the meeting in person. Seating is limited and is available on a first-come, first-served basis. During this meeting, the Committee will discuss: Committee organizational details; environmental conflict resolution (ECR) processes in connection with section 101 of the National Environmental Policy Act (NEPA); best practices in ECR; reports of subcommittees on NEPA Section 101, best practices, and affected communities; and plan for future committee work. Members of the public may make oral comments at the meeting 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 each day. Written comments may be submitted by mail or by e-mail to *memerson@ecr.gov*. Written comments received in the 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. Written comments may be provided to the Committee until 5 p.m. on Tuesday, June 2, 2003, at the address below, or in person at the time of 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 meeting or wishes to submit oral or written comments should contact Melanie Emerson, Program Associate, 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 *memerson@ecr.gov*. Requests to make oral comments must be in writing (or by e-mail) to Ms. Emerson and be received no later than 5 p.m. Mountain Standard Time on Tuesday, June 2, 2003. Copies of the draft meeting agenda may be obtained from Ms. Emerson at the address, phone and e-mail address listed above.

Dated: May 12, 2003.

Christopher L. Helms,

Executive Director, Federal Register Liaison Officer.

[FR Doc. 03–12239 Filed 5–15–03; 8:45 am]

BILLING CODE 6820–FN–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: Under the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public and other Federal agencies to comment on this proposed continuing information collection. This is the second notice for public comment; the first was published in the **Federal Register** at 67 FR 79161 on December 27, 2002 and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Comments regarding these information collections are best assured of having their full effect if received by OMB within 30 days of publication in the **Federal Register**.

ADDRESSES: Written comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of NSF, including whether the information will have practical utility; (b) the accuracy of NSF's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Teresa R. Pierce, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *tpierce@nsf.gov*. Copies of the submission may be obtained by calling (703) 292–7555.

FOR FURTHER INFORMATION CONTACT: Teresa R. Pierce, NSF Reports Clearance Officer at (703) 292–7555 or send e-mail to *tpierce@nsf.gov*.

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

SUPPLEMENTARY INFORMATION:

Title of Collection: 2003 National Survey of Recent College Graduates

OMB Approval Number: 3145–0077.

Abstract: The National Survey of Recent College Graduates (NSRCG) has been conducted biennially since 1974. The 2003 NSRCG will consist of a sample of individuals who have completed bachelor's and master's degrees in science and engineering from U.S. institutions.

The purpose of this study is to provide national estimates on the new entrants in the science and engineering workforce and to provide estimates on the characteristics of recent bachelor's and master's graduates with science and engineering degrees. The study is one of three components of the Scientists and Engineers Statistical Data System (SESTAT), which produces national estimates of the size and characteristics of the nation's science and engineering population.

The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge "to provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government." The NSRCG is designed to comply with these mandates by providing information on the supply and utilization of the nation's recent bachelor's and master's level scientists and engineers. Collected data will be used to produce estimates of the characteristics of these individuals. They will also provide necessary input into the SESTAT labor force data system, which produces national

estimates of the size and characteristics of the country's science and engineering population. The Foundation uses this information to prepare congressionally mandated reports such as *Women, Minorities and Persons with Disabilities in Science and Engineering* and *Science and Engineering Indicators*. NSF publishes statistics from the survey in many reports, but primarily in the biennial series, Characteristics of Recent Science and Engineering Graduates in the United States. A public release file of collected data, designed to protect respondent confidentiality, also will be made available to researchers on CD–ROM and on the World Wide Web.

Mathematica Policy Research, Inc. of Princeton, New Jersey will conduct the study for NSF. Data are obtained by mail questionnaire, computer assisted telephone interviews and web survey beginning October 2003. The survey will be collected in conformance with the Privacy Act of 1974, the National Science Foundation Act of 1950, as amended, and the Confidential Information Protection and Statistical Act of 2002. The individual's response to the survey is voluntary. NSF will insure that all information collected will be kept strictly confidential and will be used only for research or statistical purposes and for preparing scientific reports and articles.

Expected Respondents: A statistical sample of approximately 18,000 bachelor's and master's degree recipients in science, engineering, and health will be contacted in 2003. A total response rate in 2001 was 80%.

Burden on the Public: The amount of time to complete the questionnaire may vary depending on an individual's circumstances; however, on average it will take approximately 25 minutes to complete the survey. The total annual burden will be 6,000 hours during the year.

Dated: May 12, 2003.

Teresa R. Pierce,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 03–12215 Filed 5–15–03; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–27, License No. SNM–42, EA 03–087]

In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately)

BWX Technologies, Inc., ("BWXT" or the "licensee") is the holder of Special Nuclear Material License No. SNM–42 issued by the U.S. Nuclear Regulatory (NRC or Commission) pursuant to Title 10 of the Code of Federal Regulations (10 CFR) part 70. BWXT is authorized by its license to receive, possess, and transfer special nuclear material in accordance with the Atomic Energy Act of 1954, as amended, and 10 CFR part 70. The BWXT license, originally issued on August 22, 1956, was last renewed on October 2, 1995, and is due to expire on September 30, 2005.

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, utilizing large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees and eventually Orders to selected licensees, including BWXT, to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. The Commission has also communicated with other Federal, State and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the nature of the current threat. In addition, the Commission has been conducting a comprehensive review of its safeguards and security programs and requirements. As part of this review, the Commission issued an Order to BWXT on August 21, 2002, to implement interim compensatory measures (ICMs) to enhance physical security of licensed operations at this facility.

As a result of information provided by the intelligence community concerning the nature of the threat and the Commission's assessment of this information, the Commission has determined that a revision is needed to the Design Basis Threat (DBT) specified in 10 CFR 73.1. Therefore, the Commission is imposing a revised DBT, as set forth in Attachment 1 [1] of this Order. The DBT, which supercedes the DBT specified in 10 CFR 73.1, provides the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. The requirements of this Order will remain in effect until the Commission determines otherwise. To address the DBT set forth in Attachment 1 of this Order, BWXT is required to revise its physical security plan, safeguards contingency plan, and guard training and qualification plan that are required by 10 CFR 70.22.

In order to provide assurance that BWXT is implementing prudent measures to protect against the DBT, Materials License SNM–42 shall be modified to require that the physical security plans, including pertinent requirements of the Order issued on August 21, 2002, safeguards contingency plan, and the guard training and qualification plan, required by 10 CFR 70.22 be revised to provide protection against this DBT. Upon completion of NRC review and approval of the revised physical security plan, including pertinent requirements of the Order issued on August 21, 2002, safeguards contingency plan, and the guard training and qualification plan, and their full implementation, the Commission will consider requests to relax or rescind, either in whole or in part, the requirements of the Order issued on August 21, 2002, imposing ICMs. In addition, pursuant to 10 CFR 2.202, 70.32, and 70.81, I find that, in the circumstances described above, the public health, safety and interest and the common defense and security require that this Order be immediately effective.

Accordingly, pursuant to sections 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 70.32, and 70.81, *it is hereby ordered, effective immediately,* that material license SNM–42 is modified as follows:

A. 1. BWXT shall, notwithstanding the provisions of any Commission regulation, license, or order to the contrary, revise its physical protection plan, safeguards contingency plan, and guard training and qualification plan prepared pursuant to 10 CFR 70.22 to provide protection against the DBT set forth in Attachment 1 to this Order. BWXT shall submit the revised physical security plan, revised safeguards contingency plan, and revised guard training and qualification plan including an implementation schedule, to the Commission for review and approval no later than April 29, 2004.

2. The revised physical security plan, revised safeguards contingency plan, and revised guard training and qualification plan must be fully implemented by the licensee by October 29, 2004.

B. 1. BWXT shall, within twenty (20) days of the date of this Order, notify the Commission, (1) if it is unable to comply with any of the requirements of this Order, (2) if compliance with any of the requirements is unnecessary in its specific circumstances, or (3) if

[1] Attachment 1 contains classified information and will not be released to the public.

implementation of any of the requirements would cause BWXT to be in violation of the provisions of any Commission regulation or its facility license. The notification shall provide BWXT's justification for seeking relief from, or variation of, any specific requirement.

2. If BWXT considers that implementation of any of the requirements of this Order would adversely impact safe operation of its facility, BWXT must notify the Commission, within twenty (20) days of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives of this Order, or a schedule for modifying the facility to address the adverse safety condition. If neither approach is appropriate, BWXT must supplement its response to Condition B.1 of this Order to identify the condition as a requirement with which it cannot comply, with attendant justifications as required in Condition B.1.

C. BWXT shall report to the Commission, in writing, when it has fully implemented the approved revisions to its physical security plan, safeguards contingency plan, and guard training and qualification plan to protect against the DBT described in Attachment 1 to this Order.

D. Notwithstanding the provisions of any Commission regulation, license or order to the contrary, all measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise, except that BWXT may make changes to their revised physical security plan, safeguards contingency plan, and guard training and qualification plan if authorized by 10 CFR 73.32 (e) or (g).

BWXT's responses to Conditions A.1, B.1, B.2, and C above, shall be submitted in accordance with 10 CFR 70.5. In addition, BWXT's submittals that contain classified information shall be properly marked and handled in accordance with 10 CFR 95.39.

The Director, Office of Nuclear Material Safety and Safeguards may, in writing, relax or rescind any of the above conditions upon demonstration by BWXT of good cause.

IV

In accordance with 10 CFR 2.202, BWXT must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within twenty (20) days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law on which BWXT or other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; to the Assistant General Counsel for Materials Litigation and Enforcement at the same address; to the Regional Administrator for NRC Region II and to BWXT if the answer or hearing request is by a person other than the licensee. Because of possible disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by BWXT or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), BWXT may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty (20) days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

For the Nuclear Regulatory Commission.
Dated this 29th day of April, 2003.

Martin J. Virgilio,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 03–12255 Filed 5–15–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–143, License No. SNM–124, EA 03–087]

In the Matter of Nuclear Fuel Services Inc., Erwin, TN; Order Modifying License (Effective Immediately)

Nuclear Fuel Services Inc., ("NFS" or the "licensee") is the holder of Special Nuclear Material License No. SNM–124 issued by the U.S. Nuclear Regulatory (NRC or Commission) pursuant to Title 10 of the Code of Federal Regulations (10 CFR) part 70. NFS is authorized by its license to receive, possess, and transfer special nuclear material in accordance with the Atomic Energy Act of 1954, as amended, and 10 CFR part 70. The NFS license, originally issued on September 18, 1957, was last renewed on July 2, 1999, and is due to expire on July 31, 2009.

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, utilizing large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees and eventually Orders to selected licensees, including NFS, to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. The Commission has also communicated with other Federal, State and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the nature of the current threat. In addition, the

Commission has been conducting a comprehensive review of its safeguards and security programs and requirements. As part of this review, the Commission issued an Order to NFS on August 21, 2002, to implement interim compensatory measures (ICMs) to enhance physical security of licensed operations at this facility.

As a result of information provided by the intelligence community concerning the nature of the threat and the Commission's assessment of this information, the Commission has determined that a revision is needed to the Design Basis Threat (DBT) specified in 10 CFR 73.1. Therefore, the Commission is imposing a revised DBT, as set forth in Attachment 1 [1] of this Order. The DBT, which supercedes the DBT specified in 10 CFR 73.1, provides the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. The requirements of this Order will remain in effect until the Commission determines otherwise. To address the DBT set forth in Attachment 1 of this Order, NFS is required to revise its physical security plan, safeguards contingency plan, and guard training and qualification plan that are required by 10 CFR 70.22.

In order to provide assurance that NFS is implementing prudent measures to protect against the DBT, Materials License SNM–124 shall be modified to require that the physical security plan, safeguards contingency plan, and the guard training and qualification plan, required by 10 CFR 70.22 be revised to provide protection against this DBT. Upon completion of NRC review and approval of the revised physical security plan, including pertinent requirements of the Order issued on August 21, 2002, safeguards contingency plan, and the guard training and qualification plan, and their full implementation, the Commission will consider requests to relax or rescind, either in whole or in part, the requirements of the Order issued on August 21, 2002, imposing ICMs. In addition, pursuant to 10 CFR 2.202, 70.32, and 70.81, I find that, in the circumstances described above, the public health, safety and interest and the common defense and security require that this Order be immediately effective.

Accordingly, pursuant to sections 53, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 70.32, and 70.81, it is hereby ordered, effective immediately, that material license SNM–124 is modified as follows:

A. 1. NFS shall, notwithstanding the provisions of any Commission regulation, license, or order to the contrary, revise its physical protection plan, safeguards contingency plan, and guard training and qualification plan prepared pursuant to 10 CFR 70.22 to provide protection against the DBT set forth in Attachment 1 to this Order. NFS shall submit the revised physical security plan, revised safeguards contingency plan, and revised guard training and qualification plan including an implementation schedule, to the Commission for review and approval no later than April 29, 2004.

2. The revised physical security plan, revised safeguards contingency plan, and revised guard training and qualification plan must be fully implemented by the licensee by October 29, 2004.

B. 1. NFS shall, within twenty (20) days of the date of this Order, notify the Commission, (1) if it is unable to comply with any of the requirements of this Order, (2) if compliance with any of the requirements is unnecessary in its specific circumstances, or (3) if implementation of any of the requirements would cause NFS to be in violation of the provisions of any Commission regulation or its facility license. The notification shall provide NFS's justification for seeking relief from, or variation of, any specific requirement.

2. If NFS considers that implementation of any of the requirements of this Order would adversely impact safe operation of its facility, NFS must notify the Commission, within twenty (20) days of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives of this Order, or a schedule for modifying the facility to address the adverse safety condition. If neither approach is appropriate, NFS must supplement its response to Condition B.1 of this Order to identify the condition as a requirement with which it cannot comply, with attendant justifications as required in Condition B.1.

C. NFS shall report to the Commission, in writing, when it has fully implemented the approved revisions to its physical security plan, safeguards contingency plan, and guard training and qualification plan to protect against the DBT described in Attachment 1 to this Order.

D. Notwithstanding the provisions of any Commission regulation, license or order to the contrary, all measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise, except that NFS may make changes to their revised physical security plan, safeguards contingency plan, and guard training and qualification plan if authorized by 10 CFR 73.32(e) or (g).

NFS's responses to Conditions A.1, B.1, B.2, and C above, shall be submitted in accordance with 10 CFR 70.5. In addition, NFS's submittals that contain classified information shall be properly marked and handled in accordance with 10 CFR 95.39.

The Director, Office of Nuclear Material Safety and Safeguards may, in writing, relax or rescind any of the above conditions upon demonstration by NFS of good cause.

In accordance with 10 CFR 2.202, NFS must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within twenty (20) days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law on which NFS or other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; to the Assistant General Counsel for Materials Litigation and Enforcement at the same address; to the Regional Administrator for NRC Region II and to NFS if the answer or hearing request is by a person other than the licensee. Because of possible disruptions in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary

[1] Attachment 1 contains classified information and will not be released to the public.

of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov* and also to the Office of the General Counsel either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by NFS or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), NFS may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty (20) days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated this 29th day of April, 2003.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 03–12257 Filed 5–15–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Licensing Support Network; Advisory Review Panel

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of public meeting.

SUMMARY: The Licensing Support Network Advisory Review Panel (LSNARP) will hold its next meeting on Tuesday and Wednesday, June 3–4, 2003, at the Alexis Park, located at 375 East Harmon, Las Vegas, Nevada 89109. The meeting will be open to the public pursuant to the Federal Advisory Committee Act (Pub. L. 94–463, 86 Stat. 770–776).

Agenda: The meeting will be held from 8:30 a.m. to 5 p.m. on Tuesday, June 3 and from 8:30 to close of business on Wednesday, June 4. The preliminary agenda includes the topics listed below. Additional details regarding timing of presentations and changes to the agenda may be obtained through the contacts listed below and will be announced prior to the meeting.

1. Introductory Remarks—NRC/LSNARP
   NRC Organizational responsibilities and roles
2. LSN Status Report—NRC–ASLBP/LSN Administrator
   Status and Schedule for document loading—NRC/DOE/Potential Parties
3. Large Document Summary Paper (review of 4 options)—NRC–OCIO
4. Large Document Draft Guidance—NRC–OCIO
5. Discussion of LSNARP membership on Options and Guidance—LSNARP
6. Scope of documents to be loaded on LSN—NRC–OGC
   Document Duplication
   Status of Revised Topical Guidelines
   Meaning of Certification
7. Need for Part 2 rule changes/schedule—NRC–OGC
   Electronic and/or CD-submittal
   Ambiguities in rule
   Document Duplication

SUPPLEMENTARY INFORMATION: The LSN is an internet based electronic discovery database being developed to aid the NRC in complying with the schedule for decision on the construction authorization for the high-level waste repository contained in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended. In 1998, the NRC Rules of Practice in 10 CFR part 2, subpart J, were modified to provide for the creation and operation of the LSN, an internet-based technological solution to the submission and management of records and documents relating to the licensing of a geologic repository for the disposal of high-level radioactive waste. (63 FR 71729) Pursuant to 10 CFR 2.1011(d), the agency has chartered the LSNARP, an advisory committee that provides advice to the NRC on fundamental issues relating to LSN design, operation, maintenance, and compliance monitoring.

FOR FURTHER INFORMATION CONTACT: U.S. Nuclear Regulatory Commission, Office of the Secretary, Mail Stop O–16 C1, Washington, DC 20555–0001; Attn: Andrew Bates (telephone 301–415–1963; e-mail *ALB@NRC.GOV*) or Atomic Safety and Licensing Board Panel, Mail Stop T–3 F23, Attn: Jack G. Whetstine (telephone 301–415–7391; e-mail *JGW@NRC.GOV*).

Public Participation: Interested persons may make oral presentations to the LSNARP or file written statements. An oral presentations request should be made to one of the contact persons listed above as far in advance as practicable so that appropriate arrangements can be made.

Dated: May 9, 2003.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 03–12254 Filed 5–15–03; 8:45 am]

BILLING CODE 7590–01–P

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Government Performance and Results Act of 1993; Revised Strategic Plan

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of request for commission.

SUMMARY: The Occupational Safety and Health Review Commission (Review Commission) announces the availability of its revised Strategic Plan for fiscal years 2003–2008 for public comment. Prepared in accordance with the Government Performance and Results Act of 1993, the revised Strategic Plan may be viewed at the Review Commission's Web site, *http://www.oshrc.gov* under "What's New." The revised Strategic Plan defines the Review Commission's strategic goal and objectives, and the methods for achieving them. The Review Commission seeks the views of those who practice before it and those who are affected by its case dispositions.

DATES: Comments should be submitted on or before June 16, 2003. The revised Strategic Plan will become effective in October 2003, without any further notice in the **Federal Register**, unless comments or government approval procedures necessitate otherwise.

ADDRESSES: Submit any written comments to Patricia A. Randle, Executive Director, Occupational Safety and Health Review Commission, 1120 20th St., NW., Ninth Floor, Washington, DC 20036–3419.

FOR FURTHER INFORMATION CONTACT: Patricia A. Randle, Executive Director, Occupational Safety and Health Review Commission, 1120 20th St., NW., Ninth

Floor, Washington, DC 20036–3419, telephone (202) 606–5380.

SUPPLEMENTARY INFORMATION: The Government Performance and Results Act requires the development of strategic plans and performance measures in the Federal government. It also requires that agencies review and update their strategic plans every three years.

The Review Commission continues to pursue its commitment to providing superior service to the public. This plan changes the 2000–2005 strategic goals and performance objectives. It maintains and revises the public service goal, and eliminate its two strategic goals—external and organizational. However, the Review Commission will continue to make the strategic goals a priority within the agency and its progress with respect to them will be monitored for effectiveness. The revised Strategic Plan is intended to focus on the Review Commission's primary public service mission and will enhance and improve the agency's effectiveness and public accountability.

Your comments on the revised Strategic Plan will be useful and will provide the agency with additional information to facilitate the agency's continued ability to provide superior public service.

(Authority: 5 U.S.C. 306(d))

Dated: May 12, 2003.

W. Scott Railton,

Chairman.

[FR Doc. 03–12258 Filed 5–15–03; 8:45 am]

BILLING CODE 7600–01–M

OVERSEAS PRIVATE INVESTMENT CORPORATION

Submission for OMB Review; Comment Request

AGENCY: Overseas Private Investment Corporation (OPIC).

ACTION: Request for comments.

SUMMARY: Under the provision of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission.

At OPIC's request, OMB is reviewing this information collection for emergency processing for 90 days, under OMB control number 3420–0011.

Comments are being solicited on the need for the information, its practical utility, the accuracy of the Agency's burden estimate, and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review is summarized below.

DATES: Comments must be received on or before June 16, 2003.

ADDRESSES: Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency submitting officer. Comments on the form should be submitted to the Agency Submitting Officer.

FOR FURTHER INFORMATION CONTACT: OPIC Agency Submitting Officer: Bruce Campbell, Record Manager, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

Summary Form Under Review

Type of Request: Revised form.

Title: Application for Political Risk Investment Insurance.

Form Number: OPIC–52.

Frequency of Use: Once per investor per project.

Type of Respondents: Business or other institution (except farms); individuals.

Standard Industrial Classification Codes: All.

Description of Affected Public: U.S. companies or citizens investing overseas.

Reporting Hours: 7 hours per project.

Number of Responses: 150 per year.

Federal Cost: $28,350.

Authority for Information Collection: Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 1961, as amended.

Abstract (Needs and Uses): The application is the principle document used by OPIC to determine the investor's and the project's eligibility for political risk insurance, assess the environmental impact and developmental effects of the project, measure the economic effects for the U.S. and the host country economy, and collect information for insurance underwriting analysis.

Dated: May 12, 2003.

Eli Landy,

Senior Counsel, Administrative Affairs, Department of Legal Affairs.

[FR Doc. 03–12231 Filed 5–15–03; 8:45 am]

BILLING CODE 3210–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3499]

State of Oklahoma

As a result of the President's major disaster declaration on May 10, 2003, I find that Canadian, Cleveland, Grady, Kingfisher, Lincoln, Logan, McClain, Oklahoma and Pottawatomie Counties in the State of Oklahoma constitute a disaster area due to damages caused by severe storms and tornadoes occurring on May 8, 2003 and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on July 9, 2003 and for economic injury until the close of business on February 10, 2004 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Blaine, Caddo, Comanche, Creek, Garfield, Garvin, Major, Noble, Okfuskee, Payne, Pontotoc, Seminole and Stephens in the State of Oklahoma.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere:	5.625
Homeowners Without Credit Available Elsewhere:	2.812
Businesses With Credit Available Elsewhere:	5.906
Businesses and Non-Profit Organizations Without Credit Available Elsewhere:	2.953
Others (Including Non-Profit Organizations) With Credit Available Elsewhere:	5.500
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere:	2.953

The number assigned to this disaster for physical damage is 349912 and for economic injury the number is 9V2700.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: May 12, 2003.

Cheri C. Wolff,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 03–12253 Filed 5–15–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3498]

State of Tennessee

As a result of the President's major disaster declaration on May 8, 2003, I find that Carroll, Cheatham, Chester, Crockett, Dickson, Dyer, Gibson, Hardeman, Haywood, Henderson, Henry, Houston, Lake, Lauderdale, Madison, Montgomery, Obion, Robertson, Stewart and Weakley Counties in the State of Tennessee constitute a disaster area due to damages caused by severe storms, tornadoes and flooding occurring on May 4, 2003 and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on July 7, 2003 and for economic injury until the close of business on February 6, 2004 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Benton, Davidson, Decatur, Fayette, Hardin, Hickman, Humphreys, McNairy, Sumner, Tipton and Williamson in the State of Tennessee; Calloway, Christian, Fulton, Graves, Hickman, Logan, Simpson, Todd and Trigg counties in the State of Kentucky; New Madrid and Pemiscot counties in the State of Missouri; Mississippi county in the State of Arkansas; and Alcorn, Benton and Tippah counties in the State of Mississippi.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.625
Homeowners Without Credit Available Elsewhere	2.812
Businesses With Credit Available Elsewhere	5.906
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	2.953
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	5.500
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	2.953

The number assigned to this disaster for physical damage is 349812. For economic injury the number is 9V2200 for Tennessee; 9V2300 for Kentucky; 9V2400 for Missouri; 9V2500 for Arkansas; and 9V2600 for Mississippi.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: May 12, 2003.

Cheri C. Wolff,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 03–12252 Filed 5–15–03; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4367]

Culturally Significant Objects Imported for Exhibition Determinations: "Manet and the American Civil War: The Battle of the 'Kearsarge' and the 'Alabama'"

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, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the objects to be included in the exhibition "Manet and the American Civil War: The Battle of the 'Kearsarge' and the 'Alabama'," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, from on or about June 2, 2003 until on or about August 17, 2003, 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, including a list of the exhibit objects, contact Orde F. Kittrie, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: 202/401–4779). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: May 12, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–12295 Filed 5–15–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4306]

Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

The Advisory Committee on Historical Diplomatic Documentation will meet in the Department of State, 2201 C Street, NW., Washington, DC, June 4–5, 2003, in Conference Room 1205. Prior notification and a valid government-issued photo ID (such as driver's license, passport, U. S. government or military ID) are required for entrance into the building. Members of the public planning to attend must notify Gloria Walker, Office of the Historian (202–663–1124) no later than May 28, 2003 to provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the enumerated forms of ID, please consult with Gloria Walker for acceptable alternative forms of picture identification.

The Committee will meet in open session from 1:30 p.m. through 3 p.m. on Wednesday, June 4, 2003, to discuss declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the *Foreign Relations* series. The remainder of the Committee's sessions from 3:15 p.m. until 4:30 p.m. on Wednesday, June 4, 2003, and 9 a.m. until 1 p.m. on Thursday, June 5, 2003, will be closed in accordance with section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions of agency declassification decisions concerning the *Foreign Relations* series and other declassification issues. These are matters not subject to public disclosure under 5 U.S.C.552b(c)(1) and the public interest requires that such activities be withheld from disclosure.

Questions concerning the meeting should be directed to Marc J. Susser, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC 20520, telephone (202) 663–1123, (e-mail *history@state.gov*).

Dated: April 30, 2003.

Marc J. Susser,

Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State.

[FR Doc. 03–12297 Filed 5–15–03; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34299]

Gulf & Ohio Railways Holding Co., Inc., H. Peter Claussen and Linda C. Claussen—Continuance in Control Exemption—Chattahoochee & Gulf Railroad Co., Inc.

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of exemption.

SUMMARY: The Board grants an exemption, under 49 U.S.C. 10502, from the prior approval requirements of 49 U.S.C. 11323–25 for Gulf & Ohio Railways Holding Co., Inc., a noncarrier, and H. Peter Claussen and Linda C. Claussen (collectively, Petitioners), to continue in control of Chattahoochee & Gulf Railroad Co., Inc. (CGR), upon CGR's becoming a rail carrier pursuant to a related transaction in STB Finance Docket No. 34298.[1]

DATES: This exemption will be effective June 15, 2003. Petitions to stay must be filed by June 2, 2003. Petitions to reopen must be filed by June 10, 2003.

ADDRESSES: Send an original and 10 copies of all pleadings, referring to STB Finance Docket No. 34299, to: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, send one copy of pleadings to Troy W. Garris, Weiner Brodsky Sidman Kider PC, 1300 19th Street, NW., Fifth Floor, Washington, DC 20036–1609.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565–1600 (assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. Copies of the decision may be purchased from Dā 2 Dā Legal Copy Service by calling (202) 293–7776 (assistance for the hearing impaired is available through FIRS at 1–800–877–8339) or by visiting Suite 405, 1925 K Street, NW., Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: May 9, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams,

Secretary.

[FR Doc. 03–12260 Filed 5–15–03; 8:45 am]

BILLING CODE 4915–00–P

[1] *Chattahoochee & Gulf Railroad Co., Inc.—Acquisition and Operation Exemption-Line of Central of Georgia Railroad Company*, STB Finance Docket No. 34298 (STB served Mar. 26, 2003).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34316 (Sub–No. 1)]

The Burlington Northern and Santa Fe Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

AGENCY: Surface Transportation Board, DOT.

ACTION: Petition for partial revocation.

SUMMARY: The Board, under 49 U.S.C. 10502, exempts the temporary trackage rights arrangement between The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) described in STB Finance Docket No. 34316,[1] to permit them to expire upon completion of the construction of BNSF's rail line between Kamey and Seadrift, TX.[2]

DATES: This exemption is effective on June 15, 2003. Petitions to stay must be filed by May 27, 2003. Petitions to reopen must be filed by June 5, 2003.

ADDRESSES: An original and 10 copies of all pleadings referring to STB Finance Docket No. 34316 (Sub-No. 1) must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of all pleadings must be served on petitioner's representative: Sarah W. Bailiff, Senior General Attorney, The Burlington Northern and Santa Fe Railway Company, P.O. Box 961039, Fort Worth, TX 76161–0039.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 565–1600. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. Copies of the decision may be purchased from Dā 2 Dā Legal Copy Service by calling (202) 293–7776 (assistance for the hearing impaired is available through FIRS at 1–800–877–8339) or by visiting Suite 405, 1925 K Street, NW., Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: May 9, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams,

Secretary.

[FR Doc. 03–12261 Filed 5–15–03; 8:45 am]

BILLING CODE 4915–00–P

[1] The temporary trackage rights exempted in *The Burlington Northern and Santa Fe Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company*, STB Finance Docket No. 34316 (STB served Mar. 12, 2003) are over UP's Port Lavaca Subdivision from milepost 15.4 to milepost 14.2 and from milepost 6.95 to milepost 6.0. These segments are on either side of a 7.25-mile portion of UP's Port Lavaca Subdivision over which BNSF was granted an exemption for overhead trackage rights in the same notice. This petition does not involve those overhead trackage rights.

[2] BNSF was granted authority to construct and operate a railroad line in *The Burlington Northern and Santa Fe Railway Company—Construction and Operation Exemption—Seadrift and Kamey, TX*, STB Finance Docket No. 34003 (STB served Jan. 25, 2002). BNSF estimates that the construction will be completed before the end of June 2003.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34340]

Vermilion Valley Railroad Company, Inc.—Operation Exemption—FNG Logistics Co.

Vermilion Valley Railroad Company, Inc. (VVRR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate approximately 5.91 miles of railroad owned by FNG Logistics Co. (FNG) between milepost QSO–5.18 near the Illinois/Indiana State line and milepost QSO–11.09 near Olin, in Vermillion and Warren Counties, IN.[1] FNG certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier.

The transaction was scheduled to be consummated on or about April 30, 2003, the effective date of the exemption (7 days after the exemption was filed).

[1] The subject line was acquired by Flex-N-Gate Corporation (Flex) under the Board's offer of financial assistance procedures at 49 U.S.C. 10904 and 49 CFR 1152.27 in *New York Central Lines, LLC—Abandonment Exemption—in Vermillion and Warren Counties, IN*, STB Docket No. AB–565 (Sub-No. 4X) (STB served Sept. 17, 2002). In a motion filed on April 22, 2003, Flex and FNG, a wholly owned subsidiary of Flex, requested permission to substitute FNG for Flex as the purchaser of the line. That request was granted by decision served on April 28, 2003.

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to reopen the proceeding 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. 34340, must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Daniel A. LaKemper, P.O. Box 185, Morton, IL 61550.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: May 7, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 03–11878 Filed 5–15–03; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

President's Commission on the United States Postal Service

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice of meeting.

SUMMARY: Notice is given of a meeting of the President's Commission on the United States Postal Service.

DATES: The meeting will be held on Wednesday, May 28, 2003, from approximately 2 p.m. to 5 p.m. e.s.t.

ADDRESSES: The meeting will be held in Room 216 of the Hart Senate Office Building, 2nd and C Streets, NE., Washington, DC 20510.

FOR FURTHER INFORMATION CONTACT: Roger Kodat, Designated Federal Official, 202–622–7073.

SUPPLEMENTARY INFORMATION: At the public meeting, the Commission will continue its examination of the issues outlined in Executive Order 13278. Witnesses will testify at the invitation of the Commission. Seating is limited.

Dated: May 12, 2003.

Roger Kodat,

Designated Federal Official.

[FR Doc. 03–12222 Filed 5–13–03; 11:16 am]

BILLING CODE 4811–16–P

DEPARTMENT OF THE TREASURY

President's Commission on the United States Postal Service

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice of meeting.

SUMMARY: Notice is given of a meeting of the President's Commission on the United States Postal Service.

DATES: The meeting will be held on Thursday, May 29, 2003, from approximately 8:30 a.m. to 12:30 p.m. e.s.t.

ADDRESSES: The meeting will be held in Room 216 of the Hart Senate Office Building, 2nd and C Streets, NE., Washington, DC 20510.

FOR FURTHER INFORMATION CONTACT: Roger Kodat, Designated Federal Official, 202–622–7073.

SUPPLEMENTARY INFORMATION: At the public meeting, the Commission will continue its examination of the issues outlined in Executive Order 13278. Witnesses will include Postmaster General John E. Potter and Comptroller General of the United States David M. Walker. Seating is limited.

Dated: May 12, 2003.

Roger Kodat,

Designated Federal Official.

[FR Doc. 03–12223 Filed 5–13–03; 11:17 am]

BILLING CODE 4811–16–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Art Advisory Panel—Notice of Closed Meeting

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of closed meeting of Art Advisory Panel.

SUMMARY: Closed meeting of the Art Advisory Panel will be held in Washington, DC.

DATES: The meeting will be held June 11, 2003.

ADDRESSES: The closed meeting of the Art Advisory Panel will be held on June 11, 2003, in Room 4200E beginning at 10 a.m., Franklin Court Building, 1099 14th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Karen Carolan, C:AP:AS, 1099 14th Street, NW., Washington, DC 20005. Telephone (202) 694–1861 (not a toll free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), that a closed meeting of the Art Advisory Panel will be held on June 11, 2003, in Room 4200E beginning at 10:00 a.m., Franklin Court Building, 1099 14th Street, NW., Washington, DC 20005.

The agenda will consist of the review and evaluation of the acceptability of fair market value appraisals of works of art involved in Federal income, estate, or gift tax returns. This will involve the discussion of material in individual tax returns made confidential by the provisions of 26 U.S.C. 6103.

A determination as required by section 10(d) of the Federal Advisory Committee Act has been made that this meeting is concerned with matters listed in section 552b(c)(3), (4), (6), and (7), and that the meeting will not be open to the public.

David B. Robison,

Chief, Appeals.

[FR Doc. 03–12345 Filed 5–15–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee, will be conducted.

DATES: The meeting will be held Saturday, June 7, 2003, from 8 a.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee, will be held Saturday, June 7, 2003, from 8 a.m. to 5 p.m. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221. Public comments will also be welcome during the meeting. Please contact Mary Ann

Delzer at 1–888–912–1227 or (414) 297–1604 for more information.

The agenda will include the following: Various IRS issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: May 9, 2003.

Tersheia D. Carter,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03–12346 Filed 5–15–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel (TAP) Multilingual Initiative Issue (MLI) Committee Will Be Conducted (Via Teleconference)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel (TAP) Multilingual Initiative Issue (MLI) Committee will be conducted (via teleconference).

DATES: The meeting will be held Thursday, June 19, 2003.

FOR FURTHER INFORMATION CONTACT: Inez E. De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Multilingual Initiative Issue Committee will be held Thursday, June 19, 2003 from 1 p.m. e.s.t. to 2 p.m. e.s.t. via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez E. De Jesus, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez E. De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977.

The agenda will include the following: Various IRS issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: May 12, 2003.

Tersheia D. Carter,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03–12347 Filed 5–15–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel (TAP) Multilingual Initiative Issue (MLI) Committee Will Be Conducted (Via Teleconference)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel (TAP) Multilingual Initiative Issue (MLI) Committee will be conducted (via teleconference).

DATES: The meeting will be held Friday, June 13, 2003.

FOR FURTHER INFORMATION CONTACT: Inez E. De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Multilingual Initiative Issue Committee will be held Friday, June 13, 2003 from 1 p.m. e.s.t. to 2 p.m. e.s.t. via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez E. De Jesus, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez E. De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977.

The agenda will include the following: Various IRS issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: May 12, 2003.

Tersheia D. Carter,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03–12348 Filed 5–16–03; 8:45 am]

BILLING CODE 4830–01–P

UTAH RECLAMATION MITIGATION AND CONSERVATION COMMISSION

Notice of Availability of the Final Environmental Assessment and Finding of No Significant Impact for the Rehabilitation or Replacement of Diversion Dams on the Duchesne and Strawberry Rivers in Utah

AGENCY: Utah Reclamation Mitigation and Conservation Commission (Mitigation Commission).

ACTION: Notice of availability of the Final Environmental Assessment and Finding of No Significant Impact for the rehabilitation or replacement of diversion dams on the Duchesne and Strawberry Rivers in Utah.

SUMMARY: The Central Utah Project Completion Act (Pub. L. 102–575) authorized Federal funds to rehabilitate diversion dams on the Duchesne and Strawberry Rivers in Utah. The project is needed to reduce adverse effects on fish and wildlife resources.

The Final Environmental Assessment (EA) was prepared as a Programmatic document. It discusses potential environmental impacts associated with reconstructing and operating an unspecified diversion dam on the Duchesne or Strawberry River. The new diversion dam could serve single or multiple diversion rights. Potential environmental impacts addressed in the document are those impacts that would be expected regardless of which diversion dam is rehabilitated. Potential impacts to wetlands, threatened and endangered species and cultural resources are generally site specific and/or require special permits. Potential impacts to these environmental disciplines would be addressed in a Supplemental Environmental Assessment (SEA), if needed.

After considering the public comments received during scoping and agency consultation, and the analyses in the EA of environmental effects, it is my decision to select Alternative 3 for implementation, excepting the combination of the Farm Creek, Jasper-Pike and New Tabby diversions. With Alternative 3, several of the existing diversions on the Duchesne River and several of the existing diversions on the Strawberry River would be combined and new diversion dams that would serve multiple diversion rights would be constructed. This would involve transferring points of diversion from the downstream diversion(s) to the upstream diversion that would be constructed. Diversions would be combined only when the involved water rights would not be adversely affected.

However, not every diversion structure can be potentially combined with one or more of the other diversions. The combination of the Farm Creek, Jasper-Pike and New Tabby diversions as described under Alternative 3 is not approved to be combined into a single diversion because cumulative depletions of stream flows in the intervening approximately 1.4 miles of Duchesne River channel between the Farm Creek and Jasper-Pike diversions would cause a substantial adverse impact that would not be compensated for by the elimination of one or two of the diversions from the river. Alternative 3 was formulated to include consolidation of diversions that appeared feasible and reasonable based on physical and logistical considerations. At this time, potential legal, social, and institutional constraints have only been considered at a cursory level. Further examination of consolidation options could preclude some projects from being implemented. In those instances wherein Alternative 3 is determined not to be feasible, and in the case of the Farm Creek, Jasper-Pike and New Tabby diversions, Alternative 2 is selected for implementation. Alternative 2 involves the rehabilitation or construction of a new diversion facility on the Duchesne or Strawberry River at or in very close proximity to the location of the existing diversions.

The Final Environmental Assessment is a programmatic analysis. Potential environmental impacts addressed in the EA are those impacts that would be expected regardless of the diversion dam that is rehabilitated. Potential impacts to wetlands, threatened and endangered species and cultural resources generally are site specific and/or require special permits. As a subsequent decision to rehabilitate or reconstruct a particular diversion structure is made, the site-specific impacts will be assessed using a site-specific environmental evaluation checklist. If no additional impacts beyond those assessed in this EA are identified, the checklist will be approved as a decision document, and no further NEPA analysis will be conducted.

If any item on the checklist has not been satisfied, or if a project is expected to create impacts not described in the EA, to create impacts greater in magnitude or duration than described in the EA or would require mitigation measures that are not described in the EA to keep impacts below significant levels, a Supplemental EA (SEA) to address site specific impacts would be prepared for each diversion dam concurrent with the preparation of the final engineering or design report for a specific structure.

The EA was developed with the public in accordance with the Commission's National Environmental Policy Act (NEPA) rule (43 CFR part 10010.20). The Final EA and Decision Notice were sent to 28 agencies and individuals on May 2, 2003.

The EA is related to other potential future actions, specifically the detailed design and implementation of diversion dam replacements or rehabilitation. The programmatic perspective has been considered in the document. Future construction projects may require separate or supplemental NEPA compliance.

ADDRESSES: Address all comments and/or requests for further information to Mark Holden, Projects Manager, Utah Reclamation Mitigation and Conservation Commission, 102 West 500 South, Suite 315, Salt Lake City, UT, 84101.

FOR FURTHER INFORMATION CONTACT: Mark Holden, Projects Manager, 801–524–3146 *mholden@uc.usbr.gov.*

Dated: May 2, 2003.

Michael C. Weland,

Utah Reclamation Mitigation and Conservation Commission Executive Director.

[FR Doc. 03–12140 Filed 5–15–03; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee On Gulf War Illnesses; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Research Advisory Committee on Gulf War Veterans' Illnesses will meet on June 16–17, 2003, at the Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 230, Washington, DC. The meeting on June 16 will convene at 8:30 a.m. and adjourn at 5 p.m. The meeting on June 17 will convene at 8:30 a.m. and adjourn at 3:30 p.m. Both meetings will be open to the public.

The purpose of the Committee is to provide advice and make recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans and research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the Persian Gulf War.

On June 16, the Committee will hear research presentations from representatives of the Midwest Research Institute, Lawrence Livermore National Laboratories and Lovelace Respiratory Research Institute. The Committee will also receive an update on VA research from the VA's Chief Research and Development Officer. On June 17, the Committee will hear presentations on and discuss new research and reports. The Committee plans to discuss and develop recommendations and a work plan. Time will be available for public comment on both days.

Members of the public may submit written statements for the Committee's review to Ms. Laura O'Shea, Committee Manager, Department of Veterans Affairs (008A1), 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing further information should contact Ms. Laura O'Shea at (202) 273–5031.

Dated: May 7, 2003.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 03–12250 Filed 5–15–03; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

VA Vocational Rehabilitation and Employment Task Force; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the VA Vocational Rehabilitation and Employment (VR&E) Task Force will be held on Thursday, May 29, 2003, from 9 a.m. to 5 p.m., and on Friday, May 30, 2003, from 9 a.m. to 2 p.m., in Room 230, Department to Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC. The meeting is open to the public.

The purpose of the Task Force is to conduct an independent review of the VR&E Program within the Veterans Benefits Administration (VBA). The Task Force will provide recommendations to the Secretary of Veterans Affairs on improving the Department's ability to provide comprehensive services and assistance to veterans with service-connected disabilities and employment handicaps in becoming employable, and obtaining and maintaining suitable employment. The Task Force will also assess independent living services provided by VBA.

Both sessions of the May 29–30 meeting will focus on briefings for Task Force members by providers of vocational rehabilitation services and those who oversee VA's delivery of

vocational rehabilitation and employment services. On May 29, presentations will be made by the General Accounting Office, VA's Office of Inspector General, congressional committee staff and the State Directors of Veterans Affairs. On May 30, the Task Force will be briefed by the Department of Labor, Department of Education and VA's Veterans Health Administration and Veterans Benefits Administration.

No time will be allocated for receiving oral presentations from the public. Interested parties who wish to attend the meeting should have adequate identification for entry into the building and will be subject to a security screening process. Members of the public may submit written comments for review by the Committee to: Mr. John O'Hara, Executive Director, VA Vocational Rehabilitation and Employment Task Force, VA Office of Policy, Planning, and Preparedness (008B), 810 Vermont Avenue, NW., Washington, DC 20420. Mr. O'Hara can be reached at (202) 273–5130; fax number (202) 273–5991 and e-mail address *john.o'hara@mail.va.gov.*

Dated: May 9, 2003.

By Direction of the Secretary:

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 03–12249 Filed 5–15–03; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of new system of records—Center for Veterans Enterprise VA VetBiz Vendor Information Pages (123VA00VE).

SUMMARY: The Privacy Act of 1974, 5 U.S.C. 522a(e), requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that VA is establishing a new system of records entitled "VA VetBiz Vendor Information Pages" (123VA00VE).

DATES: Comments on the establishment of this new system of records must be received no later than June 16, 2003. If no public comment is received, the new system will become effective June 16, 2003.

ADDRESSES: You may mail or hand-deliver written comments concerning the proposed new system of records to the Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; or fax comments to (202) 273–9289; or e-mail comments to *OGCRegulations@mail.va.gov.* All relevant material received before June 16, 2003, will be considered. Comments will be available for public inspection at the above address in the Office of Regulation Policy and Management, room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Ms. Gail Wegner (00VE), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone number (202) 254–0233.

SUPPLEMENTARY INFORMATION: Public Law 106–50, section 302 requires, in pertinent part:

(5) Establishment of an information clearinghouse to collect and distribute information, including by electronic means, on the assistance programs of Federal, State, and local governments, and of the private sector, including information on office locations, key personnel, telephone numbers, mail and electronic addresses, and contracting and subcontracting opportunities.

(6) Provision of Internet or other distance learning academic instruction for veterans in business subjects, including accounting, marketing, and business fundamentals.

(7) Compilation of a list of small business concerns owned and controlled by service-disabled veterans that provide products or services that could be procured by the United States and delivery of such list to each department and agency of the United States. Such list shall be delivered in hard copy and electronic form and shall include the name and address of each such small business concern and the products or services that it provides."

Section 604 requires:

(b) Identification of Small Business Concerns Owned by Eligible Veterans. Each fiscal year, the Secretary of Veterans Affairs shall, in consultation with the Assistant Secretary of Labor for Veterans' Employment and Training and the Administrator of the Small Business Administration, identify small business concerns owned and controlled by veterans in the United States. The Secretary shall inform each small business concern identified under this paragraph that information on Federal procurement is available from the Administrator.

This new system of records will be used to maintain and access an automated database containing the information on veteran-owned businesses set forth in the law (section 302, paragraph (7) and section 604, paragraph (b)). While corporations do not have any Privacy Act rights, it is not entirely clear whether individuals acting in an entrepreneurial capacity, such as a sole proprietor of a small business, have Privacy Act rights. Hence, the adoption of this system of records.

The automated database is known as the VA VetBiz Vendor Information Pages (VIP). The database includes data on veteran-owned businesses extracted from the Small Business Administration's Procurement Marketing and Access Network (Pro-Net) database, the Central Contractor Registration database, and other databases. It will be augmented with voluntarily submitted data provided by veteran-owned businesses wishing to do business with the Federal government and private entities either in a capacity as a prime contractor or as a subcontractor.

The information in this system will be maintained in electronic form. The information in these records will be freely available to government agencies, companies, and the general public via the Internet.

A "Report of Intention to Publish a **Federal Register** Notice of a New System of Records' and an advance copy of the new system notice have been provided to the Chairmen of the House Committee on Governmental Reform and the Senate Committee on Governmental Affairs, and the Director, Office of Management and Budget (OMB), as required by provisions of title 5, U.S.C. 522a (Privacy Act), and guidelines issued by OMB (61 FR 6428) (1996).

Approved: May 2, 2003.

Anthony J. Principi,

Secretary of Veterans Affairs.

123 VA00VE

SYSTEM NAME:

Center for Veterans Enterprise (CVE) VA VetBiz Vendor Information Pages (123VA00VE).

SYSTEM LOCATION:

Records are maintained at the Center for Veterans Enterprise's office in VA Headquarters, Washington, DC. VA's Automation Center, 1615 E. Woodward Street, Austin, Texas 78772, maintains the computerized database and Web site.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system of records will cover all companies owned by veterans that wish to be a part of the system of records, including those already registered in the SBA Pro-Net database and/or the Central Contractor Registration database.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records will contain data on veteran-owned companies who have contacted the Center for Veterans Enterprise or have been extracted from e-government databases to which the companies have voluntarily submitted the data as a part of the marketing efforts to the federal government. The records may include business addresses and other contact information, information concerning products/services offered, information pertaining to the business, including Federal contracts, certifications, and security clearances held.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Pub. L. 106–50, as amended.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Federal, State, and local government personnel will access the system to find veteran-owned businesses to contract with and for purposes of market research in compliance with their respective procurement regulations and procedures.

2. The general public, including companies and corporate entities, will access the system, via Internet, to review the information and to locate potential subcontractors and/or potential teaming partners for purposes of complying with applicable regulations concerning use of veteran-owned businesses.

3. The Center for Veterans Enterprise will use the records and reports derived from the database to manage their responsibilities under the Veterans Entrepreneurship and Small Business Development Act of 1999.

COMPATIBILITY OF THE PROPOSED ROUTINE USES:

The Privacy Act permits disclosure of information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which the information is collected. In all of the routine use disclosures described above, the recipient of the information will use the information in connection with a matter relating to one of VA's programs.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The VetBiz VIP will be stored in an automated, computerized database. The system will operate on servers located at VA's Austin Automation Center (AAC), 1615 E. Woodward Street, Austin, Texas 78772. Data backups will reside on appropriate media according to normal system backup plans for the AAC. The system will be managed by the Center for Veterans Enterprise in VA Headquarters, Washington, DC.

RETRIEVABILITY:

Automated records may be retrieved by business name, type, location, previous experience, certifications (*e.g.* HUBZone, 8(a), etc.), product identifiers (*e.g.*, NAICS), and federal identifiers (*e.g.* CAGE Code, Pro-Net identification number, etc.).

SAFEGUARDS:

Read access to the system is via Internet access. AAC and CVE personnel will have access to the system via VA Intranet and local connections for management and maintenance purposes and tasks. Access to the Intranet portion of the system is via user-id and password at officially approved access points. Veteran-owned businesses will establish and maintain user-ids and passwords for accessing their corporate information under system control. Policy regarding issuance of user-ids and passwords is formulated in VA by the Office of Information and Technology, Washington, DC.

RETENTION AND DISPOSAL:

Records will be maintained and disposed of in accordance with the records disposal authority approved by the Archivist of the United States, the National Archives and Records Administration, and published in Agency Records Control Schedules.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Director, Center for Veterans Enterprise (00VE), 810 Vermont Avenue, NW., Washington, DC 20420.

NOTIFICATION PROCEDURES:

Individuals wishing to inquire whether this system of records contains information about themselves should contact the Deputy Director, Center for Veterans Enterprise (00VE), 810 Vermont Avenue, NW., Washington, DC 20420.

RECORD ACCESS PROCEDURE:

Individuals seeking access to records about themselves contained in this system of records may access the records via the Internet, or submit a written request to the system manager.

CONTESTING RECORD PROCEDURES:

An individual who wishes to contest records maintained under his or her name or other personal identifier may write or call the system manager. VA's rules for accessing records and contesting contents and appealing initial agency determinations are published in regulations set forth in the Code of Federal Regulations. *See* 38 CFR 1.577, 1.578.

RECORD SOURCE CATEGORIES:

The information in this system of records is obtained from the following sources: a. Information voluntarily submitted by the business; b. information gathered from VA contracting activities; and c. information extracted from other business databases.

[FR Doc. 03–12251 Filed 5–15–03; 8:45 am]
BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 68, No. 95
Friday, May 16, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–14936; Airspace Docket No. 03–ACE–39]

Modification of Class E Airspace; Muscatine, IA

Correction

In rule document 03–11642 beginning on page 24871 in the issue of Friday, May 9, 2003, make the following correction:

§71.1 [Corrected]

On page 24872, in the third column, in §71.1, under **ACE IA E5 Muscatine, IA**., in the 10th line, "northwest" should read, "northeast".

[FR Doc. C3–11642 Filed 5–15–03; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Friday,
May 16, 2003

Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2002–0054 and OAR–2002–0055, FRL–7459–9]

RIN 2060–A167 and 2060–A168

National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national emission standards for hazardous air pollutants (NESHAP) for new and existing sources at brick and structural clay products (BSCP) manufacturing facilities and NESHAP for new and existing sources at clay ceramics manufacturing facilities. This action will implement section 112(d) of the Clean Air Act (CAA) by requiring major sources to meet hazardous air pollutant (HAP) emission standards reflecting the application of the maximum achievable control technology (MACT). The two subparts will protect air quality and promote the public health by reducing emissions of several of the HAP listed in section 112(b)(1) of the CAA. The rules will reduce HAP emissions from existing sources by 2,300 tons per year nationwide, with hydrogen fluoride (HF) and hydrogen chloride (HCl) accounting for 2,290 tons per year (99.6 percent) of the total HAP emissions reductions from existing sources. The associated metals (antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium) reductions from existing sources account for approximately 6 tons per year nationwide (0.4 percent). Exposure to these substances has been demonstrated to cause adverse health effects such as irritation of the lung, skin, and mucus membranes, effects on the central nervous system, and kidney damage. The EPA has classified three of the HAP as known human carcinogens, four as probable human carcinogens, and one as a possible human carcinogen. We estimate that the two subparts will reduce nationwide emissions of HAP from these facilities by approximately 2,100 megagrams per year (Mg/yr)(2,300 tons per year (tpy)), a reduction of approximately 35 percent from the current level of emissions.

EFFECTIVE DATE: The final rule is effective May 16, 2003.

ADDRESSES: Docket No. OAR–2002–0054 contains supporting documentation used in developing the final BSCP rule. Docket No. OAR–2002–0055 contains supporting documentation used in developing the final clay ceramics rule. The dockets are located at the Air and Radiation Docket and Information Center in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460, telephone (202) 566–1744. The dockets are available for public inspection from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For further information concerning applicability and rule determinations, contact the appropriate State or local agency representative. If no State or local representative is available, contact the EPA Regional Office staff listed in 40 CFR 63.13. For information concerning the analyses performed in developing the final rules, contact Ms. Mary Johnson, Combustion Group, Emission Standards Division (MC–C439–01), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5025, e-mail address: *johnson.mary@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* Entities potentially regulated by this action are those industrial facilities that manufacture BSCP and clay ceramics. Brick and structural clay products manufacturing is classified under Standard Industrial Classification (SIC) codes 3251, Brick and Structural Clay Tile; 3253, Ceramic Wall and Floor Tile; and 3259, Other Structural Clay Products. The North American Industry Classification System (NAICS) codes for BSCP manufacturing are 327121, Brick and Structural Clay Tile; 327122, Ceramic Wall and Floor Tile Manufacturing; and 327123, Other Structural Clay Products. Clay ceramics manufacturing is classified under SIC codes 3253, Ceramic Wall and Floor Tile; and 3261, Vitreous Plumbing Fixtures (Sanitaryware). The NAICS codes for clay ceramics manufacturing are 327122, Ceramic Wall and Floor Tile Manufacturing; and 327111, Vitreous China Plumbing Fixture and China and Earthenware Bathroom Accessories Manufacturing. Regulated categories and entities are shown in Table 1 of this preamble.

TABLE 1.—REGULATED CATEGORIES AND ENTITIES

Category	SIC	NAICS	Examples of potentially regulated entities
Industrial	3251	327121	Brick and structural clay tile manufacturing facilities (BSCP NESHAP)
Industrial	3253	327122	Ceramic wall and floor tile manufacturing facilities (Clay Ceramics NESHAP) and extruded tile manufacturing facilities (BSCP NESHAP).
Industrial	3259	327123	Other structural clay products manufacturing facilities (BSCP NESHAP)
Industrial	3261	327111	Vitreous plumbing fixtures (sanitaryware) manufacturing facilities (Clay Ceramics NESHAP).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in § 63.8385 of today's final BSCP rule and § 63.8535 of today's final clay ceramics rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT SECTION.**

Electronic Docket (E-Docket). The EPA has established official public dockets for this action under Docket ID No. OAR–2002–0054 for the final BSCP rule and Docket ID No. OAR–2002–0055 for the final clay ceramics rule. The official public dockets are the collection of materials that is available for public viewing at the EPA Docket Center (Air Docket), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. The Docket Center 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 Air Docket is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

Electronic Access. Electronic versions of the public dockets are available through EPA's electronic public docket

and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the indexes of the contents of the official public dockets, and to access those documents in the public dockets that are available electronically. Once in the system, select "search" and key in the appropriate docket identification number. 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 this document.

Worldwide Web (WWW). In addition to being available in the dockets, an electronic copy of today's document also will be available on the WWW. Following the Administrator's signature, a copy of this action will be posted at *www.epa.gov/ttn/oarpg* on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of the final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by July 15, 2003. Under section 307(d)(7)(B) of the CAA, only an objection to the final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce the requirements.

Outline. The information presented in this preamble is organized as follows:

I. Background

A. What Is the Source of Authority for Development of NESHAP?

Section 112 of the CAA requires us to list categories and subcategories of major and area sources of HAP and to establish NESHAP for the listed source categories and subcategories. Clay products manufacturing was listed as a category of major sources on the initial source category list published in the **Federal Register** on July 16, 1992 (57 FR 31576). In the July 22, 2002 **Federal Register** notice (67 FR 47894) that proposed NESHAP for BSCP manufacturing and clay ceramics manufacturing, the clay products manufacturing source category was replaced by the BSCP manufacturing source category and the clay ceramics manufacturing source category. Today's action contains final rules for the two source categories. Major sources of HAP are those stationary sources or groups of stationary sources that are located within a contiguous area and under common control that emit or have the potential to emit considering controls, in the aggregate, 9.07 Mg/yr (10 tpy) or more of any one HAP or 22.68 Mg/yr (25 tpy) or more of any combination of HAP. Area sources are those stationary sources that are not major sources.

B. What Criteria Are Used in the Development of NESHAP?

Section 112 of the CAA requires that we establish NESHAP for the control of HAP from both new and existing major

sources. The CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable. This level of control is commonly referred to as MACT.

The MACT floor is the minimum control level allowed for NESHAP and is defined under section 112(d)(3) of the CAA. In essence, the MACT floor ensures that the standards are set at a level that assures that all major sources achieve the level of control at least as stringent as that already achieved by the better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory for which the Administrator has emissions information (or the best-performing 5 sources for which the Administrator has or could reasonably obtain emissions information for categories or subcategories with fewer than 30 sources).

In developing MACT, we also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of cost of achieving the emissions reductions, any health and environmental impacts, and energy requirements.

C. How Were the Final Rules Developed?

We proposed standards for BSCP manufacturing and clay ceramics manufacturing on July 22, 2002 (67 FR 47894). The preamble for the proposed standards described the rationale for the proposed standards. Public comments were solicited at the time of proposal. The public comment period lasted from July 22, 2002 to September 20, 2002. Industry representatives, regulatory agencies, environmental groups, and the general public were given the opportunity to comment on the proposed rules and to provide additional information during the public comment period. We also offered at proposal the opportunity for oral presentation of data, views, or arguments concerning the proposed rules. A public hearing on the proposed BSCP rule was held on August 21, 2002, during which 21 presentations were made. Following the public hearing, we met with representatives of industry and environmental groups on several occasions.

We received a total of 80 public comment letters on the proposed BSCP rule and 9 public comments letters on the proposed clay ceramics rule. Comments were submitted by industry trade associations, BSCP and clay ceramics manufacturing companies, State regulatory agencies and their representatives, and environmental groups. Today's final rules reflect our consideration of all of the comments received. Major public comments on the proposed rules, along with our responses to those comments, are summarized in this preamble.

D. What Are the Health Effects of Pollutants Emitted From the Brick and Structural Clay Products Manufacturing and Clay Ceramics Manufacturing Source Categories?

Today's proposed rules protect air quality and promote the public health by reducing emissions of some of the HAP listed in section 112(b)(1) of the CAA. Emissions data collected during development of the proposed rules show that HF, HCl, and small amounts of metals (antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium) are emitted from BSCP and clay ceramics manufacturing facilities. Exposure to these HAP is associated with a variety of adverse health effects. These adverse health effects include chronic health disorders (*e.g.*, irritation of the lung, skin, and mucus membranes, effects on the central nervous system, and damage to the kidneys), and acute health disorders (*e.g.*, lung irritation and congestion, alimentary effects such as nausea and vomiting, and effects on the kidney and central nervous system). We have classified three of the HAP as human carcinogens, four as probable human carcinogens, and one as a possible human carcinogen. We do not know the extent to which the adverse health effects described above occur, or if any adverse effects occur, in the populations surrounding these facilities. However, to the extent the adverse effects do occur, today's proposed rules would reduce emissions and subsequent exposures. The majority of the emissions reductions from this rule are HF (1900 tons per year nationwide) and HCl (390 tons per year nationwide), while the rule will only reduce emissions of the HAP metals listed below by a small amount (approximately 6 tons nationwide per year).

1. Hydrogen Fluoride

Acute (short-term) inhalation exposure to gaseous HF can cause severe respiratory damage in humans, including severe irritation and pulmonary edema. Chronic (long-term) exposure to fluoride at low levels has a beneficial effect of dental cavity prevention and may also be useful for the treatment of osteoporosis. Exposure to higher levels of fluoride may cause dental fluorosis or mottling, while very high exposures through drinking water or air can result in crippling skeletal fluorosis. One study reported menstrual irregularities in women occupationally exposed to fluoride. We have not classified HF for carcinogenicity.

2. Hydrogen Chloride

Hydrogen chloride, also called hydrochloric acid, is corrosive to the eyes, skin, and mucous membranes. Acute (short-term) inhalation exposure may cause eye, nose, and respiratory tract irritation and inflammation and pulmonary edema in humans. Chronic (long-term) occupational exposure to HCl has been reported to cause gastritis, bronchitis, and dermatitis in workers. Prolonged exposure to low concentrations may also cause dental discoloration and erosion. No information is available on the reproductive or developmental effects of HCl in humans. In rats exposed to HCl by inhalation, altered estrus cycles have been reported in females and increased fetal mortality and decreased fetal weight have been reported in offspring. We have not classified HCl for carcinogenicity.

3. Antimony

Acute (short-term) exposure to antimony by inhalation in humans results in effects on the skin and eyes. Respiratory effects, such as inflammation of the lungs, chronic bronchitis, and chronic emphysema, are the primary effects noted from chronic (long-term) exposure to antimony in humans via inhalation. Human studies are inconclusive regarding antimony exposure and cancer, while animal studies have reported lung tumors in rats exposed to antimony trioxide via inhalation. Effects of oral exposure to antimony are not well-described, but a single study has reported decreased longevity and changes in serum glucose and cholesterol in rats. We have not classified antimony for carcinogenicity.

4. Arsenic

Acute (short-term) high-level inhalation exposure to arsenic dust or fumes has resulted in gastrointestinal effects (nausea, diarrhea, abdominal

pain), and central and peripheral nervous system disorders. Chronic (long-term) inhalation exposure to inorganic arsenic in humans is associated with irritation of the skin and mucous membranes. Human data suggest a relationship between inhalation exposure of women working at or living near metal smelters and an increased risk of reproductive effects, such as spontaneous abortions. Inorganic arsenic exposure in humans by the inhalation route has been shown to be strongly associated with lung cancer, while ingestion of inorganic arsenic in humans has been linked to a form of skin cancer and also to bladder, liver, and lung cancer. We have classified inorganic arsenic as a Group A, human carcinogen.

5. Beryllium

Acute (short-term) inhalation exposure to high levels of beryllium has been observed to cause inflammation of the lungs or acute pneumonitis (reddening and swelling of the lungs) in humans; after exposure ends, these symptoms may be reversible. Chronic (long-term) inhalation exposure of humans to beryllium has been reported to cause chronic beryllium disease (berylliosis), in which granulomatous (noncancerous) lesions develop in the lung. Inhalation exposure to beryllium has been demonstrated to cause lung cancer in rats and monkeys. Human studies are limited, but suggest a causal relationship between beryllium exposure and an increased risk of lung cancer. Oral exposure to beryllium was found to cause stomach lesions in dogs, but effects on humans are not well-described. We have classified beryllium as a Group B1, probable human carcinogen, when inhaled; data are inadequate to determine whether beryllium is carcinogenic when ingested.

6. Cadmium

The acute (short-term) effects of cadmium inhalation in humans consist mainly of effects on the lung, such as pulmonary irritation. Chronic (long-term) inhalation or oral exposure to cadmium leads to a build-up of cadmium in the kidneys that can cause kidney disease. Cadmium has been shown to be a developmental toxicant in animals, resulting in fetal malformations and other effects, but no conclusive evidence exists in humans. An association between cadmium inhalation exposure and an increased risk of lung cancer has been reported from human studies, but these studies are inconclusive due to confounding factors. Animal studies have demonstrated an increase in lung cancer from long-term inhalation exposure to cadmium. We have classified cadmium as a Group B1, probable human carcinogen when inhaled; data are inadequate to determine whether cadmium is carcinogenic when ingested.

7. Chromium

Chromium may be emitted in two forms, trivalent chromium (chromium III) or hexavalent chromium (chromium VI). The respiratory tract is the major target organ for chromium VI toxicity, for acute (short-term) and chronic (long-term) inhalation exposures. Shortness of breath, coughing, and wheezing have been reported from acute exposure to chromium VI, while perforations and ulcerations of the septum, bronchitis, decreased pulmonary function, pneumonia, and other respiratory effects have been noted from chronic exposure. Limited human studies suggest that chromium VI inhalation exposure may be associated with complications during pregnancy and childbirth, while animal studies have not reported reproductive effects from inhalation exposure to chromium VI. Human and animal studies have clearly established that inhaled chromium VI is a carcinogen, resulting in an increased risk of lung cancer. We have classified chromium VI as a Group A, human carcinogen by the inhalation exposure route. Oral exposure of humans to chromium VI has been reported to cause sores in the mouth, gastrointestinal effects, and elevated white blood cell counts. Animal studies of oral chromium VI exposure have reported testicular degeneration and fetal damage in mice and rats. Chromium IV is also a potent contact sensitizer, producing allergic dermatitis in previously-exposed humans. Data are inadequate to determine if chromium VI is carcinogenic by oral exposure.

Chromium III is much less toxic than chromium VI. The respiratory tract is also the major target organ for chromium III toxicity, similar to chromium VI. Chromium III is an essential element in humans, with a daily oral intake of 50 to 200 micrograms per day (µg/d) recommended for an adult. Data on adverse effects of high oral exposures of chromium III are not available for humans, but a study with mice suggests possible damage to the male reproductive tract. We have not classified chromium III for carcinogenicity.

8. Cobalt

Acute (short-term) exposure to high levels of cobalt by inhalation in humans and animals results in respiratory effects such as a significant decrease in ventilatory function, congestion, edema, and hemorrhage of the lung. Respiratory effects are also the major effects noted from chronic (long-term) exposure to cobalt by inhalation, with respiratory irritation, wheezing, asthma, pneumonia, and fibrosis noted. Cardiac effects, congestion of the liver, kidneys, and conjunctiva, and immunological effects have also been associated with cobalt inhalation in humans. Cobalt is an essential element in humans, as a constituent of vitamin B12, but excessive oral intake has been reported to damage the heart, and to cause gastrointestinal effects and contact dermatitis. Human and animal studies are inconclusive with respect to potential carcinogenicity of cobalt. We have not classified cobalt for carcinogenicity.

9. Mercury

Mercury exists in three forms: Elemental mercury, inorganic mercury compounds (primarily mercuric chloride), and organic mercury compounds (primarily methylmercury). Each form exhibits different health effects. Brick, structural clay products, and clay ceramics manufacturing may release elemental or inorganic mercury, but not methylmercury. However, elemental and inorganic mercury are deposited on surface water, where they are converted to methylmercury, an important food contaminant.

Acute (short-term) exposure to high levels of elemental mercury in humans results in central nervous system (CNS) effects such as tremors, mood changes, and slowed sensory and motor nerve function. High inhalation exposures can also cause kidney damage and effects on the gastrointestinal tract and respiratory system. Chronic (long-term) inhalation exposure to elemental mercury in humans also affects the CNS, with effects such as increased excitability, irritability, excessive shyness, and tremors. Data on toxic effects of oral exposure to elemental mercury are sparse. We have not classified elemental mercury for carcinogenicity.

Acute exposure to inorganic mercury by the oral route may result in effects such as nausea, vomiting, and severe abdominal pain. The major effect from chronic exposure, either oral or inhalation, to inorganic mercury is kidney damage. Reproductive and developmental animal studies have reported effects such as alterations in

testicular tissue, increased embryo resorption rates, and abnormalities of development. Mercuric chloride (an inorganic mercury compound) exposure has been shown to result in forestomach, thyroid, and renal tumors in experimental animals. We have classified mercuric chloride as a Group C, possible human carcinogen.

Both acute and chronic oral exposure to methylmercury have been found to cause developmental damage to the central nervous system in fetuses and children, with effects including mental retardation, deafness, blindness, and cerebral palsy. Lower exposures may cause developmental delays and abnormal reflexes. The most important source of methylmercury exposure for most people is eating fish. Although fish is an important part of a balanced diet federal and state fish advisories recommend limiting intake of certain fish that contain elevated methylmercury levels.

10. Manganese

Health effects in humans have been associated with both deficiencies and excess intakes of manganese. Chronic (long-term) exposure to low levels of manganese in the diet is considered to be nutritionally essential in humans, with a recommended daily allowance of 2 to 5 milligrams per day (mg/d). Chronic inhalation exposure to high levels of manganese by inhalation in humans results primarily in CNS effects. Visual reaction time, hand steadiness, and eye-hand coordination were affected in chronically-exposed workers. Manganism, characterized by feelings of weakness and lethargy, tremors, a mask-like face, and psychological disturbances, may result from chronic exposure to higher levels. Impotence and loss of libido have been noted in male workers afflicted with manganism attributed to inhalation exposures. We have classified manganese as Group D, not classifiable as to human carcinogenicity.

11. Nickel

Nickel is an essential element in some animal species, and it has been suggested it may be essential for human nutrition. Nickel dermatitis, consisting of itching of the fingers, hands, and forearms, is the most common effect in humans from chronic (long-term) skin contact with nickel. Respiratory effects have also been reported in humans from inhalation exposure to nickel. No information is available regarding the reproductive or developmental effects of nickel in humans, but animal studies have reported such effects. Human and animal studies have reported an increased risk of lung and nasal cancers from exposure to nickel refinery dusts and nickel subsulfide. Animal inhalation studies of soluble nickel compounds (*i.e.*, nickel carbonyl) have reported lung tumors. Dermal exposure to nickel may produce contact dermatitis. Adverse effects of oral nickel exposure are not well-described. We have classified nickel refinery dust and nickel subsulfide as Group A, human carcinogens, and nickel carbonyl as a Group B2, probable human carcinogen, by inhalation exposure.

12. Lead

Lead is a very toxic element, causing a variety of effects at low oral or inhaled dose levels. Brain damage, kidney damage, and gastrointestinal distress may occur from acute (short-term) exposure to high levels of lead in humans. Chronic (long-term) exposure to lead in humans results in effects on the blood, CNS, blood pressure, and kidneys. Children are particularly sensitive to the chronic effects of lead, with slowed cognitive development, reduced growth, and other effects reported. Reproductive effects, such as decreased sperm count in men and spontaneous abortions in women, have been associated with lead exposure. The developing fetus is at particular risk from maternal lead exposure, with low birth weight and slowed postnatal neurobehavioral development noted. Human studies are inconclusive regarding lead exposure and cancer, while animal studies have reported an increase in kidney cancer from lead exposure by the oral route. We have classified lead as a Group B2, probable human carcinogen.

13. Selenium

Selenium is a naturally occurring substance that is toxic at high concentrations but is also a nutritionally essential element. Acute (short-term) exposure to elemental selenium, hydrogen selenide, and selenium dioxide by inhalation results primarily in respiratory effects, such as irritation of the mucous membranes, pulmonary edema, severe bronchitis, and bronchial pneumonia. Studies of humans chronically (long-term) exposed to high levels of selenium in food and water have reported discoloration of the skin, pathological deformation and loss of nails, loss of hair, excessive tooth decay and discoloration, lack of mental alertness, and listlessness. The consumption of high levels of selenium by pigs, sheep, and cattle has been shown to interfere with normal fetal development and to produce birth defects. Results of human and animal studies suggest that supplementation with some forms of selenium may result in a reduced incidence of several tumor types. One selenium compound, selenium sulfide, is carcinogenic in animals exposed orally. We have classified elemental selenium as a Group D, not classifiable as to human carcinogenicity, and selenium sulfide as a Group B2, probable human carcinogen.

II. Summary of Responses to Major Comments and Changes to the Brick and Structural Clay Products Manufacturing Proposed NESHAP

In response to the public comments received on the proposed BSCP rule, we made several changes in developing today's final BSCP rule. The major comments and our responses and rule changes are summarized in the following sections. A more detailed summary can be found in the Response-to-Comments document, which is available from several sources (see **SUPPLEMENTARY INFORMATION** section).

A. Air Pollution Control Devices

The most significant change to the proposed BSCP rule concerns our conclusions regarding the effective application of air pollution control devices (APCD) to existing kilns. The EPA received numerous comments from industry representatives, kiln manufacturers, and air pollution control device vendors on issues related to the application and performance of APCD. The MACT floor in the proposed rule was based on the use of dry lime injection fabric filters (DIFF), dry lime scrubber/fabric filters (DLS/FF), or wet scrubbers (WS). Another technology commonly used to control emissions from brick kilns, dry limestone adsorbers (DLA), was not considered to be a MACT floor technology at the time of proposal because we had concerns with monitoring options and our data indicated that the DLA could not achieve HAP emissions reductions equivalent to the reductions achieved by DIFF, DLS/FF, or WS technologies. However, as discussed in the paragraphs below, many commenters reported disadvantages of the DIFF, DLS/FF, and WS technologies for BSCP kilns and provided information to address our concerns about DLA technology. Consequently, the final rule allows some sources to use the DLA technology.

Several commenters argued that DIFF, DLS/FF, and WS technologies are not proven or commercially available for BSCP kilns. Commenters pointed out that, with the exception of one facility, full-scale WS have never been used on

BSCP kilns, although some short-term pilot tests of WS have been conducted. The commenters pointed out that injection systems (such as DIFF and DLS/FF) and wet control devices need a certain airflow to operate properly, and different products may require different airflows, some of which could be outside of the range within which the APCD operates properly. In addition, commenters pointed out that during kiln slowdowns (which could be caused by a situation such as an economic slowdown), the APCD may not be able to operate at all because of reduced kiln airflow.

Several commenters expressed concerns about waste disposal. Commenters stated that DIFF and DLS/FF systems produce large amounts of solid waste that is difficult and expensive to dispose of. Commenters stated that WS would not be viable options for many BSCP plants because of wastewater treatment issues (*e.g.*, limited or no sewer access, wastewater treatment costs). Commenters added that recycling of WS wastewater back into the brick body is not an option because of problems created by the soluble salts in the water (*e.g.*, scumming and efflorescence) and because the volume of wastewater generated would exceed process water needs even if recycling were possible.

Commenters also raised concerns about retrofitting existing BSCP kilns with DIFF, DLS/FF, and WS technologies. Commenters pointed out that brick color, the primary factor in brick sales, is affected by kiln airflow. Thus, retrofitting with an APCD that changes the kiln airflow would change the recipes for the manufacture of brick in a tunnel kiln. Thus, years of experience in the colors produced by the unique firing characteristics of a kiln would be lost. Implications are serious if a facility cannot match its existing product line.

The commenters also charged that we did not account for other retrofitting problems associated with installing DIFF, DLS/FF, or WS on older kilns, and the costs associated with these problems. Commenters also described how attempts at retrofitting kilns with these APCD have resulted in significant amounts of kiln downtime and permanent reductions in kiln production capacities. As stated by the commenters, none of the retrofits have been entirely successful in terms of reducing emissions while not disrupting the production process, and several have had dramatic negative impacts on the production process. At one facility that retrofitted two kilns with DIFF, the capacities of the two kilns decreased from 13.5 cars per day to 12.2 cars per day because of changes in the kiln airflow that resulted from the retrofit. This resulted in a loss of revenue of about $1 million per year. Another retrofit DIFF (multi-stage injection system) installation at a different facility was reported to be extremely problematic, and the cost of the APCD, which was originally estimated at $1 million, is now over $2 million and the system is still not operating correctly more than 2 years later. The facility has experienced numerous problems with the basic design of the unit, including improperly designed dampers and reagent feeding systems. A facility representative stated that the problems are largely due to the fact that few systems have been developed for brick kiln operations; therefore, vendors are still learning (often on the industry's nickel) how to design these systems. In the facility's public comments, they stated that they plan to never build another hot baghouse (DIFF or DLS/FF) due to the massive operating problems associated with them. A retrofit DLS/FF system, the only one that has been attempted in the U.S. to date, also was problematic. The facility stated that they have experienced maintenance and material quality problems that have resulted in kiln downtime. The facility added that the problems stem from the fact that the system is a prototype without a substantial operational, troubleshooting and maintenance history, which has left the facility in the position of having to diagnose and solve the problems as the system operates. In addition, the company that installed this system is no longer quoting systems to the BSCP industry.

Numerous commenters recommended that EPA allow use of DLA. The commenters described the operating benefits of DLA, including ease of operation, low operating cost, little down time, and the ability to handle kiln fluctuations with changing throughputs. Most importantly, DLA do not impact kiln operation. The commenters pointed out that DLA do not require a minimum airflow like DIFF, DLS/FF, or WS technologies. One commenter pointed out that once a DLA is designed for maximum airflow, any fluctuations below this maximum only create more contact time between the kiln exhaust gases and the limestone, which would likely increase the effectiveness of the DLA and would not impact the operation of the kiln. The commenters pointed out that DLA have been used extensively in Europe for many years and also are the most prevalent APCD used in the BSCP industry in the United States. Many commenters stated that DLA should be allowed if they can meet the BSCP standards. The commenters indicated that plants should not have to request site-specific monitoring parameters for DLA because they are the most prevalent technology. In addition, some commenters discussed the high costs and limited additional HAP reduction associated with replacing existing DLA with a DIFF system.

Several commenters felt that EPA disregarded or "bashed" DLA and disagreed with EPA's conclusions regarding DLA in the preamble to the proposed rule. Specifically, the commenters disagreed that: DLA generate particulate matter (PM) emissions; long-term test data that demonstrate DLA performance over the life of the sorbent are not available; DLA limestone is not continuously replaced; and the performance of DLA decreases as the sorbent is re-used because the ability of the sorbent to adsorb HF and HCl decreases.

We disagree with commenters that the use of DIFF has not been proven in the brick industry. The DIFF and DLS/FF systems are a proven control technology for kilns with a given minimum airflow rate. We do, however, believe that retrofitting existing kilns with DIFF or DLS/FF systems is not feasible in many cases. We recognize that WS may not be practical or low-cost for most facilities, but believe they could be a legitimate option for some facilities (*e.g.*, facilities with sewer access). We acknowledge that retrofitting existing BSCP kilns with certain APCD (particularly those that affect kiln airflow) can alter time-honored recipes for brick color, thereby changing the product. We acknowledge that DLA are used extensively around the world to control emissions from brick kilns. In developing the description of DLA technology for the preamble to the proposed rule, we used the technical data available to us at the time. We had no intention of "bashing" DLA but simply reported the data at hand.

After consideration of the comments received regarding DIFF, DLS/FF, WS, and DLA technologies, we have come to new conolusions regarding the effective application of these devices. We now believe that DLA are the only currently available technology that can be used to retrofit existing kilns without potentially significant impacts on the production process, and we have revised today's final rule accordingly. In addition, we believe that, because of the retrofit concerns that we have identified, it is not technologically and economically feasible for an existing

small tunnel kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2 and whose design capacity is increased such that it is equal to or greater than 9.07 Mg/hr (10 tph) of fired product (for the remainder of this preamble, these sources will be referred to as "existing small kilns that are rebuilt such that they become large kilns") to meet the relevant standards (*i.e.*, new source MACT) by retrofitting with a DIFF, DLS/FF, or WS. In addition, we believe that it is not technologically and economically feasible for an existing large DLA-controlled kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2 (for the remainder of this preamble, these sources will be referred to as "existing large DLA-controlled kilns that are rebuilt") to meet the relevant (*i.e.*, new source MACT) standards by retrofitting with a DIFF, DLS/FF, or WS. Accordingly, we have added regulatory language in 40 CFR 63.8390(i) to provide that an existing small kiln that is rebuilt such that it becomes a large kiln and an existing large DLA-controlled tunnel kiln that is rebuilt do not meet the definition of reconstruction in 40 CFR 63.2 and are not subject to the same requirements as new and reconstructed large tunnel kilns. However, it is technologically and economically feasible for both types of kilns described in 40 CFR 63.8390(i) to retrofit with a DLA (or to continue operating an existing DLA) and we have revised today's final rule to require that such kilns meet emission limits that correspond to the level of control provided by a DLA. We continue to believe that DIFF, DLS/FF, and WS are appropriate technologies for new large tunnel kilns and for reconstructed large tunnel kilns that were equipped with DIFF, DLS/FF, or WS prior to reconstruction. However, DLA are the only APCD that have been demonstrated on small tunnel kilns (which have smaller airflows than large tunnel kilns), and, therefore, the requirements for new and reconstructed small tunnel kilns are based on the level of control that can be achieved by a DLA. We note that facilities have the flexibility to select any control device or technique that ensures that emissions from their brick kilns are in compliance with the emission limits set forth in the final rule. Each of the APCD described above have advantages and disadvantages to their use, and the selection of the APCD to meet the requirements of the final rule will be dependent on site-specific parameters.

B. Affected Source

1. Production-Rate Limit

The proposed rule subcategorized tunnel kilns based on a 9.07 Mg/hr (10 tph) design capacity. We requested comment on the appropriate design capacity-based subcategorization level in the preamble to the proposed rule. We received numerous comments regarding subcategorization of tunnel kilns. While some commenters agreed with the 9.07 Mg/hr (10 tph) distinction among tunnel kiln subcategories, several commenters thought that the 9.07 Mg/hr (10 tph) limit was arbitrarily assigned. The commenters charged that EPA did not use all available data in determining the appropriate size cutoff. Many commenters argued that the design capacity limit should be higher based on available data (*i.e.*, 10.1 Mg/hr (11.1 tph) or 12.1 Mg/hr (13.3 tph)). The commenters disagreed that the cutoff should be rounded down from 10.1 Mg/hr (11.1 tph) to 9.07 Mg/hr (10 tph).

Some commenters noted that a design capacity distinction gives a competitive advantage to facilities operating smaller kilns. One commenter disagreed that there was a technological basis for differentiating among tunnel kilns producing above or below 9.07 Mg/hr (10 tph). The commenter stated that EPA may not subcategorize tunnel kilns to reduce costs.

Through subcategorization, we are able to define subsets of similar emission sources within a source category if differences in emissions characteristics, processes, APCD viability, or opportunities for pollution prevention exist within the source category. Section 112(d)(1) of the CAA states "the Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory" in establishing emission standards. Thus, we have discretion in determining appropriate subcategories based on classes, types, and sizes of sources. We used this discretion in developing subcategories for the BSCP source category. We first subcategorized kilns based on type (*i.e.*, periodic kilns versus tunnel kilns). We then further subcategorized tunnel kilns based on kiln size. Our distinctions are based on technological differences in the equipment. For example, periodic kilns are smaller than tunnel kilns and operate in batch cycles, whereas tunnel kilns operate continuously. There are also differences in the effective application of air pollution controls. To our knowledge, HAP emissions from periodic kilns have not successfully been controlled. Similarly, we distinguished between tunnel kilns with design capacities above and below 9.07 Mg/hr (10 tph) at proposal in part because the APCD we believed to be the best performers (DIFF, DLS/FF, and WS) were not demonstrated on existing tunnel kilns with design capacities below roughly 9.07 Mg/hr (10 tph). For the reasons discussed below, we revisited the appropriate subcategorization level in response to comments on the proposal when developing today's final rule. While we continue to believe that 9.07 Mg/hr (10 tph) is the appropriate subcategorization level, our reasons for choosing that level have changed since proposal in light of new information that we received during the public comment period about DLA controls and the three proposed MACT controls (DIFF, DLS/FF, and WS).

As discussed earlier, numerous commenters pointed out serious concerns regarding retrofitting existing kilns with APCD such as DIFF, DLS/FF, and WS. Therefore, we now consider DLA to be the only currently available technology that can be used to retrofit existing kilns, including existing small kilns that are rebuilt such that they become large kilns and existing large DLA-controlled kilns that are rebuilt, without potentially significant impacts on the production process.

In response to comments suggesting that we include new data in our analyses, we updated our data base with information on new kilns, new APCD (except those controls that we consider to achieve the lowest achievable emission rate (LAER) as specified in section 112(d)(3)(A) of the CAA), changes in kiln capacities, and changes in facility ownership. We used the information submitted by commenters and made followup calls to States and individual facilities for additional clarification as necessary to update our data base.

We used our updated data base in reevaluating all aspects of the proposed standards. The smallest tunnel kiln with MACT floor controls (*i.e.*, with DLA controls reflecting the existing source MACT floor under today's final rule) in our updated database has a capacity of 8.3 Mg/hr (9.1 tph). Rounding up to the nearest integer, based on current application of APCD to BSCP tunnel kilns, we believe that 9.07 Mg/hr (10 tph) continues to be an appropriate subcategorization level. Commenters have stated that a smaller tunnel kiln (*e.g.*, 4.5 Mg/hr (5 tph) capacity) is dissimilar from a larger tunnel kiln (*e.g.*, 13.6 Mg/hr (15 tph) capacity), especially with regard to the airflow, which is a key operating parameter for APCD. Airflow is particularly important for

lime injection-type systems (DIFF and DLS/FF), because the injected lime is carried through the reaction chamber (or duct) by the kiln exhaust gas. For a given lime injection rate, if a minimum exhaust flow is not maintained, the sorbent can settle in the duct work and cause APCD malfunction. Furthermore, APCD malfunctions can affect the airflow within the kiln, and can destroy product that is in the kiln. We believe that DIFF and DLS/FF systems, if attempted on smaller kilns, would experience more difficulties with respect to airflow than systems on larger kilns because as the design airflow decreases, the acceptable operating range also would be expected to decrease. Any fluctuation in airflow would be expected to have a greater impact on APCD operation as the size of the system decreases. Given the technological concerns and the capacities of currently-controlled tunnel kilns, we maintain that a design capacity-based subcategorization level of 9.07 Mg/hr (10 tph) is appropriate for existing tunnel kilns.

We acknowledge the comments suggesting that 10.1 Mg/hr (11.1 tph) should be the size cutoff based on the smallest DIFF-controlled tunnel kiln. However, because we now consider that the performance of a DLA represents the MACT floor for existing sources (and DIFF, DLS/FF, and WS also can meet the emission limits), we considered the smallest non-LAER DLA-controlled kiln in setting the subcategorization level. We disagree that 12.1 Mg/hr (13.3 tph) would have been the proper level for proposal or for the final rule. We believe that consideration of technological differences and the effective application of APCD to kilns of different sizes is the appropriate method of selecting a subcategorization level. We maintain that 9.07 Mg/hr (10 tph) is appropriate.

We understand that, regardless of the particular subcategorization level selected, there will be facilities that operate kilns with throughputs slightly above the level and some that operate kilns at slightly below the level. Facilities operating kilns slightly above the subcategorization level have the option of accepting a federally enforceable permit limit to limit their throughput to below the level. Facilities operating just below the level must make careful decisions regarding expansion of their kilns. We acknowledge that facilities operating near the subcategorization level must make decisions regarding permit limits and expansions based on facility-specific considerations (*e.g.*, control costs, impact on revenue). However, as some commenters have pointed out, cost is not an appropriate criteria for us to use in establishing subcategories, because our discretion for establishing subcategories is limited, under the CAA, to distinguishing among classes, types, and sizes of sources.

2. R&D Kiln Definition

One commenter requested that we change the definition of research and development (R&D) kiln so that it is consistent with the definition of R&D in section 112(c)(7) of the CAA and most other NESHAP. Therefore, today's final rule includes a revised definition of research and development kiln that is consistent with section 112(c)(7) of the CAA and other NESHAP.

C. Existing Source MACT

1. Consideration of Synthetic Area Sources in the MACT Floor Determinations for Existing Sources

In the preamble to the proposed BSCP rule, we requested comment on inclusion of synthetic area sources (also called synthetic minor sources) in the MACT floor determinations for existing tunnel kilns. For the remainder of this preamble, we will refer to these sources as synthetic minor sources. Synthetic minor sources are those facilities that emit fewer than 10 tons per year of any HAP and fewer than 25 tons per year of any combination of HAP because they use some emission control device (or devices), the operation of which is required by a Federally Enforceable State Operating Permit (FESOP). In the absence of such controls, these sources would be major.

Inclusion of synthetic minor sources in the MACT floor determination was an issue prior to proposal because whether or not synthetic minor sources were included would affect the level of control represented by the floor determinations for existing large tunnel kilns (*i.e.*, tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph)). Had synthetic minor sources been excluded, the MACT floor for existing tunnel kilns would have been "no emissions reductions." With synthetic minor sources included (as we proposed), the MACT floor for existing tunnel kilns was based on a DIFF, DLS/FF or WS.

Industry representatives asserted, prior to proposal, that the BSCP MACT floor determination should not include synthetic minor sources. We rejected the idea of excluding synthetic minor sources from the MACT floor determination for several reasons discussed in the preamble to the proposed rule. (See 67 FR 47894, 47911–47912, July 22, 2002.) Nevertheless, because of the industry representatives' arguments, we requested comment from all interested parties on inclusion of synthetic minor sources in MACT floor determinations.

Following proposal, numerous industry representatives commented on the issue of whether to include synthetic minor sources in MACT floor determinations. The industry representatives commented that only major sources are included in the listed BSCP source category, and therefore, only major sources are to be used in the MACT floor determination. The commenters referenced section 112(a)(1) of the CAA, which defines major source as a source that "emits or has the potential to emit *considering controls* 10 tons per year * * *." (emphasis added), and stated that by definition, synthetic minor sources are not major sources. The commenters noted that EPA did not include true area sources (or minor sources) in the MACT floor determination and stated that synthetic minor sources should be treated similarly for purposes of establishing MACT floors.

An environmental group also commented on the issue of including synthetic minor sources in MACT floor determinations. The commenter supported EPA's decision to include synthetic minor sources in the MACT floor for BSCP. The commenter stated that the CAA requires EPA to include synthetic minor sources in MACT floor determinations. The commenter stated that excluding consideration of the best-controlled sources (which became synthetic minor sources as a result of effective controls) would contradict the CAA section 112(d) MACT floor methodology established by Congress. The commenter argued that such exclusion would weaken emission standards required for existing sources, and increase the levels of air toxics released into the environment.

Section 112(d) of the CAA directs us to establish emission standards for each category or subcategory of major sources and minor sources of HAP listed for regulation pursuant to section 112(c) of the CAA. Each such standard must reflect a minimum level of control known as the MACT floor. (See CAA section 112(d).) However, section 112 of the CAA does not specifically address synthetic minor or synthetic area sources, which include those sources that emit fewer than 10 tons per year of any HAP or fewer than 25 tons per year of any combination of HAP because they use some emission control device(s), pollution prevention techniques or other measures (collectively referred to as controls in this preamble) adopted

under Federal or State regulations. If not for the enforceable controls they have implemented, synthetic minor sources would be major sources under section 112 of the CAA.

We believe that the better interpretation of the CAA's plain language and legislative history requires that synthetic minor sources be included in MACT floor determinations. First, the plain language of the statute makes clear that our MACT floor determinations are to reflect the best sources in a category. For new sources in a category or subcategory, the MACT floor shall not be less stringent than the emission control that is achieved in practice by the *best-controlled* similar source, as determined by EPA. (See CAA section 112(d)(3), emphasis added.) For existing sources in a category or subcategory with 30 or more sources, the MACT floor may be less stringent than the floor for new sources in the same category or subcategory but shall not be less stringent than the average emission limitation achieved by the *best performing* 12 percent of the existing sources (for which the Administrator has emissions information). (See CAA section 112(d)(3)(A), emphasis added.[1]) Thus, section 112(d)(3) of the CAA requires that MACT floors reflect what the best-controlled new sources and the best-performing existing sources achieve in practice. These phrases contain no exemptions and are not limited by references to sources with or without controls. Therefore, they suggest that all of the best-controlled or best-performing sources should be considered in MACT floor determinations, regardless of whether or not such sources rely upon controls.

Furthermore, section 112(d)(3) of the CAA expressly excludes certain sources that meet LAER requirements from MACT floor determinations for existing sources. (See CAA section 112(d)(3)(A).) The fact that Congress expressly excluded such LAER sources but did not also exclude synthetic minor sources suggests that no exclusion was intended for synthetic minor sources. Indeed, nothing in the statute suggests that EPA should exclude a control technology from its consideration of the MACT floor because the technology is so effective that it reduces source emissions such that the source is no longer a major source of HAP. (See 67 FR 36,460 and 36,464, May 23, 2002, stating this rationale for including synthetic minor sources in the floor determination for the proposed NESHAP for municipal solid waste landfills.)

Some commenters argue that because the BSCP source category only includes major sources and synthetic minor sources are non-major by definition, synthetic minor sources (like true area sources) fall outside the regulated source category and should not be considered in MACT floor determinations. EPA agrees that the BSCP source category includes only major sources. (See 67 FR 47,894 and 47,898, July 22, 2002.) However, EPA disagrees that the CAA contemplates that synthetic minor sources must be treated like true area sources and excluded from MACT floor determinations. Section 112(a) of the CAA defines a major source as:

> any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants * * *.

(*See* CAA section 112(a)(1).) An area source is defined as any stationary source of hazardous air pollutants that is not a major source. (See CAA section 112(a)(1).) In the major source definition, the reference to a source's potential to emit considering controls allows the interpretation that a source's potential to emit before and after controls is relevant, such that synthetic minor sources may be considered within the meaning of this definition and included in MACT floor determinations for categories of major sources.[2] Some commenters appear to suggest that the reference to a source's potential to emit considering controls can only mean a source's potential to emit after controls have been implemented. While it is possible to read the phrase in this manner in isolation, this interpretation would have the effect of excluding the best-performing sources in a category from MACT floor determinations and therefore would be contrary to the statutory mandate that EPA set MACT floors based on the levels the best-controlled new sources and the best-performing existing sources achieve in practice. We believe the statutory reference to potential to emit considering controls should be read in a manner consistent with the other requirements of section 112(d) of the CAA to allow for the consideration of synthetic minor sources in MACT floor determinations for categories of major sources.

In addition, the legislative history suggests that synthetic minor sources should be included in MACT floor determinations. In a floor statement, Senator Durenberger stated that in implementing section 112(d)(3) of the CAA, "the [Senate] managers intend the Administrator to take whatever steps are necessary to assure that [the Administrator] has collected data on *all of the better-performing sources within each category*. [The Administrator] must have a data-gathering program sufficient to assure that [EPA] does not miss *any sources that have superior levels of emission control*." (See Environment and Natural Resources Policy Division, Congressional Research Service, 103d Cong., S.Prt. 103–38 (prepared for the U.S. Senate Committee on Environment and Public Works), A Legislative History of the Clean Air Act Amendments of 1990 at 870, Nov. 1993, emphasis added.) This statement underscores that Congress intended for MACT floor determinations to reflect consideration of all of the sources in each category with the best emission controls. We believe it would be inconsistent with Congress's intent and the plain language of the CAA to exclude synthetic minor sources—those sources with superior controls which became synthetic minor sources by implementing such controls—from MACT floor determinations.

We believe that the inclusion of synthetic minor sources in MACT floor determinations is justified because of the reasons explained above. Even if the MACT floor determination had been "no emissions reductions" we believe that a departure from the MACT floor to a beyond-the-floor standard, based on DLA technology, is viable because the benefits associated with the emissions reductions will exceed the cost of installing and operating the technology.

2. MACT Floors for Existing Sources

Some commenters questioned how the MACT floor for existing sources was

[1] If a category or subcategory has fewer than 30 sources, the floor shall be "the average emission limitation achieved by the *best performing* 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory." (See CAA section 112(d)(3)(B), emphasis added.)

[2] We believe this approach is not inconsistent with our policy that existing sources that limit their potential to emit to below the major source threshold prior to the first compliance deadline under a MACT standard will not be subject to the standard, as one commenter suggests. (See Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, to EPA Regions, "Potential to Emit for MACT Standards—Guidance on Timing Issues," May 16, 1995.) Including synthetic minor sources in MACT floor determinations ensures that MACT floors reflect the best-performing sources, as the CAA requires. At the same time, our policy recognizes that sources that already achieve or perform better than the MACT floors need not be subject to the MACT standards.

set. Some commenters thought that control devices installed for sulfur oxides (SO_x) control (rather than for HAP control) should not be considered in the MACT floor. Other commenters felt that costs should be a consideration.

One commenter charged that EPA has simply set MACT floors based on control technology type and that EPA did not identify the relevant best performers and set floors reflecting their average emission level. The commenter noted that factors other than control device type affect emissions and that EPA must consider all non-negligible factors in setting MACT floors and considering beyond-the-floor measures. The commenter stated that if EPA believes it is unworkable to consider all factors, then perhaps EPA should base standards on actual emissions data which reflects all the factors influencing a source's performance. The commenter also noted that EPA picked the worst performance of any source that used the chosen technology to set the floor for PM.

A detailed discussion of how we determined the MACT floor for existing large tunnel kilns (*i.e.*, tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph)) is provided below. Although the discussion in the example below focuses on existing large tunnel kilns that exhaust directly to the atmosphere or to an APCD, the same MACT floor methodology was used for existing large tunnel kilns that exhaust to sawdust dryers prior to exhausting to the atmosphere, existing small tunnel kilns that exhaust directly to the atmosphere or to an APCD, existing small sawdust-fired tunnel kilns that duct to sawdust dryers, and existing periodic kilns. Details of these MACT floor determinations were discussed in the preamble to the proposed rule. (See 67 FR 47909–47912, July 22, 2002.) Section 112(d)(3) is the section of the CAA that dictates how we must establish MACT floors. Section 112(d)(3) of the CAA states that:

> The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than—
>
> (A) Rhe average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 171) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources * * *.

With the exception of the LAER provisions in section 112(d)(3)(A) of the CAA, the CAA requires us to base the MACT floor on the best-performing sources without consideration of why facilities decided to control emissions. Therefore, if an APCD is reducing HAP emissions (*e.g.*, HF, HCl, or HAP metals), it is irrelevant if sources installed APCD for SO_X or visible emissions control for purposes of conducting MACT floor determinations.

We determined the MACT floor control level for existing sources using the following general procedure:

(1) We reviewed available data on pollution prevention techniques (including substitution of raw materials and/or fuels) and the performance of add-on control devices to determine the techniques that were viable for and effective at reducing HAP emissions;

(2) For each subcategory, we ranked the kilns from the best performing to the worst performing based on the emission reduction technique used on the kilns;

(3) For each subcategory, we then identified the 94th percentile kiln and the emission reduction technique that represented the MACT floor technology; and

(4) For each subcategory, we then selected production-based or percent-reduction emission limits that correspond to the 94th percentile kiln and emission reduction technique, and we based our selections on the available data while considering variability in the performance of a given emission reduction technique.

To identify the best-performing emission reduction techniques, we reviewed available data on pollution prevention techniques (*i.e.*,, substitution of raw materials and/or fuels) and the performance of add-on control devices. We determined that substitution of raw materials and/or fuels is not an option because substitution of raw materials and/or fuels could affect the ability of a facility to duplicate its current product line. In addition, it is impractical for facilities to import, from a distance of more than a few miles, the large amounts of raw material that are required (most facilities are located in close proximity to their raw material source). With respect to use of low-HAP fuels, our available test data for the BSCP industry do not show identifiable differences in emissions based on kiln fuel type; that is, the contribution of raw materials to HAP emissions far outweighs the contribution of the fuels. In addition, fuel type can impact the color of a product, and any requirement that would require a kiln to change fuel type could cause the kiln to be unable to match an existing product line. While we agree that factors other than APCD type can affect emissions, we do not have the data to determine the specific degree of the effect of factors other than APCD on emissions, and we believe that, for the BSCP industry, factors other than APCD use are not viable MACT floor or beyond-the-floor control options. Our data show that add-on APCD have a large effect on emissions, and further show that the presence or absence of an APCD is likely the greatest factor in determining a BSCP kiln's actual performance. It follows that the subset of BSCP kilns that are the best performers are those with add-on APCD. Therefore, our analysis focused on the performance of add-on control devices.

Prior to proposal we concluded that the best-performing add-on control devices were DIFF, DLS/FF, and WS. Based on the comments received following proposal (as discussed elsewhere in this preamble) regarding retrofit concerns with these technologies, we now believe that DLA are the only currently available technology that can be used to retrofit existing large kilns without potentially significant impacts on the production process. Thus, DLA are the best-performing APCD for existing large tunnel kilns.

We ranked the kilns within each subcategory according to APCD use. Information on the number of kilns and the types of APCD was based primarily on responses to a survey of the industry and additional information gathered following the survey including public comments on the proposed rule. Equipment in use at major sources and synthetic minor sources was used in the equipment ranking. In accordance with section 112(d)(3)(A) of the CAA, equipment at kilns that achieved LAER less than 18 months before proposal was not included in the equipment ranking. When we ranked the large tunnel kilns, we treated kilns equipped with DLA as the best-controlled sources, although DIFF, DLS/FF, and WS also can achieve the level of performance of a DLA. We ranked the kilns by APCD rather than actual unit-specific emissions reductions because we do not have emissions test data for all kilns.

Section 112(d)(3) of the CAA specifies that we set standards for existing sources that are no less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources (for which the Administrator has emissions information) where there are 30 or more sources in the category or subcategory. Our interpretation of average emission limitation is that it is a measure of central tendency, such as the arithmetic mean or the median. If the median is used when there are at least 30 sources, then the emission level achievable by the source and its APCD that is at the bottom of the top 6 percent of the best-performing sources (*i.e.*, the 94th percentile) represents the MACT floor control level. We based our MACT floors for each BSCP subcategory on this interpretation. Nineteen percent (22 of 115) of the existing large tunnel kilns located at synthetic minor sources or major sources are controlled by a DLA (12), DIFF (4), DLS/FF (4), or WS (2). Because more than 6 percent of the large tunnel kilns reduce emissions by some technique, emissions reductions from these kilns are required under the CAA. We then considered which of these controls are proven to be applicable to existing tunnel kilns, and we ranked these kilns to determine the appropriate MACT emission limits. We consider the 12 DLA to be equivalent and believe that this type of control can be applied to any existing large tunnel kiln without causing potentially significant production problems. We consider the performance of all of the DLA to be equivalent because there currently are two types of DLA in the industry (supplied by two manufacturers), and we have test data for both designs that show HF removal efficiencies that are within 1 percent of one another. We excluded DIFF and DLS/FF from our ranking of controls for existing sources because of the reported problems caused by applying DIFF and DLS/FF to existing kilns. We excluded WS from our ranking of controls for existing sources because many facilities do not have proven wastewater disposal options. Therefore, we only considered DLA in our ranking, and accordingly, the 94th percentile source (the 7th best-controlled source) is a DLA-controlled kiln. Therefore, the MACT floors for existing large tunnel kilns are based on the level of control achieved by a DLA. We have DLA outlet test data for 7 of the 12 existing large DLA-controlled tunnel kilns, and therefore, we are confident that our test data are within the best-controlled 6 percent of sources. Furthermore, the single best-performing source, based on our available DLA outlet data, is one of the three sources for which a control efficiency is available.

Section 112(d)(2) of the CAA dictates how we must establish MACT. The MACT can either be established at the MACT floor, or can be some control level more stringent than the MACT floor or beyond-the-floor. Section 112(d)(2) of the CAA states that:

> Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies * * *.

Although section 112(d)(3) of the CAA does not allow us to consider cost when determining MACT floors, we do consider costs when we examine beyond-the-floor control options according to section 112(d)(2) of the CAA. We acknowledge the commenters' concerns regarding the cost of the proposed standards. We determined that beyond-the-floor control measures would not be appropriate for existing large BSCP kilns because of retrofit costs arising from technical difficulties in retrofitting DIFF, DLS/FF, or WS. Thus, the emission limits for existing large tunnel kilns in today's final rule are based on the level of control achievable with a DLA.

It is our goal to set emission standards that reflect the performance of the best-controlled sources. Once we identified the subset of the best-controlled BSCP sources (*i.e.*, DLA-controlled kilns), we used the highest emission level associated with these best performers to set the emission standard because it was our intent to set emission limits that reflect the performance that the best-controlled sources continually achieve considering variability. All sources, including the best-controlled sources, have variability in emissions. For example, data (individual test runs) from two tests conducted on one DLA-controlled kiln showed HF control efficiencies that ranged from 91.6 percent to 96.4 percent. This variability may result from APCD performance, and also could result from uncertainty associated with the test methods. Commenters have agreed with our approach to setting the production-based emission limits at or slightly higher than the highest data point, because this approach accounts for variability in the performance of individual sources, variability that could exist across the industry, and uncertainty in the test methods used to measure emissions. Furthermore, use of the highest emission level associated with the best performers prevents sources within the best-controlled subset from having to remove their existing APCD and replace it with a new one that may or may not achieve slightly better performance.

We believe and intend that a well-operated DLA will achieve the emission limits set forth in this rulemaking. However, concerns have recently been raised that if high concentrations of sulfur exist in the kiln exhaust gas stream, the ability of a well-operated DLA to reduce the target acid gas HAP emissions (*i.e.*, HF and HCl) may be compromised. The data we have does not suggest that these concerns are justified. If the EPA receives information showing that they are, EPA will take prompt action to resolve the issue through rulemaking and ensure that a facility with a well-operated DLA will be in compliance with the rule. The EPA will also work with any affected facilities to ensure that they are not subject to inappropriate sanctions before we are able to complete such a rulemaking.

D. New Source MACT

Several commenters disagreed that a large (design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product) tunnel kiln equipped with DIFF, DLS/FF or WS was the best-controlled similar source for all new tunnel kilns. The commenters expressed concern that the DIFF, DLS/FF or WS controls proposed for all new tunnel kilns have not been demonstrated on smaller kilns. The commenters argued that emissions from small (*e.g.*, less than 9.07 Mg/hr (10 tph)) and large tunnel kilns are different because the required airflow and pollutant loading is different. The commenters stated that controls such as DIFF, DLS/FF, or WS do not decrease in size or cost for kilns below 9.07 Mg/hr (10 tph) design capacity. The commenters thought that the proposed standards for new tunnel kilns would prevent future construction of and upgrades to smaller kilns. The commenters recommended that a throughput cutoff be provided for new and reconstructed kilns. One commenter suggested that EPA create a size-cutoff for new kilns, where the best-controlled similar source for smaller new kilns is a DLA-controlled kiln, and DLS/FF, DIFF, or WS for the larger

kilns. One commenter noted the potential of existing kilns triggering new source requirements during reconstruction. The commenter requested that the ability of small businesses to overhaul existing kilns be addressed in the final rule.

These commenters have addressed several related issues including the selection of the best-controlled similar source, differences between small and large tunnel kilns, the feasibility of the proposed MACT-level controls in controlling emissions from smaller tunnel kilns or reconstructed tunnel kilns, and the costs of new controls. In responding to these comments, we have re-evaluated our analysis of MACT for new and reconstructed tunnel kilns. In the original MACT analysis developed for the proposed rule, we recognized the inherent differences between small and large tunnel kilns and established a subcategorization level of 9.07 Mg/hr (10 tph). The proposed 9.07 Mg/hr (10 tph) subcategorization level applied to both existing and new tunnel kilns. For new and reconstructed sources, we selected the best-controlled similar source (DIFF, DLS/FF, WS) that would be applied to all new sources regardless of size. In re-evaluating this analysis and in light of several comments that described the inherent differences and issues with the application of DIFF, DLS/FF, and WS control technologies to small tunnel kilns or reconstructed tunnel kilns, we have revised MACT for new sources. We also have added language in 40 CFR 63.8390(i) to provide that it is not technologically and economically feasible for two types of existing kilns that would otherwise meet the criteria for reconstruction under 40 CFR 63.2 to meet the relevant standards—*i.e.*, new source MACT—and that such kilns do not fall within the definition of reconstruction and are not subject to new source MACT requirements. The two types of kilns are existing small kilns that are rebuilt such that they become large kilns and existing large DLA-controlled tunnel kilns that are rebuilt. Today's final emission limits for those kilns and for new and reconstructed small tunnel kilns are based on the performance of DLA control technology. The final emission limits for new large tunnel kilns are based on the performance of DIFF, DLS/FF, and WS control technology. In addition, existing large tunnel kilns equipped with DIFF, DLS/FF or WS are reconstructed sources subject to new source MACT requirements if they meet the criteria for reconstruction in 40 CFR 63.2. Such kilns must continue to meet new source MACT limits, which are based on the performance of DIFF, DLS/FF, and WS.

We agree with the commenters that DIFF, DLS/FF, and WS control technologies have not been demonstrated on small kilns. However, we believe that the 9.07 Mg/hr (10 tph) size represents the threshold where emission control using DIFF, DLS/FF, or WS is technically feasible and demonstrated. Smaller kilns have smaller airflow rates than larger kilns and any fluctuations in airflow rates can have a significant impact on the ability of DIFF, DLS/FF, or WS to operate correctly. For new and reconstructed small kilns, the DLA control technology has been demonstrated to perform adequately despite the lower airflow rates; DLA control systems are not as sensitive to airflow changes as DIFF, DLS/FF, or WS control systems. In addition, existing small kilns that are rebuilt such that they become large kilns and existing large DLA-controlled kilns that are rebuilt would experience the same types of retrofit problems that we described for existing tunnel kilns, and we believe that such tunnel kilns should be subject to requirements that can be met with a DLA. The DIFF, DLS/FF, and WS control systems have been demonstrated on new large kilns. Therefore, MACT for new and reconstructed large tunnel kilns is based on DIFF, DLS/FF, and WS control and is unchanged from proposal. Finally, the determination of MACT for new sources at the floor does not take the cost of control into consideration.

Our revised standards for new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled kilns that are rebuilt are based on the use of a DLA, which is considerably less expensive than the other MACT controls. The revised standards should minimize the commenters' concerns over the costs of reconstructing older kilns.

E. Cost and Economic Impacts

Numerous comments were received regarding costs of the proposed rule. Commenters contended that EPA did not consider the full costs of the rule (*e.g.*, costs associated with problems retrofitting existing kilns). In general, commenters indicated that the economic impacts to brick industry would be severe. Several commenters pointed out that the brick industry is losing market share to cheaper building materials (*e.g.*, vinyl) that are more detrimental to the environment. The commenters stated that the proposed rule would have a negative effect on the future of many small businesses and the communities where they are located. The commenters expressed concern that the proposed rule would limit the opportunity for continued operation or expansion of brick plants throughout the U.S. The commenters noted that increased production costs would increase brick prices, causing brick to become less competitive with other materials and brick imports to rise, putting small U.S. companies out of business. Several commenters stated that the costs of the rule as proposed would prevent their company from ever replacing, performing a major repair on, or upgrading their existing kiln. Some commenters stated that the rule as proposed would eventually cause their company to go out of business. Some commenters added that they live in an economically depressed area and other jobs are not readily available.

One commenter disagreed with the Administrator's certification that the proposed rule would not create a significant impact on a substantial number of small entities. The commenter submitted an Economic Impacts Analysis (EIA). The commenter calculated and presented the Sales Test, Cash Flow Test, and Profit Test criteria which the commenter believes shows a greater number of small businesses at risk than does EPA's EIA. In addition, the commenter provided several specific comments on EPA's EIA. The commenter argued that the rule as proposed is a significant rulemaking per Executive Order (E.O.) 12866. A few commenters provided specific comments on the monitoring, reporting, and recordkeeping costs in the Office of Management and Budget (OMB) 83–I form and supporting statement.

Commenters also questioned the environmental benefits of the BSCP rule as proposed. One commenter questioned why the BSCP rule is necessary if brick manufacturing emissions are not causing public health problems or adverse environmental effects. Another commenter argued that there is no epidemiological evidence that anyone in North America has been harmed by brick plant HF emissions and that cancer incidence in brick plant workers is not higher than for the general population.

As previously mentioned in this preamble, section 112(b) of the CAA contains a list of HAP identified by Congress and authorizes EPA to add to that list pollutants that present or may present a threat of adverse effects to human health or the environment. Section 112(c) of the CAA requires us to list all categories and subcategories of major and area sources of HAP and to

establish NESHAP for the listed source categories and subcategories under section 112(d) of the CAA. Because BSCP manufacturing is a listed source category containing major sources of HAP, we are required by the CAA to establish NESHAP for BSCP manufacturing.

As stated previously, MACT can either be established at the MACT floor, or can be some control level more stringent than the MACT floor or beyond the floor. Section 112(d)(3) of the CAA does not allow us to consider cost when determining MACT floors. We are only allowed to consider costs when we examine beyond-the-floor control options according to section 112(d)(2) of the CAA. We acknowledge the commenters' concerns regarding the cost of the proposed rule. At proposal, we determined that beyond-the-floor control measures would not be appropriate for the BSCP industry, in part because of costs.

Following proposal, we reevaluated the MACT floors for existing tunnel kilns and have revised the standards to incorporate use of DLA on existing large tunnel kilns. We also revised the MACT standards for new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled tunnel kilns that are rebuilt such that the standards are based on the level of performance that can be achieved by a DLA. (MACT requirements for existing small tunnel kilns and new and reconstructed large tunnel kilns remain unchanged.) We continue to agree that beyond-the-floor control measures are not warranted for the BSCP industry. The revised MACT standards for new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled kilns that are rebuilt are the same as the revised standards for existing large tunnel kilns. These revised standards are less costly and should reduce concerns regarding cost of retrofitting or rebuilding existing kilns and starting up new small kilns. Environmental benefits of today's final BSCP rule are discussed later in this preamble.

EPA reviewed the economic impact analysis report submitted by the commenter. We have revised our EIA to identify additional small businesses affected by the rule. We have also incorporated the lower revised cost estimates into the EIA. Impacts on small businesses are considerably lower in the revised analysis and prices are predicted to rise by less than one percent on average. The results of our revised EIA, as well as a discussion of the impact of today's final rule on small businesses, are presented later in this preamble.

Comments on the costs of monitoring, reporting, and recordkeeping were incorporated into the revised OMB 83–I form and supporting statement as appropriate. A discussion of the OMB 83–I form and supporting statement prepared in compliance with the Paperwork Reduction Act is presented later in this preamble.

F. Test Data and Emission Limits

1. HF and HCl Emission Limits

Commenters stated that the test data EPA used to set the HF and HCl limits are questionable. An independent consultant, hired by the BSCP industry, reviewed the data and determined that six of the seven test runs used the wrong filter media. A glass filter media was used instead of a Teflon filter. The commenter suggested that, as a result, the data could be biased. One commenter also charged that EPA removed high test runs without any technical basis even though all of these runs met the same quality control (QC) criteria as other runs. Finally, one commenter stated that EPA's use of both HF and total fluorides (TF) data to develop the average uncontrolled HF emission factor (which was used in developing the HF emission limit) was unsupported, and the commenter believes that EPA should use only the HF test data because HF is the regulated pollutant.

We have reviewed the emission tests mentioned by the commenter and agree that there are some problems with most of the available test data, and we have accounted for any potential bias by revising the emission limits. In consultation with EPA's Emission Measurement Center (EMC), we used a conservative approach to determine the possible impact of the bias on the percent reduction emission limits. The analysis showed that our available percent reduction data could be as much as about 5 percent high, and we, therefore, decreased the corresponding HF and HCl percent reduction requirements by 5 percent and adjusted the corresponding production-based emission limits accordingly. In response to the commenter's assertion that we dropped two test runs without a technical reason, we examined the test runs in question and incorporated one of the two runs back into the data set used for developing the standards. Finally, in response to the appropriateness of using TF data in calculating the average HF emission factor, while the average of the TF and HF data sets suggest that TF and HF measurements are similar, we recognize the inconsistencies between the few available side-by-side HF and TF tests and we, therefore, decided to remove the TF data from the HF emission factor calculation. Based on the three issues discussed above, we revised the emission limits for kilns where MACT is based on use of DIFF, DLS/FF, or WS (*i.e.*, for new large kilns). Today's final rule requires new large kilns to limit HF emissions to 0.029 kilograms per megagram (kg/Mg) (0.057 pounds per ton (lb/ton)) of fired product or reduce HF emissions by 90 percent; and limit HCl emissions to 0.028 kg/Mg (0.056 lb/ton) or reduce HCl emissions by 85 percent.

The revised HF and HCl emission limits for existing large tunnel kilns, new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled tunnel kilns that are rebuilt are based on the use of a DLA for HAP reduction. Two HF emission tests (both conducted on the same source) and two total fluorides emission test are available for DLA-controlled kilns, and the tests showed HF or TF control efficiencies of 92.3 percent (HF), 96.4 percent (HF), 93.3 percent (TF), and 93.5 percent (TF). Similar to the DIFF and DLS/FF tests, we identified problems with the two HF emission tests that could have biased the control efficiencies high. To account for this uncertain bias, and considering typical vendor guarantees for DLA systems (vendors will guarantee 90 percent HF reduction unless a lesser percentage meets the customer's need, in which case the vendors typically provide lower guarantees), we selected a percent reduction emission limit of 90 percent for HF. We applied this 90 percent reduction to the revised average HF emission factor of 0.29 kg/Mg (0.57 lb/ton) to calculate a production-based HF emission limit of 0.029 kg/Mg (0.057 lb/ton). Control efficiency data for HCl are available from two tests on a single DLA-controlled kiln. The tests averaged 30.7 percent control, and we selected a percent reduction HCl emission limit of 30 percent. We applied this 30 percent reduction to the average HCl emission factor of 0.19 kg/Mg (0.37 lb/ton) to calculate a production-based HCl emission limit of 0.13 kg/Mg (0.26 lb/ton).

Percent of HAP metals in PM. Several commenters noted that HAP metals and PM data from four facilities (0.16 percent, 0.99 percent, 2.8 percent, and 4.5 percent) were used to arrive at 1.9 percent of the PM is PM HAP. The

commenters stated that EPA included an invalid, high data point for manganese in developing the percentage of PM that is PM HAP. We have examined the test run mentioned by the commenters and agree that the run should be voided. Our revised analyses now indicate that the overall percentage of PM that is HAP metals is 0.72 percent.

PM limit. Other commenters argued that a PM limit for brick kilns is unnecessary. One commenter noted that metals occur naturally in clays or shales used to make bricks and that PM emissions from BSCP plants are clay dust. The commenter argued that metals are locked into the structure of the clay dust and are not bio-available to affect humans through respiratory adsorption, ingestion, or dermal contact. Some commenters noted that there is limited information on the amount of HAP metals in the PM emitted. Commenters pointed out that EPA is not setting a PM limit for clay refractory kilns. Some commenters disagreed that PM is an adequate surrogate for HAP metals emissions. Commenters also requested that a percent reduction alternative be allowed for the PM standard, similar to the percent reduction limits for HF and HCl.

We agree that PM emitted from BSCP facilities is largely clay dust, and that metals are naturally occurring in clays and shales used to make bricks. Many BSCP facilities apply surface coatings or body additives containing HAP metals to their products, and these coatings are another potential source of HAP metals emissions. These types of additives and coatings are not used in the manufacture of clay refractories.

We have four emission tests for HAP metals from tunnel kilns and all of these tests measured some level of HAP metals emissions including emissions of antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium. Based on these data, we believe that all kilns emit some level of HAP metals and, therefore, we are regulating HAP metals emissions. Test data for HAP metals are not available for clay refractories kilns.

We are unaware of any information to support the idea that the HAP metals are locked into the structure of the clay and are not bio-available to affect humans. In the absence of such information and in the interest of protecting public health, we assume conservatively that the HAP metals are bio-available and could affect human health. This assumption is consistent with the conservative approach embodied in the CAA section 112(b)(2) directive that EPA add pollutants to the statutory list of HAP that "may" present adverse risks to human health and the environment through various exposure routes.

We used PM as a surrogate for HAP metals so that individual emission limits would not be based on the limited and variable data. We examined the available HAP metals test data and calculated that about 95 percent of the HAP metals emissions are in particulate form. Furthermore, the types of control technologies used on BSCP kilns remove PM and would indiscriminately remove particulate HAP metals. The United States Court of Appeals for the District of Columbia Circuit stated in a December 15, 2000 decision (in response to the National Lime Association (NLA) challenge of the use of PM as a surrogate for HAP metals), "if HAP metals are invariably present in cement kiln PM, then even if the ratio of metals to PM is small and variable, or simply unknown, PM is a reasonable surrogate for the metals—assuming * * * that PM control technology indiscriminately captures HAP metals along with other particulates." Our use of PM as a surrogate for HAP metals in the final BSCP rule is consistent with this decision.

We typically do not include percent reduction as an alternative for PM because a percent reduction standard rewards those facilities that have high inlet PM loadings. We believe that this is different from the percent reduction standards for HF and HCl because facilities do not typically have options for reducing the uncontrolled levels of HF or HCl. Therefore, we are not providing an alternative percent reduction standard for PM.

The revised PM emission limit for existing large tunnel kilns, new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled tunnel kilns that are rebuilt is based on the use of a DLA. Data from four tests conducted at the outlets of DLA were available for establishing a production-based emission limit, and we selected the highest PM data point as the emission limit in order to account for variability. Today's final rule contains a PM emission limit of 0.21 kg/Mg (0.42 lb/ton) of fired product for existing large tunnel kilns, new and reconstructed small tunnel kilns, existing small kilns that are rebuilt such that they become large kilns, and existing large DLA-controlled tunnel kilns that are rebuilt. The PM emission limit for new and reconstructed large tunnel kilns is unchanged from proposal (0.060 kg/Mg (0.12 lb/ton) of fired product).

G. Monitoring Requirements

Numerous comments were received on the proposed monitoring requirements. Some commenters felt that the monitoring, reporting, and recordkeeping requirements were unreasonable. Commenters noted that the monitoring requirements would require additional and higher skilled personnel.

Under section 114(a)(3) of the CAA, owners or operators of major sources are required to conduct enhanced monitoring of affected sources to ensure compliance with applicable emission standards. In response to this mandate, we have incorporated continuous compliance requirements into all part 63 standards, generally in the form of continuous emissions monitoring or continuous parameter monitoring. We believe that continuous monitoring is needed to ensure that emission controls are operated properly. However, 40 CFR 63.8(f) allows owners and operators of affected sources to request approval for alternative monitoring procedures to demonstrate compliance with emission limitations.

Although we have eliminated some of the proposed monitoring requirements (such as fabric filter inlet temperature monitoring) from today's final rule, we have retained most of the proposed monitoring requirements. We believe that those monitoring requirements are the minimum needed to ensure continuous compliance with the emission limits.

1. Operation, Maintenance, and Monitoring (OM&M) Plan

Some commenters felt that development of an OM&M plan was overly burdensome. One commenter thought the requirement to include OM&M procedures for kiln operation was unjustified. Another commenter noted possible contradictions of OM&M plan requirements and Table 7 of the proposed BSCP rule (the table showing applicability of the General Provisions to part 63).

After reviewing these comments, we decided that OM&M plans do not have to include procedures for monitoring the operation and maintenance of tunnel kilns, and we have written the final rule accordingly. However, we continue to believe that site-specific OM&M plans are necessary to ensure continued proper operation of any control device that is used to comply with the final rule.

Regarding the apparent contradictions between 40 CFR 63.8425(b)(8) through (10) and Table 7 of the proposed rule, we did not cite the General Provisions

to part A in the proposed 40 CFR 63.8425 (b)(8) through (10), but specified that OM&M plans must include operation and maintenance, quality assurance, and reporting and recordkeeping procedures that are consistent with the General Provisions. Therefore, we believe there is no contradiction between 40 CFR 63.8425 (b)(8) through (10) and Table 7 of the proposed rule. However, we did clarify in Table 7 of the final rule that 40 CFR 63.8(c)(4) does not apply to subpart JJJJJ because 40 CFR 63.8425 and 63.8465 specify the requirements for continuous monitoring systems (CMS).

Some commenters requested clarification on whether OM&M plans (and startup, shutdown, and malfunction plans (SSMP)) are required for kilns that would not be subject to control requirements (*e.g.*, existing small tunnel kilns). Another commenter questioned if an OM&M plan would be required if compliance is achieved without a control device. The BSCP NESHAP applies only to affected sources. Under today's final rule, an existing small tunnel kiln is not an affected source. Therefore, the requirements for OM&M plans, SSMP, and other monitoring, notification, reporting, and recordkeeping requirements do not apply to those kilns. Owners or operators will be required to prepare an OM&M plan and SSMP for any kiln that is an affected source even if the kiln can meet the emission limits without the use of a control device.

2. Bag Leak Detectors

Commenters indicated that bag leak detectors are unnecessary, overly protective, and maintenance intensive. The commenters noted that bag failure is noticeable because PM emissions would be visible at the stack. Several commenters requested that opacity or visible emissions (VE) determinations be allowed as opposed to bag leak detectors.

We agree with the commenters that periodic VE checks should provide a reasonable alternative to bag leak detectors, and we have written the final rule accordingly. In today's final rule, owners and operators of affected kilns that are controlled with a DLS/FF or DIFF can choose between installing a bag leak detection system or performing daily VE checks. Today's final rule also includes a provision for decreasing the frequency of VE checks provided no VE are observed.

3. Water Injection Rate Monitoring on DLS/FF

Three commenters stated that DLS/FF water injection rate monitoring has nothing to do with HF or HCl removal (but is important for sulfur dioxide (SO_2) removal) and recommended that the provision for monitoring DLS/FF water injection rate be eliminated.

After reviewing the available information, we decided to eliminate the requirement for water injection rate monitoring on affected DLS/FF-controlled kilns. Water injection is used to enhance the removal of SO_2 by a DLS/FF, but has little effect on removal of HF and HCl.

4. Fabric Filter Inlet Temperature

Several commenters recommended that the requirement to monitor fabric filter inlet temperature be eliminated from the rule as proposed. The commenters explained that it would be impractical to hold the fabric filter inlet temperature to within 25 degrees below the average established during the performance test. The fabric filter inlet temperature varies frequently, much more than 25 degrees, because of many process factors. Other commenters noted that fabric filter inlet temperature has little relevancy to acid gas control. One commenter stated that control systems using hydrated lime are generally known to have increased HCl and HF removal when temperatures increase.

As a result of these comments, we have eliminated the requirement for monitoring fabric filter inlet temperatures on affected kilns that are controlled with a DLS/FF or DIFF. We believe that the other monitoring requirements (*e.g.*, lime feed rate monitoring and periodic VE checks) that we have incorporated into the final rule are adequate for ensuring continuous compliance with the emission limits.

5. DLA Parameter Monitoring

Many commenters suggested potential parametric monitoring requirements for DLA that could be used to demonstrate continuous compliance. Various commenters suggested documenting use, on a continuous basis, of the same limestone that was used during the performance test demonstrating compliance. Other suggestions included monitoring pressure drop (demonstrating airflow); limestone flow; and inlet and/or exhaust gas temperature.

We have incorporated parameter monitoring requirements for DLA into the final rule based on information provided by commenters and a recent site visit to a facility operating a DLA. Today's final rule will require owners and operators of affected kilns with DLA to continuously monitor the pressure drop across the DLA; perform a daily visual check of the limestone hopper and storage bin (located at the top of the DLA), and record the limestone feeder setting daily; and perform periodic VE observations. In addition, owners and operators will be required to document the source of the limestone used during the most recent performance test and maintain records that demonstrate that the source of limestone has not changed.

6. Continuous Emission Monitoring Systems

In the preamble to the proposed rule, we requested comment on requiring the application of PM continuous emission monitoring systems (CEMS) as a method to assure continuous compliance with the proposed PM emission limits for BSCP tunnel kilns. While we believe there is evidence that PM CEMS should work on BSCP tunnel kilns, we received no comments in support of requiring PM CEMS. Commenters opposed use of CEMS when less expensive, but effective, parametric monitoring alternatives are available. Therefore, today's final rule does not require use of PM CEMS or any other type of CEMS. We believe that the parameter monitoring requirements specified in the final rule are adequate for ensuring continuous compliance.

7. Establishing/Re-Establishing Production Rate

Several commenters requested that the process weight threshold be based on average annual throughput instead of hourly or monthly throughput. One commenter pointed out that the nature of brick production does not allow for spikes in emissions. Several commenters stated that the averaging period used to determine the MACT floor applicability to existing tunnel kilns must have the same production averaging basis as the data used in setting the subcategorization level. The commenters stated that it is not reasonable to base the standard on a 12-month averaging period and then enforce the floor on an instantaneous or 30-day rolling averaging period.

One commenter requested clarification as to whether EPA would require a retest if the maximum production level of a kiln would be higher than the level observed during the performance test. The commenter added that several States recognize that capacity and maximum production are difficult figures to calculate for a brick kiln because they are highly dependent

on the specific characteristics of a product (size, percent void).

We agree with the commenters that a kiln's process weight threshold (*e.g.*, design capacity level) should be based on average annual tonnage rather than on the proposed 30-day rolling average. We have revised the final BSCP rule accordingly to require the ton per hour production capacity of a kiln to be calculated based on the maximum amount of BSCP (in tons) that can be produced in a 12-month period divided by 8,760 hours per year.

Regarding the question of whether we will require a retest if the maximum production level of a kiln is higher than the level observed during the performance test, a retest will be required because an increase in production is likely to increase emissions, and the operating limits that are based on the performance test would no longer demonstrate continuous compliance with the emission limits.

8. Test Methods

One commenter requested that we allow any of the applicable EPA Method 5 variations to demonstrate compliance with the PM standard. The commenter pointed out that a facility with high SO_2 could reduce the potential for SO_2 to be counted as PM by using EPA Method 5B. We are not including EPA Method 5B as a test method because our emission limit is based on EPA Method 5 and includes tests on sources with high SO_2 emissions. Individual facilities will have the option of requesting an alternative test method.

One commenter on the proposed clay ceramics rule requested that the final rule provide facilities with the option to use either EPA Method 26A or EPA Method 320 for all required stack testing for HF and HCl. This comment applies for both BSCP and clay ceramics. Therefore, we have modified today's final BSCP rule to include EPA Method 320 as an alternative to EPA Method 26A.

H. Startup, Shutdown, and Malfunction

1. APCD Bypass

Several commenters stated that the BSCP rule, as proposed, would not allow the kiln control device to be bypassed at any time. Various commenters stated that the proposed MACT controls (DIFF, DLS/FF, or WS) must maintain a given flow to perform efficiently. Thus, the APCD would dictate how the kiln is operated. During initial kiln startup or subsequent kiln startups or shutdowns, airflow temperatures and volumes would be below APCD design volumes. The heat from the furnace zone could damage the kiln walls and cars if not vented. Therefore, the ability to bypass during startups, routine maintenance, and emergency shutdowns of the APCD is needed.

Several commenters noted that brick kilns are constant flow devices that cannot just be turned off without detrimental impact to large volumes of product (*e.g.*, character, color, and quality of brick) and the kiln itself. The commenters stated that days to weeks may be needed to properly shut down a brick kiln. One commenter noted that kilns operate continuously 2 to 3 years before being shut down for routine maintenance.

Commenters stated that short periods of bypass are necessary to conduct routine preventive maintenance inspections of APCD. Commenters pointed out that the control devices currently employed have and use bypass capability for routine maintenance and emergency repairs.

We generally agree with the commenters that some provision is needed to allow the control device on tunnel kilns to be bypassed for routine maintenance of the control device, and we have revised the rule accordingly. Under 40 CFR 63.8420(e) of today's final rule, owners and operators of an affected tunnel kiln can bypass the kiln control device for a cumulative period of up to 4 percent of the annual operating hours for the kiln. Based on the data and other information submitted by commenters on the proposed rule, we believe that the amount of time equating to 4 percent of annual kiln operating hours is adequate for completing routine maintenance on the types of controls that are likely to be used to comply with the BSCP NESHAP.

To comply with this bypass provision, owners or operators must submit a request to us for a routine control device maintenance exemption. The request must justify the need for the routine maintenance on the control device and the time required to complete the maintenance activities. The request also must describe the maintenance activities and the frequency of the maintenance activities, explain why the maintenance cannot be accomplished during kiln shutdowns, and describe how emissions will be minimized during the period when the kiln is operating and the control device is offline. Upon approval, the request for exemption must be incorporated by reference in, and attached to, the affected source's title V permit. During any period when the kiln is operating and the kiln control device is offline, the owner or operator must minimize HAP emissions. The duration of such periods also must be minimized.

We also note that the bypass provision included in today's final rule does not apply to startups, shutdowns, or malfunctions. 40 CFR 63.6(f)(1) explicitly states that nonopacity emission standards, such as the proposed emission limits for HF, HCl, and PM, "* * * apply at all times except during periods of startup, shutdown, and malfunction * * *" Startups, shutdowns, and malfunctions must be addressed in a facility's SSMP.

2. Initial Startup

Commenters stated that it is impractical to meet emission standards during initial startup of a tunnel kiln. The commenters indicated that it can take from weeks to a year to bring new BSCP kilns online. In addition, APCD such as DIFF, DLS/FF, or WS cannot be brought online until adequate temperature and airflow ranges are met. The commenters indicated that roughly 75 percent of design gas flow rate or kiln production rate must be obtained before a DIFF or DLS/FF could begin to operate properly. Another commenter stated that the proposed initial testing deadline (180 days following the compliance date) would not provide enough time for a new kiln to come up-to-speed.

We recognize that an extended period of time may be needed for the initial startup of a new kiln and have added a definition of initial startup to the BSCP final rule to address the concerns expressed by the commenters. The definition differentiates between DLA-controlled kilns and DIFF-, DLS/FF-, or WS-controlled kilns, because DLA are not sensitive to airflow and only require that the kiln gases are hot enough to avoid condensation in the DLA. Avoiding condensation is necessary because water and calcium carbonate (limestone) combine to make cement, and any introduction of water in the DLA reaction chamber could cause the limestone to be cemented together. In the final rule, we provided the following definition: "Initial startup" means: (1) For a new or reconstructed tunnel kiln controlled with a DLA, and for a tunnel kiln that would be considered reconstructed but for 40 CFR 63.8390(i)(1) or 40 CFR 63.8390(i)(2), the time at which the temperature in the kiln first reaches 260 °C (500 °F) and the kiln contains product; or (2) for a new or reconstructed tunnel kiln controlled with a DIFF, DLS/FF, or WS, the time at which the kiln first reaches a level of production that is equal to 75 percent of the kiln design capacity or 12 months

after the affected source begins firing BSCP, whichever is earlier. Although some commenters suggested that initial startup for DIFF-, DLS/FF-, and WS-controlled kilns be defined in terms of airflow, we defined initial startup in terms of production rate for DIFF-, DLS/FF-, and WS-controlled kilns because the final rule requires owners and operators of affected sources to monitor production rate, whereas flowrate monitoring is not required under today's final rule. We included the stipulation for DIFF-, DLS/FF-, and WS-controlled kilns that initial startup occurs no later than 12 months after the new kiln begins firing BSCP to prevent facilities from operating an affected new or reconstructed kiln at just less than 75 percent of the kiln design capacity long term to circumvent the final rule. A similar stipulation is not necessary for DLA-controlled kilns because the kiln temperature requirement is such that the kiln cannot produce BSCP until well after the temperature is reached.

By defining initial startup in today's final rule, we also have clarified the compliance date for new and reconstructed sources, which is specified in terms of the initial startup. Thus, new and reconstructed DIFF-, DLS/FF-, and WS-controlled tunnel kilns beginning operation after the promulgation date will be allowed to reach 75 percent of the kiln design capacity before initial startup is triggered and the APCD must come online. New and reconstructed DLA-controlled tunnel kilns, and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8390(i)(1) or 40 CFR 63.8390(i)(2), beginning operation after the promulgation date will trigger initial startup when the temperature in the kiln first reaches 260°C (500°F) and the kiln contains product. Performance testing is required 180 days following the compliance date (*i.e.*, 180 days following initial startup). Facilities wishing to conduct performance testing to determine the level of air pollution control necessary may conduct such testing prior to achieving initial startup.

3. Startup

Two commenters expressed concern with how startup is defined with respect to the proposed rule. The commenters stated that, under the proposed rule, a kiln could be considered to be operating if only one burner was operating. However, a kiln could have as many as 100 burners or more. To clarify what constitutes kiln startup we added to today's final rule a definition of "startup" that incorporates "starting the production process."

4. Deviations

One commenter felt that the requirement of reporting emissions as deviations during startup, shutdown, or malfunction (SSM) is inappropriate because facilities are not required to be in compliance with the emission limitations during SSM. Another commenter requested that EPA make it clear the deviations are not necessarily an indication of noncompliance or excess emissions.

The term deviation applies to events during which an affected source fails to meet an emission limitation or comply with another requirement of the final rule. Deviations are not synonymous with violations; depending on the circumstances, a deviation may or may not be a violation of an applicable requirement. We agree with the commenter that an affected source need not be in compliance with emission limits during periods of SSM. Although we consider non-compliance with emission limits during startup, shutdown, and malfunction to be deviations from the emission limits, we do not consider these deviations to be violations of the emission limits. 40 CFR 63.7(e)(1) specifies that, "Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test, nor shall emissions in excess of the level of the relevant standard during periods of startup, shutdown, and malfunction be considered a violation of the relevant standard unless otherwise specified in the relevant standard or a determination of noncompliance is made under 40 CFR 63.6(e)." As indicated in Table 7 of the final rule, this language of the general provisions to part 63 does apply to subpart JJJJJ. The definition of deviation included in today's final rule is consistent with how deviation is defined in other NESHAP, and has not been changed since proposal.

I. Risk-Based Approaches

The preamble to the proposed BSCP rule requested comment on whether there might be further ways to structure the BSCP rule to focus on the facilities which pose significant risks and avoid the imposition of high costs on facilities that pose little risk to public health and the environment. Specifically, we requested comment on the technical and legal viability of two risk-based approaches: (1) An applicability cutoff for threshold pollutants under the authority of CAA section 112(d)(4); and (2) subcategorization and delisting under the authority of CAA sections 112(c)(1) and 112(c)(9).[3] We indicated that we would evaluate all comments before determining whether either approach would be included in the final BSCP rule. Numerous commenters submitted detailed comments on these risk-based approaches. These comments are summarized in the BSCP Response-to-Comments document (see **SUPPLEMENTARY INFORMATION** section).

Based on our consideration of the comments received and other factors, we have decided not to include the risk-based approaches in today's final BSCP rule. The risk-based approaches described in the proposed BSCP rule and addressed in the comments we received raise a number of complex issues. In addition, we are under time pressure to complete the BSCP rule, because the statutory deadline for promulgation has passed and a deadline suit has been filed against EPA. (See Sierra Club v. Whitman, Civil Action No. 1:01CV01537 (D.D.C.).) Given the range of issues raised by the risk-based approaches and the need to promulgate a final rule expeditiously, we believe that it is appropriate not to include any risk-based approaches in today's final BSCP rule. Nonetheless, we expect to continue to consider risk-based approaches in connection with other proposed NESHAP where we have described and solicited comment on such approaches. Finally, while we are not including risk-based approaches in today's final BSCP rule, we have included a number of other measures that we expect will reduce the costs and burdens on the affected sources.

III. Summary of the Final Brick and Structural Clay Products Manufacturing NESHAP

A. What Source Category Is Regulated by the Final Rule?

Today's final rule for BSCP manufacturing applies to BSCP manufacturing facilities that are, are located at, or are part of, a major source of HAP emissions. The BSCP manufacturing source category includes those facilities that manufacture brick (including, but not limited to, face brick, structural brick, and brick pavers); clay pipe; roof tile; extruded floor and wall tile; and/or other extruded, dimensional clay products. Brick and structural clay products primarily are produced from common clay and shale. Production of BSCP typically consists of processing and handling the raw materials, forming

[3] See 68 FR 1276 (January 9, 2003) (Plywood and Composite Wood Products Proposed NESHAP) and docket number A–98–44, Item No. II–D–525 (White papers submitted to EPA outlining the risk-based approaches).

and cutting bricks and shapes, and drying and firing the bricks and shapes. One by-product of brick manufacturing is crushed brick, which is produced at some facilities by crushing reject bricks.

There are a total of 189 domestic BSCP manufacturing facilities; 170 of these facilities primarily produce brick, and 19 of these facilities primarily produce structural clay products. The 189 BSCP manufacturing facilities are located in 39 States and are owned by 89 companies. Seventy-six of the companies are small businesses, and these 76 companies own 92 of the BSCP manufacturing facilities. Thirteen of the companies are large businesses, and these 13 companies own 97 BSCP manufacturing facilities.

All BSCP are fired either in continuous (tunnel or roller) or batch (periodic) kilns. Because the vast majority of continuous kilns are tunnel kilns, continuous kilns, including roller kilns, will be referred to as tunnel kilns for the remainder of this preamble. A total of 314 permitted and operable tunnel kilns were reported by industry; 302 of these kilns are located at facilities that are estimated, based on uncontrolled emissions, to be major sources. Of the 302 tunnel kilns located at major sources, 275 are located at brick manufacturing facilities and 27 are located at structural clay products manufacturing facilities. A total of 227 permitted and operable periodic kilns were reported by industry; 164 of these kilns are located at facilities that are estimated to be major sources. Of the 164 periodic kilns located at major sources, 81 are located at brick manufacturing facilities and 83 are located at structural clay products manufacturing facilities.

The primary HAP emissions sources at BSCP manufacturing plants are tunnel kilns and periodic kilns, which emit HF, HCl, and HAP metals. Kilns also emit PM and SO_2. Other sources of HAP emissions at BSCP manufacturing plants are the raw material processing and handling equipment. The APCD that are used by the industry to control emissions from kilns include DIFF, DLS/FF, DLA, WS, and fabric filters.

B. What Are the Affected Sources?

The existing affected source, which is the portion of each source in the category for which we are setting emission standards, is any existing large tunnel kiln. Large tunnel kilns have a design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product. Such tunnel kilns may be fired by natural gas or other fuels, including sawdust. Sawdust firing typically involves the use of a sawdust dryer because sawdust typically is purchased wet and needs to be dried before it can be used as fuel. Consequently, some sawdust-fired tunnel kilns have two process streams, including: A process stream that exhausts directly to the atmosphere or to an APCD, and a process stream in which the kiln exhaust is ducted to a sawdust dryer where it is used to dry sawdust before being emitted to the atmosphere.

Today's final rule focuses on those process streams from existing large tunnel kilns that exhaust directly to the atmosphere or to an APCD. For existing large tunnel kilns that do not have sawdust dryers, the kiln exhaust process stream (*i.e.*, the only process stream) is subject to the requirements of today's final rule. In accordance with CAA section 112(d)(1), we have divided tunnel kilns that duct exhaust to sawdust dryers into two classes for purposes of regulation. For existing large tunnel kilns that ducted exhaust to sawdust dryers prior to July 22, 2002, only the process stream that is emitted directly to the atmosphere or to an APCD is subject to the requirements of today's final rule; any process stream from such kilns that is ducted to a sawdust dryer is not subject to those requirements.

By contrast, for existing large tunnel kilns that first duct exhaust to sawdust dryers on or after July 22, 2002, all of the exhaust (*i.e.*, both the process stream that is emitted directly to the atmosphere or to an APCD and the process stream that is ducted to a sawdust dryer) is subject to the same level of control requirement as a new tunnel kiln.

In addition, each new or reconstructed tunnel kiln is an affected source and all process streams from new or reconstructed tunnel kilns are subject to the requirements of today's final rule. The requirements of today's final rule for new and reconstructed tunnel kilns are different for small and large kilns. Small tunnel kilns have design capacities less than 9.07 Mg/hr (10 tph) of fired product, and large tunnel kilns have design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product. A source is a new affected source if construction began on or after July 22, 2002. An affected source is reconstructed if the criteria defined in 40 CFR 63.2 are met, as qualified by 40 CFR 63.8390(i). An affected source is existing if it is not new or reconstructed.

An existing tunnel kiln with a federally enforceable permit condition that restricts kiln operation to less than 9.07 Mg/hr (10 tph) of fired product on an annual average basis is not subject to the requirements of today's final rule. Kilns that are used exclusively for R&D and not used to manufacture products for commercial sale, except in a *de minimis* manner, are not subject to the requirements of today's final rule. Finally, kilns that are used exclusively for setting glazes on previously fired products are not subject to the requirements of today's final rule.

C. When Must I Comply With the Final Rule?

Existing affected sources must comply within 3 years of May 16, 2003. New and reconstructed affected sources with an initial startup before May 16, 2003 must comply no later than May 16, 2003. New and reconstructed affected sources with an initial startup after May 16, 2003 must comply upon initial startup. Existing area sources that subsequently become major sources have 3 years from the date they become major sources to come into compliance. Any portion of existing facilities that become new or reconstructed major sources and any new or reconstructed area sources that become major sources must be in compliance upon initial startup.

D. What Are the Emission Limits?

Today's final rule includes emission limits in the form of production-based mass emission limits and percent reduction requirements. In establishing the HAP emission limits, we selected PM as a surrogate for HAP metals (including mercury in particulate form). Today's final rule contains HF, HCl, and PM emission limits for existing, new, and reconstructed affected sources at BSCP manufacturing facilities, as well as for the following affected sources that would be considered reconstructed but for 40 CFR 63.8390(i): Existing small tunnel kilns whose design capacity is increased such that it is equal to or greater than 9.07 Mg/hr (10 tph) of fired product or existing large DLA-controlled kilns.

If you own or operate an existing large tunnel kiln, a new or reconstructed small tunnel kiln, an existing small kiln that is rebuilt such that it becomes a large kiln, or an existing large DLA-controlled kiln that is rebuilt, you must meet an HF emission limit of 0.029 kg/Mg (0.057 lb/ton) of fired product or reduce uncontrolled HF emissions by at least 90 percent for affected process streams. You must meet an HCl emission limit of 0.13 kg/Mg (0.26 lb/ton) of fired product or reduce uncontrolled HCl emissions by at least 30 percent. You are required to meet a PM emission limit of 0.21 kg/Mg (0.42 lb/ton) of fired product.

If you own or operate a new or reconstructed large tunnel kiln, you must meet an HF emission limit of 0.029 kg/Mg (0.057 lb/ton) of fired product or reduce uncontrolled HF emissions by at least 90 percent for all process streams. You must meet an HCl emission limit of 0.028 kg/Mg (0.056 lb/ton) of fired product or reduce uncontrolled HCl emissions by at least 85 percent. You are required to meet a PM emission limit of 0.060 kg/Mg (0.12 lb/ton) of fired product.

E. What Are the Operating Limits?

In addition to the emission limits, today's final rule includes operating limits that apply to APCD used to comply with the final rule. The operating limits require you to maintain certain process or APCD parameters within levels established during performance tests. Each facility affected by today's final rule is required to prepare, implement, and revise, as necessary, an OM&M plan. The OM&M plan generally specifies the operating parameters to be monitored; the frequency that parameter values will be determined; the limits for each parameter; procedures for proper operation and maintenance of APCD and monitoring equipment; procedures for responding to parameter deviations; and procedures for documenting compliance.

We have established operating limits for DLA, DIFF, DLS/FF, and WS. If you operate a DLA, you must maintain the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test. You also must maintain an adequate amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times. In addition, you must maintain the limestone feeder setting at or above the level established during the performance test and you must use the same grade of limestone from the same source as was used during the performance test. Finally, you must maintain no VE from the DLA stack.

If you operate a DIFF or DLS/FF, you must maintain free-flowing lime in the feed hopper or silo and to the APCD at all times and maintain the feeder setting at or above the level established during your performance test. In addition, you have the option of using a bag leak detection system or monitoring VE. If you use a bag leak detection system, you must initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions according to your OM&M plan, and operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month reporting period. If you monitor VE, you must maintain no VE from the DIFF or DLS/FF stack.

If you operate a WS, you are required to maintain the average scrubber pressure drop, the average scrubber liquid pH, the average scrubber liquid flow rate, and the average chemical addition rate, if applicable, for each 3-hour block period at or above the average values established during your performance test.

If you own or operate an affected source equipped with an alternative APCD or technique not listed in the rule, you must establish operating limits for the appropriate operating parameters subject to prior written approval by the Administrator as described in 40 CFR 63.8(f). You are required to submit a request for approval of alternative monitoring procedures that includes a description of the alternative APCD or technique, the type of monitoring device or procedure that you would use, the appropriate operating parameters that you would monitor, and the frequency that the operating parameter values would be determined and recorded. You must establish site-specific operating limits during your performance test based on the information included in the approved alternative monitoring procedures request. You are required to install, operate, and maintain the parameter monitoring system for the alternative APCD or technique according to your OM&M plan.

F. What Are the Performance Test and Initial Compliance Requirements?

We are requiring owners and operators of all affected sources to conduct an initial performance test using specified EPA test methods to demonstrate initial compliance with the emission limits. A performance test must be conducted before renewing your 40 CFR part 70 operating permit or at least every 5 years following the initial performance test, as well as when an operating limit parameter value is being revised. You must test at the outlet of the APCD and prior to any releases to the atmosphere for all affected sources. If meeting the percent reduction emission limits for HF or HCl, you must also test at the APCD inlet. You must conduct each test while operating at the maximum production level.

Under today's final rule, you are required to measure emissions of HF, HCl, and PM. You must measure HF and HCl emissions using EPA Method 26A, "Determination of Hydrogen Halide and Halogen Emissions from Stationary Sources-Isokinetic Method," 40 CFR part 60, appendix A, or any other alternative method that has been approved by the Administrator under 40 CFR 63.7(f) of the general provisions. The EPA Method 26, "Determination of Hydrogen Chloride Emissions from Stationary Sources," 40 CFR part 60, appendix A, may be used when no acid particulate matter (*e.g.*, HF or HCl dissolved in water droplets emitted by sources controlled by a WS) is present. As an alternative to using EPA Methods 26A or 26, you may measure HF and HCl emissions using EPA Method 320 "Measurement of Vapor Phase Organic and Inorganic Emission by Extractive FTIR" 40 CFR part 63, appendix A. When using EPA Method 320, you must follow the analyte spiking procedures of section 13 of Method 320 unless you can demonstrate that the complete spiking procedure has been conducted at a similar source. Particulate matter emissions must be measured using EPA Method 5, "Determination of Particulate Emissions from Stationary Sources," 40 CFR part 60, appendix A, or any other approved alternative method.

To determine initial compliance with the production-based mass emission limits for HF, HCl, and PM, you must calculate the mass emissions per unit of production for each test run using the mass emission rates of HF, HCl, and PM and the production rate (on a fired-product basis) measured during your performance test. To determine initial compliance with any of the percent reduction emission limits, you must calculate the percent reduction for each test run using the mass emission rates, measured during your performance test, of the specific HAP (HF or HCl) entering and exiting the APCD.

Prior to your initial performance test, you are required to install the CMS (*e.g.*, continuous parameter monitoring system) equipment to be used to demonstrate continuous compliance with the operating limits. During your initial test, you must use the CMS to establish site-specific operating parameter values that represent your operating limits.

If you operate a DLA, you must continuously measure the pressure drop across the DLA during the performance test and determine the 3-hour block average pressure drop. You also must maintain an adequate amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times. In addition, you must establish your limestone feeder setting one week prior to the performance test and maintain the feeder setting for the one-week period

that precedes the performance test and during the performance test. Finally, you are required to document the source and grade of the limestone used during the performance test.

If you operate a DIFF or DLS/FF, you are required to ensure that lime in the feed hopper or silo and to the APCD is free-flowing at all times during the performance test, and you are required to record the feeder setting for the three test runs. If the lime feed rate varies, you are required to determine the average feed rate from the three test runs. If you use a bag leak detection system, you must submit analyses and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems.

If you operate a WS, you are required to continuously measure the scrubber pressure drop, the scrubber liquid pH, the scrubber liquid flow rate, and the chemical addition rate (if applicable). For each WS parameter, you are required to determine and record the average values for the three test runs and the 3-hour block average value.

G. What Are the Continuous Compliance Requirements?

Today's final rule requires that you demonstrate continuous compliance with each emission limitation that applies to you. You must follow the requirements in your OM&M plan and document conformance with your OM&M plan. You are required to operate a CMS to monitor the operating parameters established during your initial performance test as described in the following paragraphs. The CMS must collect data at least every 15 minutes, and you need to have at least three of four equally spaced data values (or at least 75 percent if you collect more than four data values per hour) per hour (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption) to have a valid hour of data. You must operate the CMS at all times when the process is operating. You also have to conduct proper maintenance of the CMS, including inspections, calibrations, and validation checks, and maintain an inventory of necessary parts for routine repairs of the CMS. Using the recorded readings, you must calculate and record the 3-hour block average values of each operating parameter. To calculate the average for each 3-hour averaging period, you must have at least 75 percent of the recorded readings for that period (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption).

If you operate a DLA, you must collect and record data documenting the DLA pressure drop and reduce the data to 3-hour block averages. You must maintain the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test. You also must verify that the limestone hopper, storage bin (located at the top of the DLA), and DLA contain an adequate amount of limestone by performing a daily visual check of the limestone hopper and the storage bin, and if the hopper or storage bin do not contain adequate limestone you must promptly initiate and complete corrective actions according to your OM&M plan. You also must record the limestone feeder setting daily to verify that the feeder setting is being maintained at or above the level established during the performance test. You also must use the same grade of limestone from the same source as was used during the performance test and maintain records of the source and type of limestone. Finally, you must perform daily, 15-minute VE observations in accordance with the procedures of EPA Method 22, "Visual Determination of Fugitive Emissions from Material Sources and Smoke Emissions from Flares," 40 CFR part 60, appendix A. During the VE observations, the kiln must be operating under normal conditions. If VE are observed, you must promptly initiate and complete corrective actions according to your OM&M plan. If no VE are observed in 30 consecutive daily EPA Method 22 tests, you may decrease the frequency of EPA Method 22 testing from daily to weekly for that kiln stack. If VE are observed during any weekly test, you must promptly initiate and complete corrective actions according to your OM&M plan and you must resume EPA Method 22 testing of that kiln stack on a daily basis until no VE are observed in 30 consecutive daily tests, at which time you may again decrease the frequency of EPA Method 22 testing to a weekly basis.

For DIFF and DLS/FF systems, you must maintain free-flowing lime in the feed hopper or silo and to the APCD at all times. If lime is found not to be free flowing via the output of a load cell, carrier gas/lime flow indicator, carrier gas pressure drop measurement system, or other system, you must promptly initiate and complete corrective actions according to your OM&M plan. You also have to maintain the feeder setting at or above the level established during your performance test and record the feeder setting once each shift. If you use a bag leak detection system, you must initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions according to your OM&M plan. You also must operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period. In calculating this operating time fraction, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted. If corrective action is required, each alarm must be counted as a minimum of 1 hour, and if you take longer than 1 hour to initiate corrective action, the alarm time must be counted as the actual amount of time taken to initiate corrective action. As an alternative to using a bag leak detection system, you may monitor VE. If you choose to monitor VE, you must perform daily, 15-minute VE observations in accordance with the procedures of EPA Method 22. During the VE observations, the kiln must be operating under normal conditions. If VE are observed, you must promptly initiate and complete corrective actions according to your OM&M plan. If no VE are observed in 30 consecutive daily EPA Method 22 tests, you may decrease the frequency of EPA Method 22 testing from daily to weekly for that kiln stack. If VE are observed during any weekly test, you must promptly initiate and complete corrective actions according to your OM&M plan and you must resume EPA Method 22 testing of that kiln stack on a daily basis until no VE are observed in 30 consecutive daily tests, at which time you may again decrease the frequency of EPA Method 22 testing to a weekly basis.

For WS, you are required to continuously maintain the 3-hour block averages for scrubber pressure drop, scrubber liquid pH, scrubber liquid flow rate, and chemical addition rate (if applicable) at or above the minimum values established during your performance test.

H. What Are the Notification, Recordkeeping, and Reporting Requirements?

We are requiring owners and operators of all affected sources to submit initial notifications, notifications of performance tests, and notifications of compliance status by the specified dates in the final rule, which may vary depending on whether the affected source is new or existing. In addition to the information specified in 40 CFR

63.9(h)(2)(i), you are required to include the following in your notification of compliance status: (1) The operating limit parameter values established for each affected source (with supporting documentation) and a description of the procedure used to establish the values, and (2) if applicable, analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems.

We are requiring owners and operators of all affected sources to submit semiannual compliance reports containing statements and information concerning emission limitation deviations, out-of-control CMS, periods of startup, shutdown, or malfunction, when actions consistent with your approved SSMP were taken, and periods of routine control device maintenance for facilities obtaining a routine control device maintenance exemption. In addition, if you undertake an action that is inconsistent with your approved SSMP, then you are required to submit a startup, shutdown, and malfunction report within 2 working days of starting such action and within 7 working days of ending such action unless you have made alternative arrangements with the permitting authority.

We are requiring owners and operators of all affected sources to maintain records for at least 5 years from the date of each record. You must retain the records onsite for at least the first 2 years but may retain the records offsite for the remaining 3 years. You are required to keep a copy of each notification and report, along with supporting documentation. You are required to keep records related to the following: (1) Records of startup, shutdown, or malfunction; (2) records of performance tests; (3) records to show continuous compliance with each emission limitation; (4) if a bag leak detection system is used, records of each bag leak detection system alarm, including the time of the alarm, the time corrective action was initiated and completed, and a description of the cause of the alarm and the corrective action taken; (5) if VE measurements are taken, records of VE observations; (6) records of each operating limit parameter value deviation, including the date, time, and duration of the deviation, a description of the cause of the deviation and the corrective action taken, and whether the deviation occurred during a period of startup, shutdown, or malfunction; (7) records of routine control device maintenance for facilities obtaining a routine control device maintenance exemption, including a copy of the approved request for a routine control device maintenance exemption; (8) records of production rate; (9) records for any approved alternative monitoring or test procedures; and (10) current copies of your SSMP and OM&M plan, including any revisions, with records documenting conformance.

IV. Summary of Environmental, Energy, and Economic Impacts for the Final Brick and Structural Clay Products Manufacturing NESHAP

A. What Are the Air Quality Impacts?

At the current level of control and 1996 production levels, nationwide emissions of HAP from the 169 BSCP facilities estimated to be major sources are about 6,000 Mg/yr (6,600 tpy). Under today's final rule, it is assumed that DLA will be installed on 89 tunnel kilns with production capacities equal to or greater than 9.07 Mg (10 tph)(that currently are not controlled with a DLA, DIFF, DLS/FF, or WS). This will result in an estimated reduction in nationwide HAP emissions of 2,100 Mg/yr (2,300 tpy).

Hydrogen fluoride emissions account for approximately 60 percent of the baseline HAP emissions. Hydrogen chloride emissions account for approximately 40 percent, with HAP metals comprising less than 1 percent of the baseline HAP emissions. Estimated nationwide emissions of HF, HCl, and HAP metals from existing major source BSCP facilities at the current level of control are 3,500 Mg/yr (3,900 tpy), 2,400 Mg/yr (2,600 tpy), and 24 Mg/yr (26 tpy), respectively. Implementation of today's final rule is estimated to reduce nationwide HF emissions from existing tunnel kilns by about 1,700 Mg/yr (1,900 tpy), and HCl will be reduced by 350 Mg/yr (390 tpy). Emissions of HAP metals are estimated to be reduced by 5.4 Mg/yr (5.9 tpy). Implementation of today's final rule also is estimated to reduce PM and SO_2 emissions by 740 Mg/yr (820 tpy) and 2,500 Mg/yr (2,800 tpy), respectively.

To project air quality impacts for new sources, we assumed that two large model tunnel kilns (each with a 13.6 Mg/hr (15 tph) capacity and equipped with DIFF) and one medium model tunnel kiln (with an 8.2 Mg/hr (9 tph) capacity and equipped with a DLA), will begin operation at the beginning of the first year following promulgation. We estimate that by implementing today's final rule, HF emissions from new sources will be reduced by 87 Mg/yr (96 tpy), HCl emissions will be reduced by 47 Mg/yr (52 tpy), and HAP metals emissions will be reduced by 0.48 Mg/yr (0.53 tpy). We also estimate that PM and SO_2 emissions from the new kilns will be reduced by 67 Mg/yr (74 tpy) and 170 Mg/yr (190 tpy), respectively.

Secondary air impacts associated with today's final BSCP rule are direct impacts that result from the operation of any new or additional APCD. The generation of electricity required to operate the APCD on new and existing kilns will result in 11 Mg/yr (12 tpy) of nitrogen oxides (NO_X) emissions in the first year following compliance with today's final rule. The electricity is assumed to be generated by natural gas-fired turbines.

B. What Are the Water and Solid Waste Impacts?

Because compliance with today's final rule is based on the use of DLA or DIFF, no water pollution impacts are estimated. However, facilities with available wastewater disposal options may choose to use wet scrubbers. Based on available information, each scrubber-controlled kiln could generate as much as about 5 million gallons per year of waste water (based on a 10 gallon per minute scrubber blowdown, which is the maximum permitted amount in the industry).

The solid waste disposal impacts that result from the use of DLA include the disposal of the spent limestone that is discharged from the DLA. We calculated the solid waste by taking the difference between the amount of limestone charged into the DLA and the amount of reacted limestone and then adding the amount of reaction products and PM captured. Implementation of today's final rule is estimated to increase solid waste from existing sources by 65,200 Mg/yr (71,900 tpy).

To project solid waste impacts for new sources, we assumed that two large model tunnel kilns (equipped with DIFF) and one medium model tunnel kiln (equipped with a DLA) will begin operation at the beginning of the first year following promulgation of the final rule. The analysis of solid waste from DLA is discussed in the previous paragraph. The solid waste disposal impacts that result from the use of DIFF include the disposal of the spent lime (or other sorbent) that is injected into the kiln exhaust stream and subsequently captured by a fabric filter. We calculated the solid waste by taking the difference between the amount of lime injected into the system and the amount of reacted lime, and then adding the amount of reaction products and PM captured. Stoichiometric ratios of 1.0 to 2.0 have been reported for the DIFF and DLS/FF in use in the brick manufacturing industry. The average

stoichiometric ratio of 1.35 was used in this analysis. We estimate that implementing today's final rule will result in the generation of 1,410 Mg/yr (1,550 tpy) of solid waste from new sources.

C. What Are the Energy Impacts?

Energy impacts consist of the electricity needed to operate the APCD. Electricity requirements are driven primarily by the size of the fan needed in the APCD. We estimate the increase in electricity consumption that will result from implementation of the final rule to be 89 terajoules per year (84 billion British thermal units (Btu) per year) for existing sources.

To project energy impacts for new sources, we assumed that two large model tunnel kilns (equipped with DIFF) and one medium model tunnel kiln (equipped with a DLA) will begin operation at the beginning of the first year following promulgation of the final rule. We estimate the increase in energy consumption that will result from implementation of today's final rule to be 7.8 terajoules per year (7.4 billion Btu per year) for new sources.

D. Are There Any Additional Environmental and Health Impacts?

Reducing HAP emissions under today's final rule will lower occupational HAP exposure levels. The operation of APCD may increase occupational noise levels.

E. What Are the Cost Impacts?

For existing sources, nationwide total capital costs to implement today's final rule are estimated at $63 million, with total annualized costs of $24 million. The capital costs include the purchase and installation of DLA and monitoring equipment on 89 existing large tunnel kilns. The annualized costs include annualized capital costs of the control and monitoring equipment, operation and maintenance expenses, emission testing costs, and recordkeeping and reporting costs associated with installing and operating these 89 DLA, as well as the monitoring, recordkeeping and reporting, and emission testing costs on 20 additional APCD that currently are installed on existing large tunnel kilns.

To project costs for new sources, we assumed that two large model tunnel kilns (equipped with DIFF) and one medium model tunnel kiln (equipped with a DLA) will begin operation at the beginning of the first year following promulgation of the final rule. We estimate the capital costs associated with implementation of today's final rule to be $2.8 million for these three new sources. We estimate the annualized costs associated with implementation of today's final rule to be $1.14 million per year for new sources in the first year following promulgation of the rule.

We calculated the cost estimates using cost algorithms that are based on procedures from EPA's Office of Air Quality Planning and Standards (OAQPS) Control Cost Manual (EPA 450/3–90–006, January 1990) and cost information provided by the BSCP industry. We estimated costs by developing model process units that correspond to the various sizes of kilns found at BSCP manufacturing facilities and assigning the model process units to each facility based on the kiln sizes at each facility. The facility costs were summed to determine total industry costs.

F. What Are the Economic Impacts?

We conducted a detailed economic impact analysis to determine the market- and industry-level impacts associated with today's final rule. The compliance costs of today's final rule are expected to increase the price of brick and reduce their domestic production and consumption. We project the price of brick to increase by just less than 1 percent and project no change in price for structural clay products. Domestic production of brick is expected to decline by close to 1 percent. In addition, foreign brick imports are estimated to increase while exports decrease, both by just under 1 percent. Since there is no expected change in the price of structural clay products, we predict no change in domestic production or foreign imports of structural clay products.

In terms of industry impacts, the brick producers are projected to experience a decrease in operating profits of about 10 percent, which reflects the compliance costs associated with brick production and the resulting reductions in revenues due to the increase in the price of brick and the reduced quantity purchased. Through the market impacts described above, today's final rule would create both positive and negative financial impacts on facilities within the BSCP manufacturing industry. The majority of facilities, almost 71 percent, are expected to experience profit increases with today's final rule; however, there are some facilities projected to lose profits (about 29 percent). Furthermore, the economic impact analysis indicates that of the 189 BSCP manufacturing facilities, two brick facilities are at risk of closure because of today's final rule, while none of the structural clay products facilities are at risk to close.

Based on the market analysis, the annual social costs of today's final rule are projected to be $23.3 million. This differs from the annual engineering costs of today's final rule because the social costs account for producer and consumer behavior. These social costs are distributed across the many consumers and producers of brick. Since there are no price changes occurring in the structural clay products market, the social costs of today's final rule are confined to the brick industry. The consumers of brick are expected to incur $14.7 million in costs associated with today's final rule, with domestic consumers bearing $14.6 million and foreign consumers bearing $0.07 million. Brick producers, in aggregate, are expected to bear the remaining $8.6 million annually in costs. Domestic producers incur $8.67 million while foreign producers gain $0.04 million annually.

We estimate that 15 new kilns will be built during the 5 years after promulgation of today's final rule. The total compliance costs associated with these kilns are projected to be less than 0.6 percent of the industry's value of shipments. The economic impact analysis estimated the impact of today's final rule on these new sources through a sensitivity analysis. According to that analysis, it is projected that anywhere from three to six of these new kilns will be delayed in coming on-line in the BSCP manufacturing industry due to today's final rule.

V. Summary of Responses to Major Comments and Changes to the Clay Ceramics Manufacturing Proposed NESHAP

In response to the public comments received on the proposed clay ceramics rule, we made several changes in developing today's final clay ceramics rule. The major comments and our responses and rule changes are summarized in the following sections. A more detailed summary can be found in the Response-to-Comments document, which is available from several sources (see **SUPPLEMENTARY INFORMATION** section).

A. Affected Source

1. Subcategories of Clay Ceramics Kilns

We proposed two subcategories of clay ceramics kilns: Continuous (tunnel or roller) kilns and batch (periodic) kilns. Based on the public comments received regarding APCD applicability, as described in section V.C of this preamble, we revised the subcategorization structure for today's final rule. Today's final rule is based on

four subcategories of clay ceramics kilns: Ceramic tile or sanitaryware tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product, ceramic tile or sanitaryware tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product, ceramic tile roller kilns, and periodic kilns.

2. R&D Kiln Definition

One commenter requested that we change the definition of research and development kiln so that it is consistent with the definition of R&D in section 112(c)(7) of the CAA and most other NESHAP. Therefore, today's final rule includes a revised definition of research and development kiln that is consistent with section 112(c)(7) of the CAA and other NESHAP.

3. Facilities Co-Located With Major Sources

Commenters indicated that considering a clay ceramics facility a major source because it is co-located with a major source (under a separate NESHAP) puts those facilities at a competitive disadvantage with competitors operating facilities that are not co-located. We understand these commenters' concerns. However, section 112 of the CAA requires us to regulate HAP emissions from all major source facilities, regardless of the processes or operations that make those facilities major sources. Thus, today's final rule applies for both co-located and stand-alone clay ceramics manufacturing facilities that are major sources.

B. Existing Source MACT

Four commenters concurred with the existing MACT floor of "no emissions reductions" for existing clay ceramics sources. To the contrary, one commenter charged that EPA has simply set MACT floors based on control technology type and that EPA did not identify the relevant best performers and set floors reflecting their average emission level. The commenter noted that factors other than control device type affect emissions and that EPA must consider all non-negligible factors in setting MACT floors and considering beyond-the-floor measures. The commenter stated that if EPA believes it is unworkable to consider all factors, then perhaps EPA should base standards on actual emissions data which reflects all the factors influencing a source's performance.

We reevaluated our existing source MACT determinations following proposal based on consideration of factors other than APCD type. We agree that factors other than APCD type (*e.g.*, kiln design, fuel type, raw materials, additives and surface coatings) can affect emissions from clay ceramics kilns. We acknowledged the effect of kiln design on emissions by creating separate subcategories for periodic, roller, and tunnel kilns. We maintain that low-HAP raw material use is not a viable MACT option because, similar to the BSCP industry, all facilities use product-specific raw materials that are integral to the various products. Changes in raw materials would change the end products, and because of this, it would not be feasible for facilities to meet requirements based on the use of low-HAP raw materials. With respect to requiring kilns to fire low-HAP fuels, all clay ceramics kilns for which we have information are fired with natural gas or propane. Therefore, we are not concerned that a requirement to use natural gas (or equivalent fuel) to fire all existing kilns would have any impact on the end products of existing kilns, as would be the case in the BSCP industry. Therefore, the MACT floor for all existing clay ceramics periodic kilns, tunnel kilns, and roller kilns is based on firing the kilns with natural gas or an equivalent fuel (such as propane or other clean-burning fuel), and we added a work practice standard to the final rule that covers this requirement. We considered developing emission limitations based on firing natural gas, but the available data are insufficient for us to determine the contribution of kiln fuel to HAP emissions, and we believe that a work practice standard is the only feasible means of addressing the commenter's concern that we did not consider options besides APCD use.

C. New Source MACT

At proposal, we concluded that MACT for new and reconstructed periodic kilns was "no emissions reductions." We concluded that MACT for new and reconstructed tunnel and roller kilns was the level of control achievable with a DIFF, DLS/FF, or WS because the best-controlled similar source (a BSCP tunnel kiln) had this level of control.

Following proposal, several commenters argued that clay ceramics kilns are different from BSCP kilns, and that EPA should not consider BSCP tunnel kilns to be the best-controlled similar source. The commenters noted that clay ceramics kilns typically have much lower throughput than BSCP kilns and that the exhaust from clay ceramics kilns contains lower pollutant concentrations than BSCP kiln exhaust. Commenters stated that the lower pollutant concentrations in clay ceramics kiln exhaust would result in the inability to achieve high removal efficiencies. The commenters suggested that the proposed control technologies are not transferable to clay ceramics kilns and noted that none of the technologies are currently in use on domestic clay ceramics kilns. The commenters suggested that the best-controlled similar source should come from the sources in the clay ceramics source category, which would result in a new source MACT floor of "no emissions reductions" for clay ceramics kilns.

One commenter stated that, whereas brick products are fired unglazed, most sanitaryware products have a ceramic glaze applied before firing, which melts in the kiln, evenly covering the surface of the piece, helping to seal the surface and hinder the emission of by-products typically associated with the clay raw material.

One commenter suggested that MACT for new clay ceramics kilns be applied only to large kilns (*i.e.*, kilns with a design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product). The commenter suggested (based on their conversation with an APCD vendor) that DIFF systems may not be readily available for small (less than 9.07 Mg/hr (10 tph)) clay ceramics kilns.

One commenter requested that EPA distinguish between ceramic tile tunnel and roller kilns. The commenter stated that the two major design differences between BSCP periodic and new BSCP tunnel kilns are the same dissimilarities exhibited between clay ceramics tunnel and roller kilns. The commenter also provided reasons why clay ceramics roller kilns are different from BSCP tunnel kilns. The commenter stated that BSCP tunnel kilns are made of brick lined with refractory materials, have a high profile (tall) design, and require setting and stacking product on rail cars which move on floor rails. Bricks are fired on a 15 to 24 hour cycle. Ceramic tile roller kilns are designed in modular units with a low (short) profile (which affects the excess airflow), have different firing curves and flow characteristics, process a single row of tile moved by roller, and utilize high velocity burners for turbulent airflow. The tiles are not stacked and are fired on a 40 to 60 minute cycle. The commenter stated that firing time has a significant effect on the evolution of HF emissions (roller kilns exhibit significantly lower HF emissions) and provided detail of firing curves/emission estimates for the two types of kilns. In addition, the commenter stated that APCD available for BSCP tunnel

kilns are not readily available for roller kilns.

We acknowledge that the control technologies (DIFF, DLS/FF, and WS) that formed the basis for the proposed emission limits for new and reconstructed clay ceramics kilns are not currently in use on any domestic clay ceramics kiln. However, section 112(d) of the CAA requires us to establish emission limits for new sources based on the performance of the best-controlled similar source. The CAA does not specify that the similar source must be within the same source category. To the contrary, our interpretation of section 112(d) of the CAA is that we are obligated to consider similar sources from other source categories in determining the best-controlled similar source for establishing MACT for new sources.

We have reevaluated our subcategory and best-controlled similar source determinations for new and reconstructed clay ceramics kilns. We maintain that MACT for new and reconstructed periodic kilns does not require use of add-on APCD because the best-controlled similar source is uncontrolled. In addition, based on the comments received and other information, we have concluded that there are significant differences between clay ceramics tunnel kilns and roller kilns. We believe that differences in the operation of BSCP tunnel kilns and tile roller kilns, particularly with respect to the duration of firing, result in emission characteristics that are likely to be very dissimilar. As a result, we cannot assume that APCD that have been demonstrated to be effective for reducing HF and HCl emissions from BSCP tunnel kilns are feasible for tile roller kilns. Therefore, we have concluded that BSCP tunnel kilns cannot be considered similar sources to tile roller kilns, and we have determined that MACT for new and reconstructed clay ceramics tile roller kilns does not include control with an add-on APCD.

We disagree that there are technological differences between clay ceramics tunnel kilns and BSCP tunnel kilns. Some tunnel kilns actually produce both ceramic tile and structural clay tile (a structural clay product). Regarding the effect of glazing on emissions, we cannot refute that the glazes applied to sanitaryware form a seal that could prevent further release of certain pollutants from the body of the ware. However, we have no information that indicates that the sealing becomes effective before HF and HCl are released. To the contrary, we have data from several tests on sanitaryware kilns that quantify HF emissions, and the tests indicate that uncontrolled emissions are within the range emitted from BSCP kilns.

We maintain that the best-controlled similar source for a clay ceramics tunnel kiln is a BSCP tunnel kiln. As discussed in section II.D of this preamble, MACT for new and reconstructed BSCP tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product is based on use of a DLA, while MACT for new and reconstructed BSCP tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product is based on use of DIFF, DLS/FF, or WS. Thus, we have adopted the same requirements for new and reconstructed clay ceramics tunnel kilns. New and reconstructed clay ceramics tile and sanitaryware tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product will be required to meet emission limits based on the levels of control that can be achieved by a kiln controlled with a DLA. The emission limits for HF are 0.029 kg/Mg (0.057 lb/ton) or at least 90 percent reduction. For HCl, the emission limits are 0.13 kg/Mg (0.26 lb/ton) or at least 30 percent reduction. For PM, which is used as a surrogate for HAP metals, the emission limit is 0.21 kg/Mg (0.42 lb/ton). For new and reconstructed clay ceramics tile and sanitaryware tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product, we have revised the emission limits (based on the levels of control that can be achieved by a kiln controlled with a DIFF, DLS/FF, or WS) to reflect new data that were considered in the development of the final BSCP rule, as discussed in section II.F of this preamble. The revised HF emission limits are 0.029 kg/Mg (0.057 lb/ton) or at least 90 percent reduction. The revised HCl emission limits are 0.028 kg/Mg (0.056 lb/ton) or at least 85 percent reduction. The PM emission limit remains unchanged (from proposal) at 0.060 kg/Mg (0.12 lb/ton).

Similar to the requirements for existing sources, we added a work practice standard that requires facilities to use natural gas, or an equivalent fuel, to fire all new or reconstructed clay ceramics periodic kilns, tunnel kilns, and roller kilns, except during periods of natural gas curtailment or other periods when natural gas is not available.

Similar to the requirements for BSCP tunnel kilns, two types of clay ceramics tunnel kilns that would otherwise be considered reconstructed do not meet the definition of reconstruction in 40 CFR 63.2. We have added language in 40 CFR 63.8450(f) to provide that it is not technologically and economically feasible for these two types of existing kilns that would otherwise meet the criteria for reconstruction under 40 CFR 63.2 to meet the relevant standards—*i.e.*, new source MACT. The two types of kilns are existing tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product whose design capacities are increased such that they are equal to or greater than 9.07 Mg/hr (10 tph) of fired product, and existing DLA-controlled tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product. These sources will be required to meet emission limits based on the levels of control that can be achieved by a kiln controlled with a DLA. They also will be subject to the work practice standard that requires facilities to use natural gas, or an equivalent fuel, to fire all kilns, except during periods of natural gas curtailment or other periods when natural gas is not available.

We acknowledge that the higher airflow rates that are characteristic of clay ceramics kilns result in lower pollutant concentrations in the exhaust stream, and that control efficiency limits (or percentage reduction limits) are more difficult to achieve when exhaust gas concentrations are lower. For that reason, we proposed and are promulgating today production-based mass emission limits as alternatives to the HF and HCl percentage reduction limits. Exhaust gas concentrations have no effect on mass emission rates, provided the concentrations are above the test method detection limit. The mass emission rate (*e.g.*, pounds of pollutant emitted per hour) for a source is unchanged regardless of how much dilution air is introduced. Therefore, even though a clay ceramics kiln with a diluted exhaust stream may not be able to meet the percentage HF and HCl reduction limits, the available data indicate that a kiln that is controlled to the new source MACT level will be able to meet the production-based emission limits for HF and HCl, as well as the production-based limit for PM.

D. Cost and Economic Impacts

Several commenters stated that EPA underestimated the cost per ton of pollutant removed at proposal. In general, the commenters felt the costs were unreasonable. Commenters questioned the public health benefits of the proposed clay ceramics rule.

One commenter stated that EPA entirely misunderstood the economic state of the ceramic tile industry in the U.S., and therefore, grossly underestimated the economic impact of

the proposed rule on the industry. The commenter challenged the assumptions presented in the algorithms on which the cost analysis is based, charging that they bear no reasonable relationship to reality in the industry and that the APCD strategies are not actually feasible for implementation. The commenter also argued that the economic analysis of the MACT floor for reconstructed and new ceramic clay roller kilns does not support DIFF-, DLS/FF- or WS-based controls.

We acknowledge the commenters' statements about the high cost effectiveness of the proposed rule. As discussed previously, we have revised the rule, as proposed, such that it is now less costly. Under today's final rule, new clay ceramic roller kilns will not be subject to emission limits. In addition, we have subcategorized clay ceramics tunnel kilns by design capacity. New and reconstructed tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) will be required to meet emission limits based on the levels of control that can be achieved by a DLA. In addition to the changes mentioned above, we have added a work practice standard that requires facilities to use natural gas, or an equivalent fuel, to fire all clay ceramics kilns, except during periods of natural gas curtailment or other periods when natural gas is not available. The costs associated with this change are minimal. Based on these changes, there will be no control cost for new roller kilns and the control cost for new and reconstructed tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) will be lower than at proposal. Most of the new tunnel kilns constructed will likely be in this smaller size category. New clay ceramics tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) are still required to meet emission limits based on the use of DIFF, DLS/FF or WS technologies. However, the HF and HCl emission limits are slightly less stringent than at proposal (due to the inclusion of new test data). The PM emission limit for new clay ceramics tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) is unchanged from the proposed requirements for all new kilns.

Public health benefits are likely to be realized due to the reduced emissions and reduced exposures to emissions as a result of today's final rule. However, we have not quantified these public health benefits because we are not required to do so under the CAA.

We disagree with the commenter's statement that the economic impacts of the rule on the ceramic tile industry have been grossly underestimated. Based on revisions to the final rule as described above, we expect minimal impacts on existing sources, based on recordkeeping and reporting costs associated with the work practice standard for existing kilns, and we estimate that only one new source will be impacted by the final rule in the first five years following promulgation. Therefore, the EIA at proposal overestimated the impacts on the industry. Thus, it is very unlikely that the one new source affected by the rule or the addition of a work practice standard that requires all kilns to be fired with natural gas (or equivalent fuel) will be able to influence industry prices or foreign competition.

E. Test Data and Emission Limits

One commenter implied that there are no data to suggest that HCl is emitted from ceramic tile kilns. Another commenter stated that limits for HCl and PM are irrelevant and that we should only set an emission limit for HF (the largest single HAP emitted from the kilns). The commenter believes that there is no need to establish an emission limitation for HCl or PM because any control system designed to achieve the required HF reduction will also reduce HCl and PM. One commenter disagreed that PM is an adequate surrogate for HAP metals emissions.

We are required by section 112(d) of the CAA to establish emission limits for listed HAP emitted from major sources. Section 112(b) of the CAA lists HCl and various HAP metals. We believe that PM is an adequate surrogate for HAP metals for the reasons discussed in section II.F of this preamble.

We acknowledge that we have no test data that demonstrate that HCl is emitted from clay ceramics kilns. However, we do have data that show that chlorides are present in many clay materials, and that HCl is emitted from various types of clays when heated above a minimum temperature. The data include raw material analyses and emission test reports of HCl emissions for the BSCP manufacturing, lightweight aggregate manufacturing, and kaolin processing industries. Because of the similarities in raw materials used in those industries and the raw materials used to manufacture clay ceramics, we assume that clay ceramics kilns also emit HCl.

We agree that HF emission rates from clay ceramics kilns generally are greater than the corresponding emission rates for HCl or metal HAP. We also agree that emission controls that are used to meet the emission limits for HF are likely to reduce emissions of HCl and SO_x as well. However, as stated previously, the CAA requires us to set emission limits for all listed HAP based on MACT. The data indicated that there are existing controls on similar sources that achieve significant reductions in emissions of HCl and PM (as a surrogate for metal HAP). Therefore, we are required to establish emission limits for HCl and metal HAP. We also note that, if HCl and PM emissions from any affected source are negligible or are automatically controlled by HF control devices, complying with the HCl and PM emission limits should not present a problem.

F. Monitoring Requirements

1. Fabric Filter Inlet Temperature

Two commenters disagreed with the proposed fabric filter inlet temperature monitoring requirement. One commenter stated that control systems using hydrated lime are generally known to have increased HCl and HF removal when temperatures increase. The other commenter suggested that the only limit on fabric filter inlet temperature should be based on manufacturer's specifications for protection of the equipment.

We have eliminated the requirement for monitoring fabric filter inlet temperatures on affected kilns that are controlled with a DLS/FF or DIFF. We believe that the other monitoring requirements (*e.g.*, lime feed rate monitoring and periodic VE checks) that we have incorporated into today's final rule are adequate for ensuring continuous compliance with the emission limits.

2. Bag Leak Detection Systems and Visible Emissions

One commenter suggested changes to the amount of bag leak detector alarm time that must be recorded. We have not changed the requirements for recording bag leak detection system downtime. However, we have incorporated into today's final rule an option for owners and operators of affected kilns that are controlled with a DLS/FF, or DIFF to perform daily VE checks rather than using bag leak detection systems. Visible emissions checks are required for DLA-controlled kilns. Today's final rule also includes a provision for decreasing the frequency of VE checks provided no VE are observed.

3. Continuous Emissions Monitoring Systems

In the preamble to the proposed rule, we requested comment on requiring the application of PM CEMS as a method to assure continuous compliance with the proposed PM emission limits. Commenters opposed use of CEMS when less expensive, but effective, parametric monitoring alternatives are available. Therefore, today's final rule does not require use of PM CEMS or any other type of CEMS. We believe that the parameter monitoring requirements specified in the final rule are adequate for ensuring continuous compliance.

4. Test Methods

One commenter requested that the final clay ceramics rule provide facilities with the option to use either EPA Method 26A or EPA Method 320 for all required stack testing for HF emissions, HCl emissions, or both. Because EPA Method 320 will provide accurate HF and HCl measurements, we have modified today's final clay ceramics rule to include EPA Method 320 as an alternative to EPA Method 26A.

G. Startup, Shutdown, and Malfunction

1. Bypass

One commenter requested that EPA allow for use of the bypass stack during periods of APCD maintenance. Similar comments were received on the proposed BSCP rule. Therefore, today's final clay ceramics rule allows for bypass of the APCD during periods of routine control device maintenance for up to 4 percent of the annual kiln operating hours. Section II.H of this preamble presents details on use of this routine control device maintenance exemption.

2. Initial Startup

Commenters on both the proposed BSCP rule and clay ceramics rule pointed out that it is impractical to meet emission standards during initial startup of a tunnel kiln. Thus, as discussed in section II.H of this preamble, we have added a definition of initial startup to today's final clay ceramics rule to address the concerns expressed by the commenters.

VI. Summary of the Final Clay Ceramics Manufacturing NESHAP

A. What Source Category Is Regulated by the Final Rule?

Today's final rule for clay ceramics manufacturing applies to clay ceramics manufacturing facilities that are, are located at, or are part of, a major source of HAP emissions. The clay ceramics manufacturing source category includes those facilities that manufacture pressed floor tile, pressed wall tile, and other pressed tile; or sanitaryware (toilets and sinks). Clay ceramics are primarily composed of clay and shale, and may include many different additives, including silica, talc, and various high purity powders produced by chemical synthesis. Clay ceramics manufacturing generally includes raw material processing and handling and forming of the tile or sanitaryware shapes, followed by drying, glazing, and firing. Most clay ceramics are coated with a glaze prior to firing. The clay ceramics industry also includes dinnerware and pottery manufacturing, but these industry segments are not covered by today's final rule because we determined that there are no dinnerware or pottery manufacturing facilities that are major sources of HAP.

Available information shows a total of 58 facilities that produce clay ceramics. Thirty-two of these facilities, located in 16 States, primarily produce pressed tile, while 26 of these facilities, located in 15 States, primarily produce sanitaryware. Eight of the 58 clay ceramics manufacturing facilities are estimated to be major sources. Thirteen clay ceramics facilities are owned by small businesses, and none of the small business-owned facilities are estimated to be major sources.

All clay ceramics are fired in kilns. Firing may be performed in one or more stages. Tile can be fired in either continuous (tunnel or roller) or batch (periodic) kilns, but most facilities use either tunnel or roller kilns for tile production. Periodic kilns are usually used at smaller facilities or are used primarily for second-firing a product after a glaze has been applied.

The sanitaryware industry uses either tunnel kilns or periodic kilns for firing. Tunnel kilns account for most sanitaryware firing; periodic kilns are used primarily for refiring rejected pieces that have been repaired and re-glazed. Some smaller facilities use periodic kilns for all firing operations.

The primary HAP emission sources at clay ceramics manufacturing plants are roller, tunnel, and periodic kilns which emit HF, HCl, and HAP metals. Kilns also emit PM and SO_2. Currently, no APCD are used by the clay ceramics industry to control emission from kilns, although the industry's emissions are minimized because the kilns fire clean-burning fuels. Other sources of HAP emissions at clay ceramics manufacturing plants are the raw material processing and handling equipment.

B. What Are the Affected Sources?

The affected sources, which are the portions of each source in the category for which we are setting emission standards, include each existing, new, or reconstructed periodic kiln, tunnel kiln, and roller kiln. Each tunnel kiln that meets the description in 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) also is an affected source. All affected sources are subject to the work practice standard in today's final rule. In addition, today's final rule contains different emission limits, based on design capacity, for new and reconstructed tunnel kilns, and also includes emission limits for tunnel kilns that would otherwise meet the criteria for reconstruction but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2). The tunnel kiln subcategories are tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product and tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product. Kilns that are used exclusively for R&D and not used to manufacture products for commercial sale, except in a *de minimis* manner, are not subject to the requirements of today's final rule. Kilns that are used exclusively for refiring or for setting glazes on previously fired products are not subject to the requirements of today's final rule.

A source is a new affected source if construction began on or after July 22, 2002. An affected source is reconstructed if the criteria defined in 40 CFR 63.2 are met, as qualified by 40 CFR 63.8540(f). An affected source is existing if it is not new or reconstructed and does not meet the descriptions in 40 CFR 63.8540(f). As indicated, affected sources described in 40 CFR 63.8540(f) also are subject to today's final rule.

C. When Must I Comply With the Final Rule?

New and reconstructed affected sources and affected sources that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) with an initial startup before May 16, 2003 must comply no later than May 16, 2003. New and reconstructed affected sources and affected sources that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) with an initial startup after May 16, 2003 must comply upon initial startup. Any portion of existing facilities that become new or reconstructed major sources and any new or reconstructed area sources that become major sources must be in compliance upon initial startup.

If you have an existing affected source, you must comply with the work practice standards within 3 years of May 16, 2003.

D. What Are the Emission Limits?

Today's final rule includes emission limits in the form of production-based mass emission limits and percent reduction requirements. In establishing the HAP emission limits, we selected PM as a surrogate for HAP metals, including mercury in particulate form. Today's final rule includes HF, HCl, and PM emission limits for new and reconstructed affected sources at clay ceramics manufacturing facilities, as well as for the following affected sources that would be considered reconstructed but for 40 CFR 63.8540(f): Existing tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) of fired product whose design capacities are increased such that they are equal to or greater than 9.07 Mg/hr (10 tph) of fired product, and existing DLA-controlled tunnel kilns with design capacities equal to or greater than 9.07 Mg/hr (10 tph) of fired product.

If you own or operate a new or reconstructed tunnel kiln with a design capacity less than 9.07 Mg/hr (10 tph) of fired product or a tunnel kiln that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2), you are required to meet an HF emission limit of 0.029 kg/Mg (0.057 lb/ton) of fired product or reduce uncontrolled HF emissions by at least 90 percent. You also are required to meet an HCl emission limit of 0.13 kg/Mg (0.26 lb/ton) of fired product or reduce uncontrolled HCl emissions by at least 30 percent. Finally, you are required to meet a PM emission limit of 0.21 kg/Mg (0.42 lb/ton) of fired product.

If you own or operate a new or reconstructed tunnel kiln with a design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product, you are required to meet an HF emission limit of 0.029 kg/Mg (0.057 lb/ton) of fired product or reduce uncontrolled HF emissions by at least 90 percent. You also are required to meet an HCl emission limit of 0.028 kg/Mg (0.056 lb/ton) of fired product or reduce uncontrolled HCl emissions by at least 85 percent. Finally, you are required to meet a PM emission limit of 0.06 kg/Mg (0.12 lb/ton) of fired product.

E. What Are the Operating Limits?

The operating limits for new and reconstructed clay ceramics tunnel kilns and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) are the same as those for new and reconstructed BSCP tunnel kilns. These operating limits are presented in section III.E of this preamble.

F. What Are the Work Practice Standards?

If you have an existing, new, or reconstructed clay ceramics periodic kiln, tunnel kiln, or roller kiln, or a tunnel kiln that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2), you must use natural gas, or an equivalent fuel, as the kiln fuel at all times except during periods of natural gas curtailment or other periods when natural gas is not available.

G. What Are the Performance Test and Initial Compliance Requirements for Sources Subject to Emission Limits?

The performance test and initial compliance requirements for new and reconstructed clay ceramics tunnel kilns and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) are the same as those for new and reconstructed BSCP tunnel kilns. These requirements are presented in section III.F of this preamble.

H. What Are the Initial Compliance Requirements for Sources Subject to a Work Practice Standard?

For each existing, new, or reconstructed clay ceramics periodic kiln, tunnel kiln, or roller kiln, and each tunnel kiln that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2), you must indicate, in your initial notification, that you use natural gas, or an equivalent fuel, as the kiln fuel, and certify that such information is true, accurate, and complete.

I. What Are the Continuous Compliance Requirements for Sources Subject to Emission Limits?

The continuous compliance requirements for new and reconstructed clay ceramics tunnel kilns and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) are the same as those for new and reconstructed BSCP tunnel kilns. These requirements are presented in section III.G of this preamble.

J. What Are the Continuous Compliance Requirements for Sources Subject to a Work Practice Standard?

For each existing, new, or reconstructed clay ceramics periodic kiln, tunnel kiln, or roller kiln, and each tunnel kiln that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2), you must use natural gas, or an equivalent fuel, as the kiln fuel, and document the type of fuel used. The type of fuel used, along with other compliance information, must be certified as part of your compliance reports. During periods of natural gas curtailment or other periods when natural gas is unavailable, you are allowed to use an alternative fuel. However, if you use an alternative fuel, you must meet the notification requirements specified in 40 CFR 63.8630(g) and the reporting requirements specified in 40 CFR 63.8635(g).

K. What Are the Notification, Recordkeeping, and Reporting Requirements for Sources Subject to Emission Limits?

The notification, recordkeeping, and reporting requirements for new and reconstructed clay ceramics tunnel kilns and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2) are the same as those for new and reconstructed BSCP tunnel kilns. These requirements are presented in section III.H of this preamble.

L. What Are the Notification, Recordkeeping, and Reporting Requirements for Sources Subject to a Work Practice Standard?

If you operate an existing, new, or reconstructed clay ceramics periodic kiln, tunnel kiln, or roller kiln, or a tunnel kiln that would be considered reconstructed but for 40 CFR 63.8540(f)(1) or 40 CFR 63.8540(f)(2), you must submit an initial notification that indicates that you use natural gas, or an equivalent fuel, as the kiln fuel. You must keep records that document your kiln fuel, and if you must use an alternative fuel due to a natural gas curtailment or other interruption of natural gas supply, you must submit a notification of alternative fuel use that includes the information specified in 40 CFR 63.8630(g). You must submit a report of alternative fuel use within 10 working days after terminating the use of the alternative fuel. The report must include the information specified in 40 CFR 63.8635(g).

VII. Summary of Environmental, Energy, and Economic Impacts for the Final Clay Ceramics Manufacturing NESHAP

A. What Are the Air Quality Impacts?

Because the only requirements for existing sources under today's final rule

are work practice standards that we believe that all facilities are already meeting, no air quality impacts are projected for existing sources. To project air quality impacts for new sources, we assumed that one sanitaryware tunnel kiln (3.6 Mg/hr (4 tph) capacity) equipped with a DLA will begin operation at the beginning of the first year following promulgation of the rule. We estimate that by implementing the rule, HF emissions from this new source will be reduced by 4.9 Mg/yr (5.4 tpy), HCl emissions will be reduced by 1.0 Mg/yr (1.1 tpy), and HAP metals emissions will be reduced by 0.028 Mg/yr (0.031 tpy). We also estimate that PM and SO_2 emissions from the new kiln will be reduced by 3.9 Mg/yr (4.3 tpy) and 13 Mg/yr (14 tpy), respectively.

Secondary air impacts associated with today's final clay ceramics rule are direct impacts that result from the operation of any new APCD. The generation of electricity required to operate the control device on the projected new kiln will result in 0.09 tpy of NO_X emissions in the first year following promulgation of the rule. The electricity was assumed to be generated by natural gas-fired turbines.

B. What Are the Water and Solid Waste Impacts?

Because the only requirements for existing sources under today's final rule are work practice standards that we believe that all facilities are already meeting, no water and solid waste impacts are projected for existing sources. Our analyses are based on the use of DLA for controlling new kilns and, therefore, no water impacts are projected for new sources. To project solid waste impacts for new sources, we assumed that one sanitaryware tunnel kiln equipped with a DLA will begin operation at the beginning of the first year following promulgation of the rule. The solid waste disposal impacts that result from the use of DLA will include the disposal of spent limestone. We calculated the solid waste by taking the difference between the amount of limestone charged into the DLA and the amount of reacted limestone and then adding the amount of reaction products and PM captured. We estimate that implementing the rule will result in the generation of 290 Mg/yr (320 tpy) of solid waste from the new source.

C. What Are the Energy Impacts?

Because the only requirements for existing sources under today's final rule are work practice standards that we believe that all facilities are already meeting, no energy impacts are projected for existing sources. To project energy impacts for new sources, we assumed that one sanitaryware tunnel kiln equipped with a DLA will begin operation at the beginning of the first year following promulgation of the rule. Energy impacts consist of the electricity needed to operate the DLA. Electricity requirements are driven primarily by the size of the fan needed in the control device. We estimate the increase in energy consumption that would result from implementation of the rule to be 710 gigajoules per year (670 million Btu per year).

D. Are There Any Additional Environmental and Health Impacts?

Reducing HAP emissions under today's final rule will lower occupational HAP exposure levels. The operation of APCD may increase occupational noise levels.

E. What Are the Cost Impacts?

Because the only requirements for existing sources under today's final rule are work practice standards that we believe that all facilities are already meeting, cost impacts projected for existing sources are based only on recordkeeping and reporting requirements associated with the work practice standard. These costs are $1,193 per year for each of the eight major source facilities, and the total annual cost to the industry for existing sources is $9,533. To project costs for new sources, we assumed that one sanitaryware tunnel kiln, equipped with a DLA, will be built during the first year following promulgation. We estimate the capital costs associated with implementation of the rule to be $510,000 for new sources. The capital costs include the purchase and installation of DLA and monitoring equipment. We estimate the annualized costs associated with implementation of the rule to be $170,000 per year for new sources. The annualized costs include annualized capital costs of the control and monitoring equipment, operation and maintenance expenses, emission testing costs, and recordkeeping and reporting costs associated with installing and operating the DLA.

We calculated the cost estimates using cost algorithms that are based on procedures from EPA's OAQPS Control Cost Manual (EPA 450/3–90–006, January 1990) and cost information provided by the BSCP industry and control device vendors. We estimated costs by developing model process units that correspond to the various sizes of kilns found at clay ceramics manufacturing facilities.

F. What Are the Economic Impacts?

We did not prepare a revised economic impact analysis for the clay ceramics industry because the requirements of the final rule will result in a decrease in cost impacts on the industry. Specifically, new and reconstructed roller kilns, which would have been subject to emission limits in the rule as proposed, are not subject to emission limits in the final rule. In addition, the requirements for clay ceramics tunnel kilns with design capacities less than 9.07 Mg/hr (10 tph) are based on control with a DLA rather than the more costly DIFF, DLS/FF, or WS systems on which the proposed rule was based.

The goal of the economic impact analysis is to estimate the market response of clay ceramics manufacturing producers to today's final rule and to determine the economic effects that may result due to the final rule. Because the MACT floor for existing clay ceramics kilns is based on firing natural gas, or an equivalent fuel, and all clay ceramics kilns for which we have data are fired by natural gas or propane, the compliance costs for existing sources associated with today's final rule consist only of recordkeeping and reporting costs and are minimal. The aggregate price of ceramic products is, therefore, expected to remain the same. Because the prices of ceramic products are not expected to change due to today's final rule, there are no projected changes in domestic production, domestic consumption, or foreign trade. Therefore, no economic impacts on existing major sources are expected from today's final rule.

Unlike existing sources, new and reconstructed tunnel kilns used to produce clay ceramics will face positive compliance costs associated with the installation and operation of APCD. We estimate that one new 3.6 Mg/hr (4 tph) capacity tunnel kiln will be constructed in the sanitaryware industry during the first 5 years after the rule is promulgated. Industry compliance costs associated with this kiln are expected to be less than 0.1 percent of industry value of shipments for the sanitaryware industry. No level of cost-to-sales for sanitaryware kilns could be developed due to the diversity of product types that they produce.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action

is "significant" and, therefore, subject to review by the OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's BSCP final rule is a "significant regulatory action" because it raises novel legal or policy issues within the meaning of paragraph (4) above. Consequently, today's final BSCP rule was submitted to OMB for review under Executive Order 12866. Any written comments from OMB and written EPA responses are available in the docket (see **ADDRESSES** section of this preamble).

Pursuant to the terms of Executive Order 12866, it has been determined that the clay ceramics final rule does not constitute a "significant regulatory action" because it does not meet any of the above criteria. Consequently, today's final clay ceramics rule was not submitted to OMB for review under Executive Order 12866.

B. Paperwork Reduction Act

The information collection requirements in today's final rules will be submitted for approval to OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The EPA has prepared an Information Collection Request (ICR) document for each of the rules (ICR No. 2022.01 for BSCP manufacturing and ICR No. 2023.01 for clay ceramics manufacturing), and a copy of either document may be obtained from Susan Auby by mail at Office of Environmental Information, Collection Strategies Division (2822T), U.S. EPA, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; by e-mail at *auby.susan@epa.gov*; or by calling (202) 566–1672. You may also download a copy off the Internet at *http://www.epa.gov/icr*. The information requirements are not enforceable until OMB approves them.

The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to EPA's policies set forth in 40 CFR part 2, subpart B.

Today's final BSCP rule will not require any notifications or reports beyond those required by the NESHAP General Provisions. The recordkeeping requirements require only the specific information needed to assure compliance.

With one exception, today's final clay ceramics rule will not require any notifications or reports beyond those required by the NESHAP General Provisions. The exception applies to affected sources that are subject to limits on the type of fuel used. In such cases, the owner or operator may use an alternative fuel under certain conditions but must submit a notification before using the alternative fuel and must report on alternative fuel use after terminating use of the alternative fuel. The recordkeeping requirements require only the specific information needed to assure compliance.

The annual monitoring, reporting, and recordkeeping burden for the collection of information required by today's final BSCP manufacturing rule (averaged over the first 3 years after the effective date of the final rule) is estimated to be 17,471 labor hours per year at a total annual labor cost of $900,328. This burden estimate includes a one-time submission of an OM&M plan; one-time submission of a SSMP, with immediate reports for any event when the procedures in the plan were not followed; semiannual compliance reports; maintenance inspections; notifications; and recordkeeping. Total annualized capital/startup costs associated with the monitoring requirements over the 3-year period of the ICR are estimated at $115,111, with operation and maintenance costs of $4,853/yr.

The annual monitoring, reporting, and recordkeeping burden for the collection of information required by today's final clay ceramics manufacturing rule (averaged over the first 3 years after the effective date of the final rule) is estimated to be 185 labor hours per year at a total annual labor cost of $9,533. This burden estimate includes a one-time submission of an OM&M plan; one-time submission of a SSMP, with immediate reports for any event when the procedures in the plan were not followed; semiannual compliance reports; maintenance inspections; notifications; and recordkeeping. Total annualized capital/startup costs associated with the monitoring requirements over the 3-year period of the ICR are estimated at $1,824, with operation and maintenance costs of $358/yr.

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.

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. The OMB control numbers for the information collection requirements in the final rules will be listed in an amendment to 40 CFR part 9 in a subsequent **Federal Register** document after OMB approves the ICRs.

C. Regulatory Flexibility Act

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this action. After considering the economic impacts of today's final rule on small entities in the two source categories, the EPA has determined that this action will not have a significant economic impact on a substantial number of small entities. Although today's final rule will not have a significant economic impact on a substantial number of small entities, we have nonetheless tried to minimize the impact of the final rule on small entities. For both the BSCP manufacturing and clay ceramics

manufacturing source categories, we exercised flexibility in minimizing impacts on small entities through subcategorization of tunnel kilns by size, which still benefits the environment by requiring greater emissions reductions from the larger kilns. In addition, for the BSCP manufacturing source category, we contacted the small entities estimated to incur impacts in excess of 1 percent of sales to explain the rule's regulatory approach, as well as a potential alternative to installing an APCD. Facilities with existing tunnel kilns operating at or near 10 tph could accept a permit condition that restricts kiln production to less than 10 tph and, therefore, places the kiln in the subcategory unaffected by the standards for existing kilns.

For purposes of assessing the impact of today's action on small entities, small entities are defined as: (1) A small business according to Small Business Administration (SBA) size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The following two sections provide descriptions of the small business assessments for the two categories of sources addressed by today's action.

1. Brick and Structural Clay Products (BSCP) Manufacturing

Small Business Administration size standards for BSCP manufacturing, by NAICS code, are shown in Table 2 of this preamble.

TABLE 2.—SMALL BUSINESS SIZE STANDARDS FOR BSCP MANUFACTURING

NAICS code	Size standard, number of employees
327121	500
327122	500
327123	500
327125	750
327993	750

We have determined that 76 of the 89 companies owning BSCP manufacturing facilities are small businesses. Although small businesses represent 86 percent of the companies within the source category, they are expected to incur about 21 percent of the total industry engineering compliance costs of $24 million. Additionally, 61 of the 76 small businesses will incur no costs. Under the final rule, we estimate that three small firms in this source category may experience an impact less 1 percent of sales, nine small firms in this source category may experience an impact between 1 percent and 3 percent of sales, and 3 small businesses (or 20 percent) may experience an impact greater than 3 percent of sales.

We also conducted an economic impact analysis that accounted for firm behavior to provide an estimate of the facility and market impacts of the proposed rule. The analysis projected that of the 189 facilities in this source category, two facilities are at risk of closure. Neither of these facilities is owned by a small business. The median compliance cost is below 1 percent of sales for both small and large firms affected by the proposed rule (0.0 and 0.1 percent for small and large firms, respectively).

Fifteen new BSCP manufacturing sources are projected to be constructed during the five years after promulgation of the rule. Industry compliance costs associated with these sources are anticipated to be less than 0.6 percent of the BSCP manufacturing industry's value of shipments. According to the new source economic impact analysis, three to six of these new sources may be delayed in coming on-line due to the compliance costs they would face. We cannot determine with certainty whether these new sources will be built by large or small companies. Regardless, impacts at the company level are not expected to be significant for a substantial number of small entities.

2. Clay Ceramics Manufacturing

Small Business Administration size standards for clay ceramics manufacturing, by NAICS code, are shown in Table 3 of this preamble.

TABLE 3.—SMALL BUSINESS SIZE STANDARDS FOR CLAY CERAMICS MANUFACTURING

NAICS code	Size standard, number of employees
326191	500
327111	750
327112	500
327122	500
327123	500
327125	750
335121	500
421220	100
421320	100

The EPA identified 13 of the 29 companies owning clay ceramics manufacturing facilities as small businesses. Because the clay ceramics manufacturing final rule does not include emissions limits for existing kilns and includes only a work practice standard that requires that existing kilns are fired with natural gas, a firm's existing kilns will be minimally impacted by the final rule. One new sanitaryware manufacturing source is projected to be constructed in the first five years following promulgation of the rule. Industry compliance costs associated with this source are expected to be less than 0.1 percent of industry value of shipments for the sanitaryware industry segments. No level of cost-to-sales for the new sanitaryware manufacturing source could be developed due to the diversity of product types produced. Thus, new clay ceramics manufacturing sources are expected to face positive compliance costs; however, we cannot determine with certainty whether these sources will be built by large or small companies. Regardless, impacts at the company level are not expected to be significant for a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA 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 EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed,

under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA's regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that today's final rules do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The total annual cost for today's final BSCP rule for any 1 year is estimated at $24 million. The total annual cost for today's final clay ceramics rule for any 1 year is estimated at $9,500. Thus, today's final rules are not subject to the requirements of sections 202 and 205 of the UMRA. In addition, the EPA has determined that today's final rules contain no regulatory requirements that might significantly or uniquely affect small governments because they contain no regulatory requirements that apply to such governments or impose obligations upon them. Therefore, today's final rules are not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132, Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the EPA may not issue a regulation that has 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, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless EPA consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and EPA's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, it must include a certification from EPA's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

Today's final rules do not have federalism implications. They will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. None of the affected facilities are owned or operated by State governments, and the final rule requirements will not supercede State regulations that are more stringent. Thus, the requirements of Executive Order 13132 do not apply to the final rules.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" are defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

Today's final rules do not have tribal implications. They will not have substantial direct effects on tribal governments, 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 in Executive Order 13175. No tribal governments are known to own or operate BSCP or clay ceramics manufacturing facilities. Thus, Executive Order 13175 does not apply to the final rules.

G. Executive Order 13045, Protection of Children From Environmental Health & Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns the environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA 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 EPA.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the rule. Today's final rules are not subject to Executive Order 13045 because they are based on technology performance and not on health or safety risks.

H. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action." Today's final clay ceramics manufacturing rule is not subject to Executive Order 13211

because it is not a significant regulatory action under Executive Order 12866. Although today's final BSCP rule is considered to be a significant regulatory action under Executive Order 12866, it is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The basis for the determination is as follows.

Today's final BSCP rule affects manufacturers in the BSCP (NAICS 327121), extruded tile (NAICS 327122), and other structural clay products (NAICS 327123) industries. There is no crude oil, fuel, or coal production from these industries. Hence, there is no direct effect on such energy production related to implementation of the BSCP rule. In fact, as previously mentioned in this preamble, there will be an increase in energy consumption, and hence an increase in energy production, resulting from installation of APCD likely needed for sources to meet the requirements of the final BSCP rule. This increase in energy consumption is equal to approximately 27 million kilowatt-hours/year (kWh/yr) for electricity. The electricity increase is considered negligible, equivalent to 0.0007 percent of 1999 U.S. electricity production.[4] There is no expected increase in natural gas consumption. It should be noted, however, that the estimated decrease in BSCP production resulting from producer's and consumer's reactions to the final BSCP rule will offset this effect on such energy production. It is likely that the output reduction in the industries will lead to less energy use by these industries and thus some reduction in overall energy production.

Given the negligible change in energy consumption resulting from the final BSCP rule, we do not expect any price increase for any energy type. The cost of energy distribution should not be affected by the final BSCP rule at all since the final rule does not affect energy distribution facilities. Finally, with changes in net exports being a minimal percentage of domestic output from the affected industries, there will be only a negligible change in international trade, and hence in dependence on foreign energy supplies. No other adverse outcomes are expected to occur with regards to energy supplies.

Therefore, we conclude that today's final BSCP rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

[4] U.S. Department of Energy, Energy Information Administration. Annual Energy Review, End-Use Energy Consumption for 1998. Located on the Internet at *http://www.eia.doe.gov.*

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. No. 104–113; 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

The final rules involve technical standards. The EPA cites the following standards in the final rules: EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 4, 5, 22, 26, 26A, and 320 of 40 CFR part 60, appendix A. Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified for EPA Methods 1A, 2A, 2D, 2F, 2G, and 22. The search and review results have been documented and are in the dockets for the final rules.

The search for emissions measurement procedures identified 11 voluntary consensus standards. The EPA determined that eight of these 11 standards identified for measuring emissions of the HAPs or surrogates subject to emission standards in the final rules were impractical alternatives to EPA test methods for the purposes of the final rules. Therefore, EPA does not intend to adopt these standards at this time. The reasons for this determination for the 11 methods are discussed in the dockets for the final rules.

Two of the 11 voluntary consensus standards identified in this search were not available at the time the review was conducted for the purposes of the final rules because they are under development by a voluntary consensus body: ASME/BSR MFC 13M, "Flow Measurement by Velocity Traverse," for EPA Method 2 (and possibly 1); and ASME/BSR MFC 12M, "Flow in Closed Conduits Using Multiport Averaging Pitot Primary Flowmeters," for EPA Method 2.

In response to public comments received, we considered and decided to include EPA Method 320 as an option for measuring HF and HCl. The voluntary consensus standard ASTM D6348–98, "Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy," has been reviewed by the EPA as a potential alternative to EPA Method 320. Suggested revisions to ASTM D6348–98 that would allow the EPA to accept ASTM D6348–98 as an acceptable alternative were sent to ASTM by the EPA. The ASTM Subcommittee D22–03 is currently undertaking a revision of ASTM D6348–98. Because of this, we are not citing this standard as an acceptable alternative for EPA Method 320 in the final rules today. However, upon successful ASTM balloting and demonstration of technical equivalency with the EPA FTIR methods, the revised ASTM standard could be incorporated by reference for EPA regulatory applicability. In the interim, facilities have the option to request ASTM D6348–98 as an alternative test method under 40 CFR 63.7(f) and 40 CFR 63.8(f) on a case-by-case basis.

Table 3 of the final BSCP rule and Table 4 of the final clay ceramics rule list the EPA testing methods included in the rules. Under 40 CFR 63.7(f) and 40 CFR 63.8(f), a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any of the EPA testing methods, performance specifications, or procedures.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing today's final rules 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 rules in the **Federal Register**. Neither of today's rules are "major rules" as defined by 5 U.S.C. 804(2). The final rules will be effective on May 16, 2003.

List of Subjects in 40 CFR Part 63

Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 28, 2003.

Christine Todd Whitman,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of the Federal Regulations 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.*

■ 2. Part 63 is amended by adding subpart JJJJJ to read as follows:

Subpart JJJJJ—National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing

Sec.

What This Subpart Covers

§ 63.8380 What is the purpose of this subpart?

This subpart establishes national emission limitations for hazardous air pollutants (HAP) emitted from brick and structural clay products (BSCP) manufacturing facilities. This subpart also establishes requirements to demonstrate initial and continuous compliance with the emission limitations.

§ 63.8385 Am I subject to this subpart?

You are subject to this subpart if you own or operate a BSCP manufacturing facility that is, is located at, or is part of, a major source of HAP emissions according to the criteria in paragraphs (a) and (b) of this section.

(a) A BSCP manufacturing facility is a plant site that manufactures brick (including, but not limited to, face brick, structural brick, and brick pavers); clay pipe; roof tile; extruded floor and wall tile; and/or other extruded, dimensional clay products. Brick and structural clay products manufacturing facilities typically process raw clay and shale, form the processed materials into bricks or shapes, and dry and fire the bricks or shapes.

(b) A major source of HAP emissions is any stationary source or group of stationary sources within a contiguous area under common control that emits or has the potential to emit any single HAP at a rate of 9.07 megagrams (10 tons) or more per year or any combination of HAP at a rate of 22.68 megagrams (25 tons) or more per year.

§ 63.8390 What parts of my plant does this subpart cover?

(a) This subpart applies to each existing, new, or reconstructed affected source at a BSCP manufacturing facility.

(b) The existing affected source is an existing tunnel kiln with a design capacity equal to or greater than 9.07 megagrams per hour (Mg/hr) (10 tons per hour (tph)) of fired product according to paragraphs (b)(1) through (3) of this section. For the remainder of this subpart, a tunnel kiln with a design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product will be called a large tunnel kiln, and a tunnel kiln with a design capacity less than 9.07 Mg/hr (10 tph) of fired product will be called a small tunnel kiln.

(1) For existing tunnel kilns that do not have sawdust dryers, the kiln exhaust process stream (*i.e.*, the only process stream) is subject to the requirements of this subpart.

(2) For existing tunnel kilns that ducted exhaust to sawdust dryers prior to July 22, 2002, only the kiln exhaust process stream (*i.e.*, the process stream that exhausts directly to the atmosphere or to an air pollution control device (APCD)) is subject to the requirements of this subpart. As such, any process stream that is ducted to a sawdust dryer is not subject to these requirements.

(3) For existing tunnel kilns that first ducted exhaust to sawdust dryers on or after July 22, 2002, all of the exhaust (*i.e.*, all process streams) is subject to the requirements of this subpart.

(c) An existing small tunnel kiln whose design capacity is increased such that it is equal to or greater than 9.07 Mg/hr (10 tph) of fired product is subject to the requirements of this subpart.

(d) An existing tunnel kiln with a federally enforceable permit condition that restricts kiln operation to less than 9.07 Mg/hr (10 tph) of fired product on a 12-month rolling average basis is not subject to the requirements of this subpart.

(e) Each new or reconstructed tunnel kiln is an affected source regardless of design capacity. All process streams from each new or reconstructed tunnel kiln are subject to the requirements of this subpart.

(f) Kilns that are used exclusively for research and development (R&D) and are not used to manufacture products for commercial sale, except in a de minimis manner, are not subject to the requirements of this subpart.

(g) Kilns that are used exclusively for setting glazes on previously fired products are not subject to the requirements of this subpart.

(h) A source is a new affected source if construction of the affected source began after July 22, 2002, and you met the applicability criteria at the time you began construction.

(i) An affected source is reconstructed if you meet the criteria as defined in § 63.2, except as provided in paragraphs (i)(1) and (i)(2) of this section.

(1) It is not technologically and economically feasible for an existing small tunnel kiln whose design capacity is increased such that it is equal to or greater than 9.07 Mg/hr (10 tph) of fired product to meet the relevant standards (*i.e.*, new source maximum achievable control technology (MACT)) by retrofitting with a dry lime injection fabric filter (DIFF), dry lime scrubber/ fabric filter (DLS/FF), or wet scrubber (WS).

(2) It is not technologically and economically feasible for an existing large dry limestone adsorber (DLA)-controlled kiln to meet the relevant standards by retrofitting with a DIFF, DLS/FF, or WS.

(j) An affected source is existing if it is not new or reconstructed.

§ 63.8395 When do I have to comply with this subpart?

(a) If you have a new or reconstructed affected source, you must comply with this subpart according to paragraphs (a)(1) and (2) of this section.

(1) If the initial startup of your affected source is before May 16, 2003, then you must comply with the applicable emission limitations in Tables 1 and 2 to this subpart no later than May 16, 2003.

(2) If the initial startup of your affected source is after May 16, 2003, then you must comply with the applicable emission limitations in Tables 1 and 2 to this subpart upon initial startup of your affected source.

(b) If you have an existing affected source, you must comply with the applicable emission limitations in Tables 1 and 2 to this subpart no later than May 16, 2003.

(c) If you have an existing area source that increases its emissions or its potential to emit such that it becomes a major source of HAP, you must be in compliance with this subpart according to paragraphs (c)(1) and (2) of this section.

(1) Any portion of the existing facility that is a new affected source or a new reconstructed source must be in compliance with this subpart upon startup.

(2) All other parts of the existing facility must be in compliance with this subpart by 3 years after the date the area source becomes a major source.

(d) If you have a new area source (*i.e.*, an area source for which construction or reconstruction commenced after July 22, 2002) that increases its emissions or its potential to emit such that it becomes a major source of HAP, you must be in compliance with this subpart upon initial startup of your affected source as a major source.

(e) You must meet the notification requirements in § 63.8480 according to the schedule in § 63.8480 and in 40 CFR part 63, subpart A. Some of the notifications must be submitted before you are required to comply with the emission limitations in this subpart.

Emission Limitations

§ 63.8405 What emission limitations must I meet?

(a) You must meet each emission limit in Table 1 to this subpart that applies to you.

(b) You must meet each operating limit in Table 2 to this subpart that applies to you.

§ 63.8410 What are my options for meeting the emission limitations?

To meet the emission limitations in Tables 1 and 2 to this subpart, you must use one or more of the options listed in paragraphs (a) and (b) of this section.

(a) *Emissions control system.* Use an emissions capture and collection system and an APCD and demonstrate that the resulting emissions or emissions reductions meet the emission limits in Table 1 to this subpart, and that the capture and collection system and APCD meet the applicable operating limits in Table 2 to this subpart.

(b) *Process changes.* Use low-HAP raw materials or implement manufacturing process changes and demonstrate that the resulting emissions or emissions reductions meet the emission limits in Table 1 to this subpart.

General Compliance Requirements

§ 63.8420 What are my general requirements for complying with this subpart?

(a) You must be in compliance with the emission limitations (including operating limits) in this subpart at all times, except during periods of startup, shutdown, and malfunction and during periods of routine control device maintenance as specified in paragraph (e) of this section.

(b) Except as specified in paragraph (e) of this section, you must always operate and maintain your affected source, including air pollution control and monitoring equipment, according to the provisions in § 63.6(e)(1)(i). During the period between the compliance date specified for your affected source in § 63.8395 and the date upon which continuous monitoring systems (CMS) (*e.g.*, continuous parameter monitoring systems) have been installed and verified and any applicable operating limits have been set, you must maintain a log detailing the operation and maintenance of the process and emissions control equipment.

(c) You must develop and implement a written startup, shutdown, and malfunction plan (SSMP) according to the provisions in § 63.6(e)(3).

(d) You must prepare and implement a written operation, maintenance, and monitoring (OM&M) plan according to the requirements in § 63.8425.

(e) If you own or operate an affected kiln and must perform routine maintenance on the control device for that kiln, you may bypass the kiln control device and continue operating the kiln upon approval by the Administrator provided you satisfy the conditions listed in paragraphs (e)(1) through (5) of this section.

(1) You must request a routine control device maintenance exemption from the Administrator. Your request must justify the need for the routine maintenance on the control device and the time required to accomplish the maintenance activities, describe the maintenance activities and the frequency of the maintenance activities, explain why the maintenance cannot be accomplished during kiln shutdowns, describe how you plan to minimize emissions to the greatest extent possible during the maintenance, and provide any other documentation required by the Administrator.

(2) The routine control device maintenance exemption must not exceed 4 percent of the annual operating uptime for each kiln.

(3) The request for the routine control device maintenance exemption, if approved by the Administrator, must be incorporated by reference in and attached to the affected source's title V permit.

(4) You must minimize HAP emissions during the period when the kiln is operating and the control device is offline.

(5) You must minimize the time period during which the kiln is operating and the control device is offline.

(f) You must be in compliance with the provisions of subpart A of this part, except as noted in Table 7 to this subpart.

§ 63.8425 What do I need to know about operation, maintenance, and monitoring plans?

(a) You must prepare, implement, and revise as necessary an OM&M plan that includes the information in paragraph (b) of this section. Your OM&M plan must be available for inspection by the permitting authority upon request.

(b) Your OM&M plan must include, as a minimum, the information in paragraphs (b)(1) through (13) of this section.

(1) Each process and APCD to be monitored, the type of monitoring device that will be used, and the operating parameters that will be monitored.

(2) A monitoring schedule that specifies the frequency that the parameter values will be determined and recorded.

(3) The limits for each parameter that represent continuous compliance with the emission limitations in § 63.8405. The limits must be based on values of the monitored parameters recorded during performance tests.

(4) Procedures for the proper operation and routine and long-term maintenance of each APCD, including a maintenance and inspection schedule that is consistent with the manufacturer's recommendations.

(5) Procedures for installing the CMS sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.*, on or downstream of the last APCD).

(6) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction system.

(7) Continuous monitoring system performance evaluation procedures and acceptance criteria (*e.g.*, calibrations).

(8) Procedures for the proper operation and maintenance of monitoring equipment consistent with the requirements in §§ 63.8450 and 63.8(c)(1), (3), (4)(ii), (7), and (8).

(9) Continuous monitoring system data quality assurance procedures consistent with the requirements in § 63.8(d).

(10) Continuous monitoring system recordkeeping and reporting procedures consistent with the requirements in § 63.10(c), (e)(1), and (e)(2)(i).

(11) Procedures for responding to operating parameter deviations, including the procedures in paragraphs (b)(11)(i) through (iii) of this section.

(i) Procedures for determining the cause of the operating parameter deviation.

(ii) Actions for correcting the deviation and returning the operating parameters to the allowable limits.

(iii) Procedures for recording the times that the deviation began and ended and corrective actions were initiated and completed.

(12) Procedures for keeping records to document compliance.

(13) If you operate an affected kiln and you plan to take the kiln control device out of service for routine maintenance, as specified in § 63.8420(e), the procedures specified in paragraphs (b)(13)(i) and (ii) of this section.

(i) Procedures for minimizing HAP emissions from the kiln during periods of routine maintenance of the kiln control device when the kiln is operating and the control device is offline.

(ii) Procedures for minimizing the duration of any period of routine maintenance on the kiln control device when the kiln is operating and the control device is offline.

(c) Changes to the operating limits in your OM&M plan require a new performance test. If you are revising an operating limit parameter value, you must meet the requirements in paragraphs (c)(1) and (2) of this section.

(1) Submit a notification of performance test to the Administrator as specified in § 63.7(b).

(2) After completing the performance tests to demonstrate that compliance with the emission limits can be achieved at the revised operating limit parameter value, you must submit the performance test results and the revised operating limits as part of the Notification of Compliance Status required under § 63.9(h).

(d) If you are revising the inspection and maintenance procedures in your OM&M plan, you do not need to conduct a new performance test.

Testing and Initial Compliance Requirements

§ 63.8435 By what date must I conduct performance tests?

You must conduct performance tests within 180 calendar days after the compliance date that is specified for your source in § 63.8395 and according to the provisions in § 63.7(a)(2).

§ 63.8440 When must I conduct subsequent performance tests?

(a) You must conduct a performance test before renewing your 40 CFR part 70 operating permit or at least every 5 years following the initial performance test.

(b) You must conduct a performance test when you want to change the parameter value for any operating limit specified in your OM&M plan.

§ 63.8445 How do I conduct performance tests and establish operating limits?

(a) You must conduct each performance test in Table 3 to this subpart that applies to you.

(b) Before conducting the performance test, you must install and calibrate all monitoring equipment.

(c) Each performance test must be conducted according to the requirements in § 63.7 and under the specific conditions in Table 3 to this subpart.

(d) You must test while operating at the maximum production level.

(e) You may not conduct performance tests during periods of startup, shutdown, or malfunction, as specified in § 63.7(e)(1).

(f) You must conduct at least three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour.

(g) You must use the data gathered during the performance test and the equations in paragraphs (g)(1) and (2) of this section to determine compliance with the emission limitations.

(1) To determine compliance with the production-based hydrogen fluoride (HF), hydrogen chloride (HCl), and particulate matter (PM) emission limits in Table 1 to this subpart, you must calculate your mass emissions per unit of production for each test run using Equation 1 of this section:

$$MP = \frac{ER}{P} \qquad \text{(Eq. 1)}$$

Where:

MP=mass per unit of production, kilograms (pounds) of pollutant per megagram (ton) of fired product

ER=mass emission rate of pollutant (HF, HCl, or PM) during each performance test run, kilograms (pounds) per hour

P=production rate during each performance test run, megagrams (tons) of fired product per hour.

(2) To determine compliance with the percent reduction HF and HCl emission limits in Table 1 to this subpart, you must calculate the percent reduction for each test run using Equation 2 of this section:

$$PR = \frac{ER_i - ER_o}{ER_i}\ (100) \qquad \text{(Eq. 2)}$$

Where:

PR=percent reduction, percent

ER_i=mass emission rate of specific HAP (HF or HCl) entering the

APCD, kilograms (pounds) per hour
ER_o=mass emission rate of specific HAP (HF or HCl) exiting the APCD, kilograms (pounds) per hour.

(h) You must establish each site-specific operating limit in Table 2 to this subpart that applies to you as specified in Table 3 to this subpart.

(i) For each affected kiln that is equipped with an APCD that is not addressed in Table 2 to this subpart or that is using process changes as a means of meeting the emission limits in Table 1 to this subpart, you must meet the requirements in § 63.8(f) and paragraphs (i)(1) and (2) of this section.

(1) Submit a request for approval of alternative monitoring procedures to the Administrator no later than the notification of intent to conduct a performance test. The request must contain the information specified in paragraphs (i)(1)(i) through (iv) of this section.

(i) A description of the alternative APCD or process changes.

(ii) The type of monitoring device or procedure that will be used.

(iii) The operating parameters that will be monitored.

(iv) The frequency that the operating parameter values will be determined and recorded to establish continuous compliance with the operating limits.

(2) Establish site-specific operating limits during the performance test based on the information included in the approved alternative monitoring procedures request and, as applicable, as specified in Table 3 to this subpart.

§ 63.8450 What are my monitoring installation, operation, and maintenance requirements?

(a) You must install, operate, and maintain each CMS according to your OM&M plan and the requirements in paragraphs (a)(1) through (5) of this section.

(1) Conduct a performance evaluation of each CMS according to your OM&M plan.

(2) The CMS must complete a minimum of one cycle of operation for each successive 15-minute period. To have a valid hour of data, you must have at least three of four equally spaced data values (or at least 75 percent if you collect more than four data values per hour) for that hour (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption as specified in § 63.8420(e)).

(3) Determine and record the 3-hour block averages of all recorded readings, calculated after every 3 hours of operation as the average of the previous 3 operating hours. To calculate the average for each 3-hour average period, you must have at least 75 percent of the recorded readings for that period (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption as specified in § 63.8420(e)).

(4) Record the results of each inspection, calibration, and validation check.

(5) At all times, maintain the monitoring equipment including, but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment.

(b) For each liquid flow measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (b)(1) through (3) of this section.

(1) Locate the flow sensor in a position that provides a representative flowrate.

(2) Use a flow sensor with a minimum measurement sensitivity of 2 percent of the liquid flowrate.

(3) At least semiannually, conduct a flow sensor calibration check.

(c) For each pressure measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (c)(1) through (7) of this section.

(1) Locate the pressure sensor(s) in or as close to a position that provides a representative measurement of the pressure.

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a gauge with a minimum measurement sensitivity of 0.5 inch of water or a transducer with a minimum measurement sensitivity of 1 percent of the pressure range.

(4) Check the pressure tap daily to ensure that it is not plugged.

(5) Using a manometer, check gauge calibration quarterly and transducer calibration monthly.

(6) Any time the sensor exceeds the manufacturer's specified maximum operating pressure range, conduct calibration checks or install a new pressure sensor.

(7) At least monthly, inspect all components for integrity, all electrical connections for continuity, and all mechanical connections for leakage.

(d) For each pH measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (d)(1) through (4) of this section.

(1) Locate the pH sensor in a position that provides a representative measurement of pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Check the pH meter's calibration on at least two points every 8 hours of process operation.

(4) At least monthly, inspect all components for integrity and all electrical connections for continuity.

(e) For each bag leak detection system, you must meet the requirements in paragraphs (e)(1) through (11) of this section.

(1) Each triboelectric bag leak detection system must be installed, calibrated, operated, and maintained according to the "Fabric Filter Bag Leak Detection Guidance," (EPA–454/R–98–015, September 1997). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Emissions, Monitoring and Analysis Division; Emission Measurement Center (MD–19), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network (TTN) under Emission Measurement Center Continuous Emission Monitoring. Other types of bag leak detection systems must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(2) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(3) The bag leak detection system sensor must provide an output of relative PM loadings.

(4) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(5) The bag leak detection system must be equipped with an audible alarm system that will sound automatically when an increase in relative PM emissions over a preset level is detected. The alarm must be located where it is easily heard by plant operating personnel.

(6) For positive pressure fabric filter systems, a bag leak detector must be installed in each baghouse compartment or cell.

(7) For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(9) The baseline output must be established by adjusting the range and the averaging period of the device and establishing the alarm set points and the alarm delay time according to section 5.0 of the "Fabric Filter Bag Leak Detection Guidance."

(10) Following initial adjustment of the system, the sensitivity or range, averaging period, alarm set points, or alarm delay time may not be adjusted except as detailed in your OM&M plan. In no case may the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection that demonstrates that the fabric filter is in good operating condition. Record each adjustment.

(11) Record the results of each inspection, calibration, and validation check.

(f) For each lime or chemical feed rate measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (f)(1) and (2) of this section.

(1) Locate the measurement device in a position that provides a representative feed rate measurement.

(2) At least semiannually, conduct a calibration check.

(g) For each limestone feed system on a DLA, you must meet the requirements in paragraphs (a)(1),(4), and (5) of this section and must ensure on a monthly basis that the feed system replaces limestone at least as frequently as the schedule set during the performance test.

(h) Requests for approval of alternate monitoring procedures must meet the requirements in §§ 63.8445(i) and 63.8(f).

§ 63.8455 How do I demonstrate initial compliance with the emission limitations?

(a) You must demonstrate initial compliance with each emission limitation that applies to you according to Table 4 to this subpart.

(b) You must establish each site-specific operating limit in Table 2 to this subpart that applies to you according to the requirements in § 63.8445 and Table 3 to this subpart.

(c) You must submit the Notification of Compliance Status containing the results of the initial compliance demonstration according to the requirements in § 63.8480(e).

Continuous Compliance Requirements

§ 63.8465 How do I monitor and collect data to demonstrate continuous compliance?

(a) You must monitor and collect data according to this section.

(b) Except for periods of monitor malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), you must monitor continuously (or collect data at all required intervals) at all times that the affected source is operating. This includes periods of startup, shutdown, malfunction, and routine control device maintenance as specified in § 63.8420(e) when the affected source is operating.

(c) You may not use data recorded during monitoring malfunctions, associated repairs, out-of-control periods, or required quality assurance or control activities for purposes of calculating data averages. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions. You must use all the valid data collected during all other periods in assessing compliance. Any averaging period for which you do not have valid monitoring data and such data are required constitutes a deviation from the monitoring requirements.

§ 63.8470 How do I demonstrate continuous compliance with the emission limitations?

(a) You must demonstrate continuous compliance with each emission limit and operating limit in Tables 1 and 2 to this subpart that applies to you according to the methods specified in Table 5 to this subpart.

(b) For each affected kiln that is equipped with an APCD that is not addressed in Table 2 to this subpart, or that is using process changes as a means of meeting the emission limits in Table 1 to this subpart, you must demonstrate continuous compliance with each emission limit in Table 1 to this subpart, and each operating limit established as required in § 63.8445(i)(2) according to the methods specified in your approved alternative monitoring procedures request, as described in §§ 63.8445(i)(1) and 63.8(f).

(c) You must report each instance in which you did not meet each emission limit and each operating limit in this subpart that applies to you. This includes periods of startup, shutdown, malfunction, and routine control device maintenance. These instances are deviations from the emission limitations in this subpart. These deviations must be reported according to the requirements in § 63.8485.

(d) During periods of startup, shutdown, and malfunction, you must operate according to your SSMP.

(e) Consistent with §§ 63.6(e)and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating according to an SSMP that satisfies the requirements of § 63.6(e) and your OM&M plan. The Administrator will determine whether deviations that occur during a period of startup, shutdown, or malfunction are violations, according to the provisions in § 63.6(e).

(f) Deviations that occur during periods of control device maintenance covered by an approved routine control device maintenance exemption according to § 63.8420(e) are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with the approved routine control device maintenance exemption.

(g) You must demonstrate continuous compliance with the operating limits in Table 2 to this subpart for visible emissions (VE) from tunnel kilns equipped with DLA, DIFF, or DLS/FF by monitoring VE at each kiln stack according to the requirements in paragraphs (g)(1) through (3) of this section.

(1) Perform daily VE observations of each kiln stack according to the procedures of Method 22 of 40 CFR part 60, appendix A. You must conduct the Method 22 test while the affected source is operating under normal conditions. The duration of each Method 22 test must be at least 15 minutes.

(2) If VE are observed during any daily test conducted using Method 22 of 40 CFR part 60, appendix A, you must promptly initiate and complete corrective actions according to your OM&M plan. If no VE are observed in 30 consecutive daily Method 22 tests for any kiln stack, you may decrease the frequency of Method 22 testing from daily to weekly for that kiln stack. If VE are observed during any weekly test, you must promptly initiate and complete corrective actions according to your OM&M plan, resume Method 22 testing of that kiln stack on a daily basis, and maintain that schedule until no VE are observed in 30 consecutive daily tests, at which time you may again decrease the frequency of Method 22 testing to a weekly basis.

(3) If VE are observed during any test conducted using Method 22 of 40 CFR part 60, appendix A, you must report these deviations by following the requirements in § 63.8485.

Notifications, Reports, and Records

§ 63.8480 What notifications must I submit and when?

(a) You must submit all of the notifications in §§ 63.7(b) and (c), 63.8(f)(4), and 63.9 (b) through (e), (g)(1), and (h) that apply to you, by the dates specified.

(b) As specified in § 63.9(b)(2) and (3), if you start up your affected source before May 16, 2003, you must submit an Initial Notification not later than 120 calendar days after May 16, 2003.

(c) As specified in § 63.9(b)(3), if you start up your new or reconstructed affected source on or after May 16, 2003, you must submit an Initial Notification not later than 120 calendar days after you become subject to this subpart.

(d) If you are required to conduct a performance test, you must submit a notification of intent to conduct a performance test at least 60 calendar days before the performance test is scheduled to begin, as required in § 63.7(b)(1).

(e) If you are required to conduct a performance test as specified in Table 3 to this subpart, you must submit a Notification of Compliance Status as specified in § 63.9(h) and paragraphs (e)(1) and (2) of this section.

(1) For each compliance demonstration that includes a performance test conducted according to the requirements in Table 3 to this subpart, you must submit the Notification of Compliance Status, including the performance test results, before the close of business on the 60th calendar day following the completion of the performance test, according to § 63.10(d)(2).

(2) In addition to the requirements in § 63.9(h)(2)(i), you must include the information in paragraphs (e)(2)(i) and (ii) of this section in your Notification of Compliance Status.

(i) The operating limit parameter values established for each affected source with supporting documentation and a description of the procedure used to establish the values.

(ii) For each APCD that includes a fabric filter, if a bag leak detection system is used, analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 63.8450(e).

(f) If you request a routine control device maintenance exemption according to § 63.8420(e), you must submit your request for the exemption no later than 30 days before the compliance date.

§ 63.8485 What reports must I submit and when?

(a) You must submit each report in Table 6 to this subpart that applies to you.

(b) Unless the Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date in Table 6 to this subpart and as specified in paragraphs (b)(1) through (5) of this section.

(1) The first compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.8395 and ending on June 30 or December 31, and lasting at least 6 months, but less than 12 months. For example, if your compliance date is March 1, then the first semiannual reporting period would begin on March 1 and end on December 31.

(2) The first compliance report must be postmarked or delivered no later than July 31 or January 31 for compliance periods ending on June 30 and December 31, respectively.

(3) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(4) Each subsequent compliance report must be postmarked or delivered no later than July 31 or January 31 for compliance periods ending on June 30 and December 31, respectively.

(5) For each affected source that is subject to permitting regulations pursuant to 40 CFR part 70 or 40 CFR part 71, if the permitting authority has established dates for submitting semiannual reports pursuant to 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), you may submit the first and subsequent compliance reports according to the dates the permitting authority has established instead of according to the dates in paragraphs (b)(1) through (4) of this section.

(c) The compliance report must contain the information in paragraphs (c)(1) through (7) of this section.

(1) Company name and address.

(2) Statement by a responsible official with that official's name, title, and signature, certifying that, based on information and belief formed after reasonable inquiry, the statements and information in the report are true, accurate, and complete.

(3) Date of report and beginning and ending dates of the reporting period.

(4) If you had a startup, shutdown or malfunction during the reporting period and you took actions consistent with your SSMP and OM&M plan, the compliance report must include the information specified in § 63.10(d)(5)(i).

(5) A description of control device maintenance performed while the control device was offline and the kiln controlled by the control device was operating, including the information specified in paragraphs (c)(5)(i) through (iii) of this section.

(i) The date and time when the control device was shutdown and restarted.

(ii) Identification of the kiln that was operating and the number of hours that the kiln operated while the control device was offline.

(iii) A statement of whether or not the control device maintenance was included in your approved routine control device maintenance exemption developed as specified in § 63.8420(e). If the control device maintenance was included in your approved routine control device maintenance exemption, then you must report the information in paragraphs (c)(5)(iii)(A) through (C) of this section.

(A) The total amount of time that the kiln controlled by the control device operated during the current semiannual compliance period and during the previous semiannual compliance period.

(B) The amount of time that each kiln controlled by the control device operated while the control device was offline for maintenance covered under the routine control device maintenance exemption during the current semiannual compliance period and during the previous semiannual compliance period.

(C) Based on the information recorded under paragraphs (c)(5)(iii)(A) and (B) of this section, compute the annual percent of kiln operating uptime during which the control device was offline for routine maintenance using Equation 1 of this section.

$$RM = \frac{DT_p + DT_c}{KU_p + KU_c} (100) \qquad \text{(Eq. 1)}$$

Where:

RM=Annual percentage of kiln uptime during which control device was offline for routine control device maintenance

DT_p=Control device downtime claimed under the routine control device maintenance exemption for the previous semiannual compliance period

DT_c=Control device downtime claimed under the routine control device maintenance exemption for the current semiannual compliance period

KU_p=Kiln uptime for the previous semiannual compliance period
KU_c=Kiln uptime for the current semiannual compliance period

(6) If there are no deviations from any emission limitations (emission limits or operating limits) that apply to you, the compliance report must contain a statement that there were no deviations from the emission limitations during the reporting period.

(7) If there were no periods during which the CMS was out-of-control as specified in your OM&M plan, the compliance report must contain a statement that there were no periods during which the CMS was out-of-control during the reporting period.

(d) For each deviation from an emission limitation (emission limit or operating limit) that occurs at an affected source where you are not using a CMS to comply with the emission limitations in this subpart, the compliance report must contain the information in paragraphs (c)(1) through (5) and paragraphs (d)(1) and (2) of this section. This includes periods of startup, shutdown, malfunction, and routine control device maintenance.

(1) The total operating time of each affected source during the reporting period.

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(e) For each deviation from an emission limitation (emission limit or operating limit) occurring at an affected source where you are using a CMS to comply with the emission limitations in this subpart, you must include the information in paragraphs (c)(1) through (5) and paragraphs (e)(1) through (13) of this section. This includes periods of startup, shutdown, malfunction, and routine control device maintenance.

(1) The total operating time of each affected source during the reporting period.

(2) The date and time that each malfunction started and stopped.

(3) The date and time that each CMS was inoperative, except for zero (low-level) and high-level checks.

(4) The date, time, and duration that each CMS was out-of-control, including the pertinent information in your OM&M plan.

(5) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of startup, shutdown, or malfunction; during routine control device maintenance covered in your approved routine control device maintenance exemption; or during another period.

(6) A description of corrective action taken in response to a deviation.

(7) A summary of the total duration of the deviation during the reporting period and the total duration as a percent of the total source operating time during that reporting period.

(8) A breakdown of the total duration of the deviations during the reporting period into those that were due to startup, shutdown, control equipment problems, process problems, other known causes, and other unknown causes.

(9) A summary of the total duration of CMS downtime during the reporting period and the total duration of CMS downtime as a percent of the total source operating time during that reporting period.

(10) A brief description of the process units.

(11) A brief description of the CMS.

(12) The date of the latest CMS certification or audit.

(13) A description of any changes in CMS, processes, or control equipment since the last reporting period.

(f) If you have obtained a title V operating permit according to 40 CFR part 70 or 40 CFR part 71, you must report all deviations as defined in this subpart in the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A). If you submit a compliance report according to Table 6 to this subpart along with, or as part of, the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), and the compliance report includes all required information concerning deviations from any emission limitation (including any operating limit), then submitting the compliance report will satisfy any obligation to report the same deviations in the semiannual monitoring report. However, submitting a compliance report will not otherwise affect any obligation you may have to report deviations from permit requirements to the permitting authority.

§ 63.8490 What records must I keep?

(a) You must keep the records listed in paragraphs (a)(1) through (4) of this section.

(1) A copy of each notification and report that you submitted to comply with this subpart, including all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted, according to the requirements in § 63.10(b)(2)(xiv).

(2) The records in § 63.6(e)(3)(iii) through (v) related to startup, shutdown, and malfunction.

(3) Records of performance tests as required in § 63.10(b)(2)(viii).

(4) Records relating to control device maintenance and documentation of your approved routine control device maintenance exemption, if you request such an exemption under § 63.8420(e).

(b) You must keep the records required in Table 5 to this subpart to show continuous compliance with each emission limitation that applies to you.

(c) You must also maintain the records listed in paragraphs (c)(1) through (6) of this section.

(1) For each bag leak detection system, records of each alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

(2) For each deviation of an operating limit parameter value, the date, time, and duration of the deviation, a brief explanation of the cause of the deviation and the corrective action taken, and whether the deviation occurred during a period of startup, shutdown, or malfunction.

(3) For each affected source, records of production rates on a fired-product basis.

(4) Records for any approved alternative monitoring or test procedures.

(5) Records of maintenance and inspections performed on the APCD.

(6) Current copies of your SSMP and OM&M plan, including any revisions, with records documenting conformance.

§ 63.8495 In what form and for how long must I keep my records?

(a) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(b) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record.

(c) You must keep each record onsite for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

Other Requirements and Information

§ 63.8505 What parts of the General Provisions apply to me?

Table 7 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you.

§ 63.8510 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by us, the U.S. EPA, or a delegated authority such as your State, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency, in addition to the U.S. EPA, has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if implementation and enforcement of this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under section 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

(c) The authorities that cannot be delegated to State, local, or tribal agencies are as specified in paragraphs (c)(1) through (4) of this section.

(1) Approval of alternatives to the applicability requirements in §§ 63.8385 and 63.8390, the compliance date requirements in § 63.8395, and the non-opacity emission limitations in § 63.8405.

(2) Approval of major changes to test methods under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(3) Approval of major changes to monitoring under § 63.8(f) and as defined in § 63.90.

(4) Approval of major changes to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90.

§ 63.8515 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2, and in this section as follows:

Air pollution control device (APCD) means any equipment that reduces the quantity of a pollutant that is emitted to the air.

Bag leak detection system means an instrument that is capable of monitoring PM loadings in the exhaust of a fabric filter in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light-scattering, light-transmittance, or other effects to monitor relative PM loadings.

Brick and structural clay products (BSCP) manufacturing facility means a plant site that manufactures brick (including, but not limited to, face brick, structural brick, and brick pavers); clay pipe; roof tile; extruded floor and wall tile; and/or other extruded, dimensional clay products. Brick and structural clay products manufacturing facilities typically process raw clay and shale, form the processed materials into bricks or shapes, and dry and fire the bricks or shapes.

Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limitation (including any operating limit) or work practice standard;

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart for any affected source required to obtain such a permit; or

(3) Fails to meet any emission limitation (including any operating limit) or work practice standard in this subpart during startup, shutdown, or malfunction, regardless of whether or not such failure is permitted by this subpart.

Dry lime injection fabric filter (DIFF) means an APCD that includes continuous injection of hydrated lime or other sorbent into a duct or reaction chamber followed by a fabric filter.

Dry lime scrubber/fabric filter (DLS/FF) means an APCD that includes continuous injection of humidified hydrated lime or other sorbent into a reaction chamber followed by a fabric filter. These systems typically include recirculation of some of the sorbent.

Dry limestone adsorber (DLA) means an APCD that includes a limestone storage bin, a reaction chamber that is essentially a packed tower filled with limestone, and may or may not include a peeling drum that mechanically scrapes reacted limestone to regenerate the stone for reuse.

Emission limitation means any emission limit or operating limit.

Fabric filter means an APCD used to capture PM by filtering a gas stream through filter media; also known as a baghouse.

Initial startup means:

(1) For a new or reconstructed tunnel kiln controlled with a DLA, and for a tunnel kiln that would be considered reconstructed but for § 63.8390(i)(1) or § 63.8390(i)(2), the time at which the temperature in the kiln first reaches 260 °C (500 °F) and the kiln contains product; or

(2) For a new or reconstructed tunnel kiln controlled with a DIFF, DLS/FF, or WS, the time at which the kiln first reaches a level of production that is equal to 75 percent of the kiln design capacity or 12 months after the affected source begins firing BSCP, whichever is earlier.

Kiln exhaust process stream means the portion of the exhaust from a tunnel kiln that exhausts directly to the atmosphere (or to an APCD), rather than to a sawdust dryer.

Large tunnel kiln means a tunnel kiln (existing, new, or reconstructed) with a design capacity equal to or greater than 9.07 Mg/hr (10 tph) of fired product.

Particulate matter (PM) means, for purposes of this subpart, emissions of PM that serve as a measure of total particulate emissions, as measured by Method 5 (40 CFR part 60, appendix A), and as a surrogate for metal HAP contained in the particulates including, but not limited to, antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium.

Plant site means all contiguous or adjoining property that is under common control, including properties that are separated only by a road or other public right-of-way. Common control includes properties that are owned, leased, or operated by the same entity, parent entity, subsidiary, or any combination thereof.

Research and development kiln means any kiln whose purpose is to conduct research and development for new processes and products and is not engaged in the manufacture of products for commercial sale, except in a de minimis manner.

Responsible official means responsible official as defined in 40 CFR 70.2.

Small tunnel kiln means a tunnel kiln (existing, new, or reconstructed) with a design capacity less than 9.07 Mg/hr (10 tph) of fired product.

Startup means the setting in operation of an affected source and starting the production process.

Tunnel kiln means any continuous kiln that is used to fire BSCP. Some tunnel kilns have two process streams, including a process stream that exhausts directly to the atmosphere or to an APCD, and a process stream in which the kiln exhaust is ducted to a sawdust dryer where it is used to dry sawdust before being emitted to the atmosphere.

Tunnel kiln design capacity means the maximum amount of brick, in Mg (tons), that a kiln is designed to produce in one year divided by the number of hours in a year (8,760 hours). If a kiln is modified to increase the capacity, the design capacity is considered to be the capacity following modifications.

Wet scrubber (WS) means an APCD that uses water, which may include caustic additives or other chemicals, as the sorbent. Wet scrubbers may use any

of various design mechanisms to increase the contact between exhaust gases and the sorbent.

Tables to Subpart JJJJJ of Part 63

As stated in § 63.8405, you must meet each emission limit in the following table that applies to you:

TABLE 1 TO SUBPART JJJJJ OF PART 63.—EMISSION LIMITS

For each . . .	You must meet the following emission limits . . .	Or you must comply with the following . . .
1. Existing large tunnel kiln (design capacity ≥10 tph of fired product), excluding any process stream that is ducted to a sawdust dryer prior to July 22, 2002; or including any process stream that exhausts directly to the atmosphere or to an APCD and any process stream that is first ducted to a sawdust on or after July 22, 2002; each new or reconstructed small tunnel kiln (design capacity <10 tph of fired product), including all process streams; each tunnel kiln that would be considered reconstructed but for § 63.8390(i)(1), including all process streams; and each large tunnel kiln previously equipped with a DLA that would be considered reconstructed but for § 63.8390(i)(2), including all process streams.	a. HF emissions must not exceed 0.029 kilograms per megagram (kg/Mg) (0.057 pounds per ton (lb/ton)) of fired product. b. HCl emissions must not exceed 0.13 kg/Mg (0.26 lb/ton) of fired product. c. PM emissions must not exceed 0.21 kg/Mg (0.42 lb/ton) of fired product.	Reduce uncontrolled HF emissions by at least 90 percent. Reduce uncontrolled HCl emissions by at least 30 percent. Not applicable.
2. New or reconstructed large tunnel kiln, including all process streams.	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product. b. HCl emissions must not exceed 0.028 kg/Mg (0.056 lb/ton) of fired product. c. PM emissions must not exceed 0.060 kg/Mg (0.12 lb/ton) of fired product.	Reduce uncontrolled HF emissions by at least 90 percent. Reduce uncontrolled HCl emissions by at least 85 percent. Not applicable.

As stated in § 63.8405, you must meet each operating limit in the following table that applies to you:

TABLE 2 TO SUBPART JJJJJ OF PART 63.—OPERATING LIMITS

For each . . .	You must . . .
1. Kiln equipped with a DLA	a. Maintain the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test; and b. Maintain an adequate amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times; maintain the limestone feeder setting at or above the level established during the performance test; and c. Use the same grade of limestone from the same source as was used during the performance test; maintain records of the source and grade of limestone; and d. Maintain no VE from the DLA stack.
2. Kiln equipped with a DIFF or DLS/FF	a. If you use a bag leak detection system, initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions in accordance with your OM&M plan; operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period; or maintain no VE from the DIFF or DLS/FF stack; and b. Maintain free-flowing lime in the feed hopper or silo and to the APCD at all times for continuous injection systems; maintain the feeder setting at or above the level established during the performance test for continuous injection systems.
3. Kiln equipped with a WS	a. Maintain the average scrubber pressure drop for each 3-hour block period at or above the average pressure drop established during the performance test; and b. Maintain the average scrubber liquid pH for each 3-hour block period at or above the average scrubber liquid pH established during the performance test; and c. Maintain the average scrubber liquid flow rate for each 3-hour block period at or above the average scrubber liquid flow rate established during the performance test; and d. If chemicals are added to the scrubber water, maintain the average scrubber chemical feed rate for each 3-hour block period at or above the average scrubber chemical feed rate established during the performance test.

As stated in § 63.8445, you must conduct each performance test in the following table that applies to you:

TABLE 3 TO SUBPART JJJJJ OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS

For each . . .	You must . . .	Using . . .	According to the following requirements . . .
1. Kiln	a. Select locations of sampling ports and the number of traverse points.	Method 1 or 1A of 40 CFR part 60, appendix A.	Sampling sites must be located at the outlet of the APCD and prior to any releases to the atmosphere for all affected sources. If you choose to meet the percent emission reduction requirements for HF or HCl, a sampling site must also be located at the APCD inlet.
	b. Determine velocities and volumetric flow rate.	Method 2 of 40 CFR part 60, appendix A.	You may use Method 2A, 2C, 2D, 2F, or 2G of 40 CFR part 60, appendix A, as appropriate, as an alternative to using Method 2 of 40 CFR part 60, appendix A.
	c. Conduct gas molecular weight analysis.	Method 3 of 40 CFR part 60, appendix A.	You may use Method 3A or 3B of 40 CFR part 60, appendix A, as appropriate, as an alternative to using Method 3 of 40 CFR part 60, appendix A.
	d. Measure moisture content of the stack gas.	Method 4 of 40 CFR part 60, appendix A.	
	e. Measure HF and HCl emissions.	Method 26A of 40 CFR part 60, appendix A; or	Conduct the test while operating at the maximum production level. You may use Method 26 of 40 CFR part 60, appendix A, as an alternative to using Method 26A of 40 CFR part 60, appendix A, when no acid PM (*e.g.*, HF or HCl dissolved in water droplets emitted by sources controlled by a WS) is present.
		Method 320 of 40 CFR part 63, appendix A.	Conduct the test while operating at the maximum production level. When using Method 320 of 40 CFR part 63, appendix A, you must follow the analyte spiking procedures of section 13 of Method 320 of 40 CFR part 63, appendix A, unless you can demonstrate that the complete spiking procedure has been conducted at a similar source.
	f. Measure PM emissions.	Method 5 of 40 CFR part 60, appendix A.	Conduct the test while operating at the maximum production level.
2. Kiln that is complying with production-based emission limits.	Determine the production rate during each test run in order to determine compliance with production-based emission limits.	Production data collected during the performance tests (*e.g.*, no. of pushes per hour, no. of bricks per kiln car, weight of a typical fired brick).	You must measure and record the production rate, on a fired-product basis, of the affected source for each of the three test runs.
3. Kiln equipped with a DLA	a. Establish the operating limit for the average pressure drop across the DLA.	Data from the pressure drop measurement device during the performance test.	You must continuously measure the pressure drop across the DLA, determine and record the block average pressure drop values for the three test runs, and determine and record the 3-hour block average of the recorded pressure drop measurements for the three test runs.

TABLE 3 TO SUBPART JJJJJ OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For each . . .	You must . . .	Using . . .	According to the following requirements . . .
	b. Establish the operating limit for the limestone feeder setting.	Data from the limestone feeder during the performance test.	You must ensure that you maintain an adequate amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times during the performance test. You must establish your limestone feeder setting one week prior to the performance test and maintain the feeder setting for the one-week period that precedes the performance test and during the performance test.
	c. Document the source and grade of limestone used.	Records of limestone purchase.	
4. Kiln equipped with a DIFF or DLS/FF.	Establish the operating limit for the lime feeder setting.	Data from the lime feeder during the performance test.	For continuous lime injection systems, you must ensure that lime in the feed hopper or silo and to the APCD is free-flowing at all times during the performance test and record the feeder setting for the three test runs. If the feed rate setting varies during the three test runs, determine and record the average feed rate from the three test runs.
5. Kiln equipped with a WS	a. Establish the operating limit for the average scrubber pressure drop.	Data from the pressure drop measurement device during the performance test.	You must continuously measure the scrubber pressure drop, determine and record the block average pressure drop values for the three test runs, and determine and record the 3-hour block average of the recorded pressure drop measurements for the three test runs.
	b. Establish the operating limit for the average scrubber liquid pH.	Data from the pH measurement device during the performace test.	You must continuously measure the scrubber liquid pH, determine and record the block average pH values for the three test runs, and determine and record the 3-hour block average of the recorded pH measurements for the three test runs.
	c. Establish the operating limit for the average scrubber liquid flow rate.	Data from the flow rate measurement device during the performance test.	You must continuously measure the scrubber liquid flow rate, determine and record the block average flow rate values for the three test runs, and determine and record the 3-hour block average of the recorded flow rate measurements for the three test runs.
6. Kiln equipped with a WS that includes chemical addition to the water.	Establish the operating limit for the average scrubber chemical feed rate.	Data from the chemical feed rate measurement device during the performance test.	You must continuously measure the scrubber chemical feed rate, determine and record the block average chemical feed rate values for the three test runs, and determine and record the 3-hour block average of the recorded chemical feed rate measurements for the three test runs.

As stated in § 63.8455, you must demonstrate initial compliance with each emission limitation that applies to you according to the following table:

TABLE 4 TO SUBPART JJJJJ OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS

For each . . .	For the following emission limitation . . .	You have demonstrated initial compliance if . . .
1. Existing large tunnel kiln (design capacity ≥10 tph of fired product), excluding any process stream that is ducted to a sawdust dryer prior to July 22, 2002; or including any process stream that exhausts directly to the atmosphere or to an APCD and any process stream that is first ducted to a sawdust dryer on or after July 22, 2002; each new or reconstructed small tunnel kiln (design capacity <10 tph of fired product), including all process streams; each tunnel kiln that would be considered reconstructed but for § 63.8390(i)(1), including all process streams; and each large tunnel kiln previously equipped with a DLA that would be considered reconstructed but for § 63.8390(i)(2), including all process streams.	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product; or uncontrolled HF emissions must be reduced by at least 90 percent; and	i. The HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in § 63.8445(g)(1), do not exceed 0.029 kg/Mg (0.057 lb/ton); or uncontrolled HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 90 percent, according to the calculations in § 63.8445(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HF emissions did not exceed 0.029 kg/Mg (0.057 lb/ton) or uncontrolled HF emissions were reduced by at least 90 percent.
	b. HCl emissions must not exceed 0.13 kg/Mg (0.26 lb/ton) of fired product; or uncontrolled HCl emissions must be reduced by at least 30 percent; and	i. The HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in § 63.8445(g)(1), do not exceed 0.13 kg/Mg (0.26 lb/ton); or uncontrolled HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 30 percent, according to the calculations in § 63.8445(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HCl emissions did not exceed 0.13 kg/Mg (0.26 lb/ton) or uncontrolled HCl emissions were reduced by at least 30 percent.
	c. PM emissions must not exceed 0.21 kg/Mg (0.42 lb/ton) of fired product.	i. The PM emissions measured using Method 5 of 40 CFR part 60, appendix A, over the period of the initial performance test, according to the calculations in § 63.8445(g)(1), do not exceed 0.21 kg/Mg (0.42 lb/ton); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which PM emissions did not exceed 0.21 kg/Mg (0.42 lb/ton).
2. New or reconstructed large tunnel kiln, including all process streams.	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product; or uncontrolled HF emissions must be reduced by at least 90 percent; and	i. The HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in § 63.8445(g)(1), do not exceed 0.029 kg/Mg (0.057 lb/ton); or uncontrolled HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 90 percent, according to the calculations in § 63.8445(g)(2); and

TABLE 4 TO SUBPART JJJJJ OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS—Continued

For each . . .	For the following emission limitation . . .	You have demonstrated initial compliance if . . .
		ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HF emissions did not exceed 0.029 kg/Mg (0.057 lb/ton) or uncontrolled HF emissions were reduced by at least 90 percent.
	b. HCl emissions must not exceed 0.028 kg/Mg (0.056 lb/ton) of fired product; or uncontrolled HCl emissions must be reduced by at least 85 percent; and	i. The HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in §63.8445(g)(1), do not exceed 0.028 kg/Mg (0.056 lb/ton); or uncontrolled HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 85 percent, according to the calculations in §63.8445(g)(2); and
		ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HCl emissions did not exceed 0.028 kg/Mg (0.056 lb/ton) or uncontrolled HCl emissions were reduced by at least 85 percent.
	c. PM emissions must not exceed 0.060 kg/Mg (0.12 lb/ton) of fired product.	i. The PM emissions measured using Method 5 of 40 CFR part 60, appendix A, over the period of the initial performance test, according to the calculations in §63.8445(g)(1), do not exceed 0.060 kg/Mg (0.12 lb/ton); and
		ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which PM emissions did not exceed 0.060 kg/Mg (0.12 lb/ton).

As stated in §63.8470, you must demonstrate continuous compliance with each emission limit and operating limit that applies to you according to the following table:

TABLE 5 TO SUBPART JJJJJ OF PART 63.—CONTINUOUS COMPLIANCE WITH EMISSION LIMITS AND OPERATING LIMITS

For each . . .	For the following emission limits and operating limits . . .	You must demonstrate continuous compliance by . . .
1. Kiln equipped with a DLA	Each emission limit in Table 1 to this subpart and each operating limit in Item 1 of Table 2 to this subpart for kilns equipped with a DLA.	i. Collecting the DLA pressure drop data according to §63.8450(a); reducing the DLA pressure drop data to 3-hour block averages according to §63.8450(a); maintaining the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test; and ii. Verifying that the limestone hopper and storage bin (located at the top of the DLA) contain adequate limestone by performing a daily visual check; and iii. Recording the limestone feeder setting daily to verify that the feeder setting is being maintained at or above the level established during the performance test; and iv. Using the same grade of limestone from the same source as was used during the performance test; maintaining records of the source and type of limestone; and v. Performing VE observations of the DLA stack at the frequency specified in §63.8470(g) using Method 22 of 40 CFR part 60, appendix A; maintaining no VE from the DLA stack.

TABLE 5 TO SUBPART JJJJJ OF PART 63.—CONTINUOUS COMPLIANCE WITH EMISSION LIMITS AND OPERATING LIMITS—Continued

For each . . .	For the following emission limits and operating limits . . .	You must demonstrate continuous compliance by . . .
2. Kiln equipped with a DIFF or DLS/FF.	Each emission limit in Table 1 to this subpart and each operating limit in Item 2 of Table 2 to this subpart for kilns equipped with DIFF or DLS/FF.	i. If you use a bag leak detection system, initiating corrective action within 1 hour of a bag leak detection system alarm and completing corrective actions in accordance with your OM&M plan; operating and maintaining the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period; in calculating this operating time fraction, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted; if corrective action is required, each alarm is counted as a minimum of 1 hour; if you take longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken by you to initiate corrective action; or performing VE observations of the DIFF or DLS/FF stack at the frequency specified in §63.8470(g) using Method 22 of 40 CFR part 60, appendix A; maintaining no VE from the DIFF or DLS/FF stack; and ii. Verifying that lime is free-flowing via a load cell, carrier gas/lime flow indicator, carrier gas pressure drop measurement system, or other system; recording all monitor or sensor output, and if lime is found not to be free flowing, promptly initiating and completing corrective actions in accordance with your OM&M plan; recording the feeder setting once during each shift of operation to verify that the feeder setting is being maintained at or above the level established during the performance test.
3. Kiln equipped with a WS	Each emission limit in Table 1 to this subpart and each operating limit in Item 3 of Table 2 to this subpart for kilns equipped with WS.	i. Collecting the scrubber pressure drop data according to §63.8450(a); reducing the scrubber pressure drop data to 3-hour block averages according to §63.8450(a); maintaining the average scrubber pressure drop for each 3-hour block period at or above the average pressure drop established during the performance test; and ii. Collecting the scrubber liquid pH data according to §63.8450(a); reducing the scrubber liquid pH data to 3-hour block averages according to §63.8450(a); maintaining the average scrubber liquid pH for each 3-hour block period at or above the average scrubber liquid pH established during the performance test; and iii. Collecting the scrubber liquid flow rate data according to §63.8450(a); reducing the scrubber liquid flow rate data to 3-hour block averages according to §63.8450(a); maintaining the average scrubber liquid flow rate for each 3-hour block period at or above the average scrubber liquid flow rate established during the performance test; and iv. If chemicals are added to the scrubber water, collecting the scrubber chemical feed rate data according to §63.8450(a); reducing the scrubber chemical feed rate data to 3-hour block averages according to §63.8450(a); maintaining the average scrubber chemical feed rate for each 3-hour block period at or above the average scrubber chemical feed rate established during the performance test.

As stated in §63.8485, you must submit each report that applies to you according to the following table:

TABLE 6 TO SUBPART JJJJJ OF PART 63.—REQUIREMENTS FOR REPORTS

You must submit . . .	The report must contain . . .	You must submit the report . . .
1. A compliance report	a. If there are no deviations from any emission limitations (emission limits, operating limits) that apply to you, a statement that there were no deviations from the emission limitations during the reporting period. If there were no periods during which the CMS was out-of-control as specified in your OM&M plan, a statement that there were no periods during which the CMS was out- of-control during the reporting period.	Semiannually according to the requirements in §63.8485(b).

TABLE 6 TO SUBPART JJJJJ OF PART 63.—REQUIREMENTS FOR REPORTS—Continued

You must submit . . .	The report must contain . . .	You must submit the report . . .
	b. If you have a deviation from any emission limitation (emission limit, operating limit) during the reporting period, the report must contain the information in § 63.8485(d) or (e). If there were periods during which the CMS was out-of-control, as specified in your OM&M plan, the report must contain the information in § 63.8485(e).	Semiannually according to the requirements in § 63.8485(b).
	c. If you had a startup, shutdown or malfunction during the reporting period and you took actions consistent with your SSMP, the compliance report must include the information in § 63.10(d)(5)(i).	Semiannually according to the requirements in § 63.8485(b).
2. An immediate startup, shutdown, and malfunction report if you took actions during a startup, shutdown, or malfunction during the reporting period that are not consistent with your SSMP.	a. Actions taken for the event according to the requirements in § 63.10(d)(5)(ii).	By fax or telephone within 2 working days after starting actions inconsistent with the plan.
	b. The information in § 63.10(d)(5)(ii)	By letter within 7 working days after the end of the event unless you have made alternative arrangements with the permitting authority.

As stated in § 63.8505, you must comply with the General Provisions in §§ 63.1 through 63.15 that apply to you according to the following table:

TABLE 7 TO SUBPART JJJJJ OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJ

Citation	Subject	Brief description	Applies to subpart JJJJJ
§ 63.1	Applicability	Initial applicability determination; applicability after standard established; permit requirements; extensions, notifications.	Yes.
§ 63.2	Definitions	Definitions for part 63 standards	Yes.
§ 63.3	Units and Abbreviations	Units and abbreviations for part 63 standards	Yes.
§ 63.4	Prohibited Activities	Compliance date; circumvention; severability	Yes.
§ 63.5	Construction/Reconstruction	Applicability; applications; approvals	Yes.
§ 63.6(a)	Applicability	General Provisions (GP) apply unless compliance extension; GP apply to area sources that become major.	Yes.
§ 63.6(b)(1)–(4)	Compliance Dates for New and Reconstructed sources.	Standards apply at effective date; 3 years after effective date; upon startup; 10 years after construction or reconstruction commences for section 112(f).	Yes.
§ 63.6(b)(5)	Notification	Must notify if commenced construction or reconstruction after proposal.	Yes.
§ 63.6(b)(6)	[Reserved].		
§ 63.6(b)(7)	Compliance Dates for New and Reconstructed area Sources That Become Major.	Area sources that become major must comply with major source standards immediately upon becoming major, regardless of whether required to comply when they were area sources.	Yes.
§ 63.6(c)(1)–(2)	Compliance Dates for Existing Sources	Comply according to date in subpart, which must be no later than 3 years after effective date; for section 112(f) standards, comply within 90 days of effective date unless compliance extension.	Yes.
§ 63.6(c)(3)–(4)	[Reserved]..		
§ 63.6(c)(5)	Compliance Dates for Existing area Sources That Become Major.	Area sources that become major must comply with major source standards by date indicated in subpart or by equivalent time period (for example, 3 years).	Yes.
§ 63.6(d)	[Reserved].		
§ 63.6(e)(1)–(2)	Operation & Maintenance	Operate to minimize emissions at all times; correct malfunctions as soon as practicable; requirements independently enforceable; information Administrator will use to determine if operation and maintenance requirements were met.	Yes.
§ 63.6(e)(3)	Startup, Shutdown, and Malfunction Plan (SSMP).	Requirement for startup, shutdown, and malfunction (SSM) and SSMP; content of SSMP.	Yes.
§ 63.6(f)(1)	Compliance Except During SSM	You must comply with emission standards at all times except during SSM.	Yes.
§ 63.6(f)(2)–(3)	Methods for Determining Compliance ..	Compliance based on performance test, operation and maintenance plans, records, inspection.	Yes.
§ 63.6(g)	Alternative Standard	Procedures for getting an alternative standard	Yes.
§ 63.6(h)	Opacity/VE Standards	Requirements for opacity and VE standards	No, not applicable.

TABLE 7 TO SUBPART JJJJJ OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJ—Continued

Citation	Subject	Brief description	Applies to subpart JJJJJ
§63.6(i)	Compliance Extension	Procedures and criteria for Administrator to grant compliance extension.	Yes.
§63.6(j)	Presidential Compliance Exemption	President may exempt source category	Yes.
§63.7(a)(1)–(2)	Performance Test Dates	Dates for conducting initial performance testing and other compliance demonstrations; must conduct 180 days after first subject to rule.	Yes.
§63.7(a)(3)	Section 114 Authority	Administrator may require a performance test under CAA section 114 at any time.	Yes.
§63.7(b)(1)	Notification of Performance Test	Must notify Administrator 60 days before the test	Yes.
§63.7(b)(2)	Notification of Rescheduling	Must notify Administrator 5 days before scheduled date of rescheduled date.	Yes.
§63.7(c)	Quality Assurance(QA)/Test Plan	Requirements; test plan approval procedures; performance audit requirements; internal and external QA procedures for testing.	Yes.
§63.7(d)	Testing Facilities	Requirements for testing facilities	Yes.
§63.7(e)(1)	Conditions for Conducting Performance Tests.	Performance tests must be conducted under representative conditions.	No, §63.8445 specifies requirements.
		Cannot conduct performance tests during SSM; not a violation to exceed standard during SSM.	Yes.
§63.7(e)(2)–(3)	Conditions for Conducting Performance Tests.	Must conduct according to subpart and EPA test methods unless Administrator approves alternative; must have at least three test runs of at least 1 hour each; compliance is based on arithmetic mean of three runs; conditions when data from an additional test run can be used.	Yes.
§63.7(f)	Alternative Test Method	Procedures by which Administrator can grant approval to use an alternative test method.	Yes.
§63.7(g)	Performance Test Data Analysis	Must include raw data in performance test report; must submit performance test data 60 days after end of test with the notification of compliance status.	Yes.
§63.7(h)	Waiver of Tests	Procedures for Administrator to waive performance test	Yes.
§63.8(a)(1)	Applicability of Monitoring Requirements.	Subject to all monitoring requirements in subpart	Yes.
§63.8(a)(2)	Performance Specifications	Performance Specifications in appendix B of 40 CFR part 60 apply.	Yes.
§63.8(a)(3)	[Reserved].		
§63.8(a)(4)	Monitoring with Flares	Requirements for flares in §63.11 apply	No, not applicable.
§63.8(b)(1)	Monitoring	Must conduct monitoring according to standard unless Administrator approves alternative.	Yes.
§63.8(b)(2)–(3)	Multiple Effluents and Multiple Monitoring Systems.	Specific requirements for installing and reporting on monitoring systems.	Yes.
§63.8(c)(1)	Monitoring System Operation and Maintenance.	Maintenance consistent with good air pollution control practices.	Yes.
§63.8(c)(1)(i)	Routine and Predictable SSM	Reporting requirements for SSM when action is described in SSMP.	Yes.
§63.8(c)(1)(ii)	SSM not in SSMP	Reporting requirements for SSM when action is not described in SSMP.	Yes.
§63.8(c)(1)(iii)	Compliance with Operation and Maintenance Requirements.	How Administrator determines if source complying with operation and maintenance requirements.	Yes.
§63.8(c)(2)–(3)	Monitoring System Installation	Must install to get representative emission and parameter measurements.	Yes.
§63.8(c)(4)	CMS Requirements	Requirements for CMS	No, §§63.8425 and 63.8465 specify requirements.
§63.8(c)(5)	Continuous Opacity Monitoring System (COMS) Minimum Procedures.	COMS minimum procedures	No, not applicable.
§63.8(c)(6)	CMS Requirements	Zero and high level calibration check requirements	No, §63.8425 specifies requirements.
§63.8(c)(7)–(8)	CMS Requirements	Out-of-control periods	No, §63.8425 specifies requirements.
§63.8(d)	CMS Quality Control	Requirements for CMS quality control	No, §63.8425 specifies requirements.
§63.8(e)	CMS Performance Evaluation	Requirements for CMS performance evaluation	No, §63.8425 specifies requirements.
§63.8(f)(1)–(5)	Alternative Monitoring Method	Procedures for Administrator to approve alternative monitoring.	Yes.

TABLE 7 TO SUBPART JJJJJ OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJ—Continued

Citation	Subject	Brief description	Applies to subpart JJJJJ
§63.8(f)(6)	Alternative to Relative Accuracy Test	Procedures for Administrator to approve alternative relative accuracy test for continuous emissions monitoring systems (CEMS).	No, not applicable.
§63.8(g)	Data Reduction	COMS and CEMS data reduction requirements	No, not applicable.
§63.9(a)	Notification Requirements	Applicability; State delegation	Yes.
§63.9(b)	Initial Notifications	Requirements for initial notifications	Yes.
§63.9(c)	Request for Compliance Extension	Can request if cannot comply by date or if installed BACT/LAER.	Yes.
§63.9(d)	Notification of Special Compliance Requirements for New Source.	For sources that commence construction between proposal and promulgation and want to comply 3 years after effective date.	Yes.
§63.9(e)	Notification of Performance Test	Notify Administrator 60 days prior	Yes.
§63.9(f)	Notification of VE/Opacity Test	Notify Administrator 30 days prior	No, not applicable.
§63.9(g)(1)	Additional Notifications When Using CMS.	Notification of performance evaluation	Yes.
§63.9(g)(2)–(3)	Additional Notifications When Using CMS.	Notification of COMS data use; notification that relative accuracy alternative criterion were exceeded.	No, not applicable.
§63.9(h)	Notification of Compliance Status	Contents; submittal requirements	Yes.
§63.9(i)	Adjustment of Submittal Deadlines	Procedures for Administrator to approve change in when notifications must be submitted.	Yes.
§63.9(j)	Change in Previous Information	Must submit within 15 days after the change	Yes.
§63.10(a)	Recordkeeping/Reporting	Applicability; general information	Yes.
§63.10(b)(1)	General Recordkeeping Requirements	General requirements	Yes.
§63.10(b)(2)(i)–(v)	Records Related to SSM	Requirements for SSM records	Yes.
§63.10(b)(2)(vi)–(xii) and (xiv).	CMS Records	Records when CMS is malfunctioning, inoperative or out-of-control.	Yes.
§63.10(b)(2)(xiii)	Records	Records when using alternative to relative accuracy test	No, not applicable.
§63.10(b)(3)	Records	Applicability Determinations	Yes.
§63.10(c)(1)–(15)	Records	Additional records for CMS	No, §§63.8425 and 63.8490 specify requirements.
§63.10(d)(1) and (2).	General Reporting Requirements	Requirements for and reporting; performance test results reporting.	Yes.
§63.10(d)(3)	Reporting Opacity or VE Observations	Requirements for reporting opacity and VE	No, not applicable.
§63.10(d)(4)	Progress Reports	Must submit progress reports on schedule if under compliance extension.	Yes.
§63.10(d)(5)	SSM Reports	Contents and submission	Yes.
§63.10(e)(1)–(3)	Additional CMS Reports	Requirements for CMS reporting	No, §§63.8425 and 63.8485 specify requirements.
§63.10(e)(4)	Reporting COMS data	Requirements for reporting COMS data with performance test data.	No, not applicable.
§63.10(f)	Waiver for Recordkeeping/Reporting	Procedures for Administrator to waive	Yes.
§63.11	Flares	Requirement for flares	No, not applicable.
§63.12	Delegation	State authority to enforce standards	Yes.
§63.13	Addresses	Addresses for reports, notifications, requests	Yes.
§63.14	Incorporation by Reference	Materials incorporated by reference	Yes.
§63.15	Availability of Information	Information availability; confidential information	Yes.

3. Part 63 is amended by adding subpart KKKKK to read as follows:

Subpart KKKKK—National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing

Sec.

What This Subpart Covers

63.8530 What is the purpose of this subpart?
63.8535 Am I subject to this subpart?
63.8540 What parts of my plant does this subpart cover?
63.8545 When do I have to comply with this subpart?

Emission Limitations and Work Practice Standards

63.8555 What emission limitations and work practice standards must I meet?
63.8560 What are my options for meeting the emission limitations and work practice standards?

General Compliance Requirements

63.8570 What are my general requirements for complying with this subpart?
63.8575 What do I need to know about operation, maintenance, and monitoring plans?

Testing and Initial Compliance Requirements

63.8585 By what date must I conduct performance tests?
63.8590 When must I conduct subsequent performance tests?
63.8595 How do I conduct performance tests and establish operating limits?
63.8600 What are my monitoring installation, operation, and maintenance requirements?
63.8605 How do I demonstrate initial compliance with the emission limitations and work practice standards?

Continuous Compliance Requirements

63.8615 How do I monitor and collect data to demonstrate continuous compliance?
63.8620 How do I demonstrate continuous compliance with the emission limitations and work practice standards?

What This Subpart Covers

§ 63.8530 What is the purpose of this subpart?

This subpart establishes national emission limitations and work practice standards for hazardous air pollutants (HAP) emitted from clay ceramics manufacturing facilities. This subpart also establishes requirements to demonstrate initial and continuous compliance with the emission limitations and work practice standards.

§ 63.8535 Am I subject to this subpart?

You are subject to this subpart if you own or operate a clay ceramics manufacturing facility that is, is located at, or is part of a major source of HAP emissions according to the criteria in paragraphs (a) and (b) of this section.

(a) A clay ceramics manufacturing facility is a plant site that manufactures pressed floor tile, pressed wall tile, other pressed tile, or sanitaryware (*e.g.*, sinks and toilets). Clay ceramics manufacturing facilities typically process clay, shale, and various additives; form the processed materials into tile or sanitaryware shapes; and dry and fire the ceramic products. Glazes are applied to many tile and sanitaryware products.

(b) A major source of HAP emissions is any stationary source or group of stationary sources within a contiguous area under common control that emits or has the potential to emit any single HAP at a rate of 9.07 megagrams (10 tons) or more per year or any combination of HAP at a rate of 22.68 megagrams (25 tons) or more per year.

§ 63.8540 What parts of my plant does this subpart cover?

(a) This subpart applies to each existing, new, or reconstructed affected source at a clay ceramics manufacturing facility and to each affected source described in paragraphs (f)(1) or (f)(2) of this section.

(b) Each existing, new, or reconstructed periodic kiln, tunnel kiln, and roller kiln is an affected source regardless of design capacity. Each source that meets the description in paragraphs (f)(1) or (f)(2) also is an affected source.

(c) Kilns that are used exclusively for research and development (R&D) and are not used to manufacture products for commercial sale, except in a *de minimis* manner, are not subject to the requirements of this subpart.

(d) Kilns that are used exclusively for setting glazes on previously fired products or for refiring are not subject to the requirements of this subpart.

(e) A source is a new affected source if construction of the affected source began after July 22, 2002, and you met the applicability criteria at the time you began construction.

(f) An affected source is reconstructed if you meet the criteria as defined in § 63.2, except as provided in paragraphs (f)(1) and (f)(2) of this section.

(1) It is not technologically and economically feasible for an existing tunnel kiln whose design capacity is less than 9.07 megagrams per hour (Mg/hr) (10 tons per hour (tph)) of fired product but is increased such that it is equal to or greater than 9.07 Mg/hr (10 tph) of fired product to meet the relevant standards (*i.e.*, new source maximum achievable control technology (MACT)) by retrofitting with a dry lime injection fabric filter (DIFF), dry lime scrubber/fabric filter (DLS/FF), or wet scrubber (WS).

(2) It is not technologically and economically feasible for an existing dry limestone adsorber (DLA)-controlled kiln whose design capacity is equal to or greater than 9.07 Mg/hr (10 tph) of fired product to meet the relevant standards by retrofitting with a DIFF, DLS/FF, or WS.

(g) An affected source is existing if it is not new or reconstructed and does not meet the descriptions provided in paragraphs (f)(1) and (f)(2) of this section.

§ 63.8545 When do I have to comply with this subpart?

(a) If you have a new or reconstructed affected source or an affected source described in § 63.8540(f)(1) or § 63.8540(f)(2), you must comply with this subpart according to paragraphs (a)(1) and (2) of this section.

(1) If the initial startup of your affected source is before May 16, 2003, then you must comply with the applicable emission limitations and work practice standards in Tables 1, 2, and 3 to this subpart no later than May 16, 2003.

(2) If the initial startup of your affected source is after May 16, 2003, then you must comply with the applicable emission limitations and work practice standards in Tables 1, 2, and 3 to this subpart upon initial startup of your affected source.

(b) If you have an existing affected source, you must comply with the work practice standards for existing sources in Table 3 to this subpart no later than May 16, 2003.

(c) If you have an existing area source that increases its emissions or its potential to emit such that it becomes a major source of HAP by adding a new affected source or by reconstructing, you must be in compliance with this subpart upon initial startup of your affected source as a major source.

(d) If you have a new area source (*i.e.*, an area source for which construction or reconstruction was commenced after July 22, 2002) that increases its emissions or its potential to emit such that it becomes a major source of HAP, you must be in compliance with this subpart upon initial startup of your affected source as a major source.

(e) You must meet the notification requirements in § 63.8630 according to the schedule in § 63.8630 and in 40 CFR part 63, subpart A. Some of the notifications must be submitted before you are required to comply with the emission limitations in this subpart.

Emission Limitations and Work Practice Standards

§ 63.8555 What emission limitations and work practice standards must I meet?

(a) You must meet each emission limit in Table 1 to this subpart that applies to you.

(b) You must meet each operating limit in Table 2 to this subpart that applies to you.

(c) You must meet each work practice standard in Table 3 to this subpart that applies to you.

§ 63.8560 What are my options for meeting the emission limitations and work practice standards?

(a) To meet the emission limitations in Tables 1 and 2 to this subpart, you must use one or more of the options listed in paragraphs (a)(1) and (2) of this section.

(1) *Emissions control system.* Use an emissions capture and collection system and an air pollution control device (APCD) and demonstrate that the resulting emissions or emissions reductions meet the emission limits in Table 1 to this subpart, and that the capture and collection system and APCD meet the applicable operating limits in Table 2 to this subpart.

(2) *Process changes.* Use low-HAP raw materials or implement manufacturing process changes and demonstrate that the resulting emissions or emissions reductions meet the emission limits in Table 1 to this subpart.

(b) To meet the work practice standards in Table 3 to this subpart, for each affected kiln, you must use natural gas, or an equivalent fuel (such as propane or other clean burning fuel), as the kiln fuel at all times except during periods of natural gas curtailment or other periods when natural gas is not available.

General Compliance Requirements

§ 63.8570 What are my general requirements for complying with this subpart?

(a) You must be in compliance with the emission limitations (including operating limits) in this subpart at all times, except during periods of startup, shutdown, and malfunction and during periods of routine control device maintenance as specified in paragraph (e) of this section.

(b) Except as specified in paragraph (e) of this section, you must always operate and maintain your affected source, including air pollution control and monitoring equipment, according to the provisions in § 63.6(e)(1)(i). During the period between the compliance date specified for your affected source in § 63.8545 and the date upon which continuous monitoring systems (CMS) (*e.g.*, continuous parameter monitoring systems) have been installed and verified and any applicable operating limits have been set, you must maintain a log detailing the operation and maintenance of the process and emissions control equipment.

(c) For each kiln that is subject to the emission limits specified in Table 1 to this subpart, you must develop and implement a written startup, shutdown, and malfunction plan (SSMP) according to the provisions in § 63.6(e)(3).

(d) For each kiln that is subject to the emission limits specified in Table 1 to this subpart, you must prepare and implement a written operation, maintenance, and monitoring (OM&M) plan according to the requirements in § 63.8575.

(e) If you own or operate a kiln that is subject to the emission limits specified in Table 1 to this subpart and must perform routine maintenance on the control device for that kiln, you may bypass the kiln control device and continue operating the kiln upon approval by the Administrator provided you satisfy the conditions listed in paragraphs (e)(1) through (5) of this section.

(1) You must request a routine control device maintenance exemption from the Administrator. Your request must justify the need for the routine maintenance on the control device and the time required to accomplish the maintenance activities, describe the maintenance activities and the frequency of the maintenance activities, explain why the maintenance cannot be accomplished during kiln shutdowns, describe how you plan to minimize emissions to the greatest extent possible during the maintenance, and provide any other documentation required by the Administrator.

(2) The routine control device maintenance exemption must not exceed 4 percent of the annual operating uptime for each kiln.

(3) The request for the routine control device maintenance exemption, if approved by the Administrator, must be incorporated by reference in and attached to the affected source's title V permit.

(4) You must minimize HAP emissions during the period when the kiln is operating and the control device is offline.

(5) You must minimize the time period during which the kiln is operating and the control device is offline.

(f) You must be in compliance with the work practice standards in this subpart at all times, except during periods of natural gas curtailment or other periods when natural gas is not available.

(g) You must be in compliance with the provisions of subpart A of this part, except as noted in Table 8 to this subpart.

§ 63.8575 What do I need to know about operation, maintenance, and monitoring plans?

(a) For each kiln that is subject to the emission limits specified in Table 1 to this subpart, you must prepare, implement, and revise as necessary an OM&M plan that includes the information in paragraph (b) of this section. Your OM&M plan must be available for inspection by the permitting authority upon request.

(b) Your OM&M plan must include, as a minimum, the information in paragraphs (b)(1) through (13) of this section.

(1) Each process and APCD to be monitored, the type of monitoring device that will be used, and the operating parameters that will be monitored.

(2) A monitoring schedule that specifies the frequency that the parameter values will be determined and recorded.

(3) The limits for each parameter that represent continuous compliance with the emission limitations in § 63.8555. The limits must be based on values of the monitored parameters recorded during performance tests.

(4) Procedures for the proper operation and routine and long-term maintenance of each APCD, including a maintenance and inspection schedule that is consistent with the manufacturer's recommendations.

(5) Procedures for installing the CMS sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (*e.g.*, on or downstream of the last APCD).

(6) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction system.

(7) Continuous monitoring system performance evaluation procedures and acceptance criteria (*e.g.*, calibrations).

(8) Procedures for the proper operation and maintenance of monitoring equipment consistent with the requirements in §§ 63.8600 and 63.8(c)(1), (3), (4)(ii), (7), and (8).

(9) Continuous monitoring system data quality assurance procedures consistent with the requirements in § 63.8(d).

(10) Continuous monitoring system recordkeeping and reporting procedures consistent with the requirements in § 63.10(c), (e)(1), and (e)(2)(i).

(11) Procedures for responding to operating parameter deviations, including the procedures in paragraphs (b)(11)(i) through (iii) of this section.

(i) Procedures for determining the cause of the operating parameter deviation.

(ii) Actions for correcting the deviation and returning the operating parameters to the allowable limits.

(iii) Procedures for recording the times that the deviation began and ended, and corrective actions were initiated and completed.

(12) Procedures for keeping records to document compliance.

(13) If you operate an affected kiln and you plan to take the kiln control device out of service for routine maintenance, as specified in § 63.8570(e), the procedures specified in paragraphs (b)(13)(i) and (ii) of this section.

(i) Procedures for minimizing HAP emissions from the kiln during periods of routine maintenance of the kiln control device when the kiln is operating and the control device is offline.

(ii) Procedures for minimizing the duration of any period of routine maintenance on the kiln control device when the kiln is operating and the control device is offline.

(c) Changes to the operating limits in your OM&M plan require a new performance test. If you are revising an operating limit parameter value, you must meet the requirements in paragraphs (c)(1) and (2) of this section.

(1) Submit a notification of performance test to the Administrator as specified in § 63.7(b).

(2) After completing the performance test to demonstrate that compliance with the emission limits can be achieved at the revised operating limit parameter value, you must submit the performance test results and the revised operating limits as part of the Notification of Compliance Status required under § 63.9(h).

(d) If you are revising the inspection and maintenance procedures in your OM&M plan, you do not need to conduct a new performance test.

Testing and Initial Compliance Requirements

§ 63.8585 By what date must I conduct performance tests?

For each kiln that is subject to the emission limits specified in Table 1 to this subpart, you must conduct performance tests within 180 calendar days after the compliance date that is specified for your source in § 63.8545 and according to the provisions in § 63.7(a)(2).

§ 63.8590 When must I conduct subsequent performance tests?

(a) For each kiln that is subject to the emission limits specified in Table 1 to this subpart, you must conduct a performance test before renewing your 40 CFR part 70 operating permit or at least every 5 years following the initial performance test.

(b) You must conduct a performance test when you want to change the parameter value for any operating limit specified in your OM&M plan.

§ 63.8595 How do I conduct performance tests and establish operating limits?

(a) You must conduct each performance test in Table 4 to this subpart that applies to you.

(b) Before conducting the performance test, you must install and calibrate all monitoring equipment.

(c) Each performance test must be conducted according to the requirements in § 63.7 and under the specific conditions in Table 4 to this subpart.

(d) You must test while operating at the maximum production level.

(e) You may not conduct performance tests during periods of startup, shutdown, or malfunction, as specified in § 63.7(e)(1).

(f) You must conduct at least three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour.

(g) You must use the data gathered during the performance test and the equations in paragraphs (g)(1) and (2) of this section to determine compliance with the emission limitations.

(1) To determine compliance with the production-based hydrogen fluoride (HF), hydrogen chloride (HCl), and particulate matter (PM) emission limits in Table 1 to this subpart, you must calculate your mass emissions per unit of production for each test run using Equation 1 of this section:

$$MP = \frac{ER}{P} \qquad \text{(Eq. 1)}$$

Where:

MP=mass per unit production, kilograms (pounds) of pollutant per megagram (ton) of fired product

ER=mass emission rate of pollutant (HF, HCl, or PM) during each performance test run, kilograms (pounds) per hour

P=production rate during each performance test run, megagrams (tons) of fired product per hour.

(2) To determine compliance with the percent reduction HF and HCl emission limits in Table 1 to this subpart, you must calculate the percent reduction for each test run using Equation 2 of this section:

$$PR = \frac{ER_i - ER_o}{ER_i}\ (100) \qquad \text{(Eq. 2)}$$

Where:

PR=percent reduction, percent

ER_i=mass emission rate of specific HAP (HF or HCl) entering the APCD, kilograms (pounds) per hour

ER_o=mass emission rate of specific HAP (HF or HCl) exiting the APCD, kilograms (pounds) per hour.

(h) You must establish each site-specific operating limit in Table 2 to this subpart that applies to you as specified in Table 4 to this subpart.

(i) For each kiln that is subject to the emission limits specified in Table 1 to this subpart and is equipped with an APCD that is not addressed in Table 2 to this subpart or that is using process changes as a means of meeting the emission limits in Table 1 to this subpart, you must meet the requirements in § 63.8(f) and paragraphs (i)(1) and (2) of this section.

(1) Submit a request for approval of alternative monitoring procedures to the Administrator no later than the notification of intent to conduct a performance test. The request must contain the information specified in paragraphs (i)(1)(i) through (iv) of this section.

(i) A description of the alternative APCD or process changes.

(ii) The type of monitoring device or procedure that will be used.

(iii) The operating parameters that will be monitored.

(iv) The frequency that the operating parameter values will be determined and recorded to establish continuous compliance with the operating limits.

(2) Establish site-specific operating limits during the performance test based on the information included in the approved alternative monitoring procedures request and, as applicable, as specified in Table 4 to this subpart.

§ 63.8600 What are my monitoring installation, operation, and maintenance requirements?

(a) You must install, operate, and maintain each CMS according to your OM&M plan and the requirements in paragraphs (a)(1) through (5) of this section.

(1) Conduct a performance evaluation of each CMS according to your OM&M plan.

(2) The CMS must complete a minimum of one cycle of operation for each successive 15-minute period. To have a valid hour of data, you must have

at least three of four equally spaced data values (or at least 75 percent if you collect more than four data values per hour) for that hour (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption as specified in § 63.8570(e)).

(3) Determine and record the 3-hour block averages of all recorded readings, calculated after every 3 hours of operation as the average of the previous 3 operating hours. To calculate the average for each 3-hour average period, you must have at least 75 percent of the recorded readings for that period (not including startup, shutdown, malfunction, out-of-control periods, or periods of routine control device maintenance covered by a routine control device maintenance exemption as specified in § 63.8570(e)).

(4) Record the results of each inspection, calibration, and validation check.

(5) At all times, maintain the monitoring equipment including, but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment.

(b) For each liquid flow measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (b)(1) through (3) of this section.

(1) Locate the flow sensor in a position that provides a representative flowrate.

(2) Use a flow sensor with a minimum measurement sensitivity of 2 percent of the liquid flowrate.

(3) At least semiannually, conduct a flow sensor calibration check.

(c) For each pressure measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (c)(1) through (7) of this section.

(1) Locate the pressure sensor(s) in or as close to a position that provides a representative measurement of the pressure.

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a gauge with a minimum measurement sensitivity of 0.5 inch of water or a transducer with a minimum measurement sensitivity of 1 percent of the pressure range.

(4) Check the pressure tap daily to ensure that it is not plugged.

(5) Using a manometer, check gauge calibration quarterly and transducer calibration monthly.

(6) Any time the sensor exceeds the manufacturer's specified maximum operating pressure range, conduct calibration checks or install a new pressure sensor.

(7) At least monthly, inspect all components for integrity, all electrical connections for continuity, and all mechanical connections for leakage.

(d) For each pH measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (d)(1) through (4) of this section.

(1) Locate the pH sensor in a position that provides a representative measurement of pH.

(2) Ensure the sample is properly mixed and representative of the fluid to be measured.

(3) Check the pH meter's calibration on at least two points every 8 hours of process operation.

(4) At least monthly, inspect all components for integrity and all electrical connections for continuity.

(e) For each bag leak detection system, you must meet the requirements in paragraphs (e)(1) through (11) of this section.

(1) Each triboelectric bag leak detection system must be installed, calibrated, operated, and maintained according to the "Fabric Filter Bag Leak Detection Guidance," (EPA–454/R–98–015, September 1997). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Emissions, Monitoring and Analysis Division; Emission Measurement Center (MD–19), Research Triangle Park, NC 27711. This document is also available on the Technology Transfer Network (TTN) under Emission Measurement Center, Continuous Emission Monitoring. Other types of bag leak detection systems must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(2) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(3) The bag leak detection system sensor must provide an output of relative PM loadings.

(4) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(5) The bag leak detection system must be equipped with an audible alarm system that will sound automatically when an increase in relative PM emissions over a preset level is detected. The alarm must be located where it is easily heard by plant operating personnel.

(6) For positive pressure fabric filter systems, a bag leak detector must be installed in each baghouse compartment or cell.

(7) For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(9) The baseline output must be established by adjusting the range and the averaging period of the device and establishing the alarm set points and the alarm delay time according to section 5.0 of the "Fabric Filter Bag Leak Detection Guidance."

(10) Following initial adjustment of the system, the sensitivity or range, averaging period, alarm set points, or alarm delay time may not be adjusted except as detailed in your OM&M plan. In no case may the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection which demonstrates that the fabric filter is in good operating condition. Record each adjustment.

(11) Record the results of each inspection, calibration, and validation check.

(f) For each lime or chemical feed rate measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and paragraphs (f)(1) and (2) of this section.

(1) Locate the measurement device in a position that provides a representative feed rate measurement.

(2) At least semiannually, conduct a calibration check.

(g) For each limestone feed system on a DLA, you must meet the requirements in paragraphs (a)(1), (4), and (5) of this section and must ensure on a monthly basis that the feed system replaces limestone at least as frequently as the schedule set during the performance test.

(h) Requests for approval of alternate monitoring procedures must meet the requirements in §§ 63.8595(i) and 63.8(f).

§ 63.8605 How do I demonstrate initial compliance with the emission limitations and work practice standards?

(a) You must demonstrate initial compliance with each emission limitation and work practice standard that applies to you according to Table 5 to this subpart.

(b) You must establish each site-specific operating limit in Table 2 to

this subpart that applies to you according to the requirements in § 63.8595 and Table 4 to this subpart.

(c) You must submit the Notification of Compliance Status containing the results of the initial compliance demonstration according to the requirements in § 63.8630(e).

Continuous Compliance Requirements

§ 63.8615 How do I monitor and collect data to demonstrate continuous compliance?

(a) You must monitor and collect data according to this section.

(b) Except for periods of monitor malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments), you must monitor continuously (or collect data at all required intervals) at all times that the affected source is operating. This includes periods of startup, shutdown, malfunction, and routine control device maintenance as specified in § 63.8570(e) when the affected source is operating.

(c) You may not use data recorded during monitoring malfunctions, associated repairs, out-of-control periods, or required quality assurance or control activities for purposes of calculating data averages. A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions. You must use all the valid data collected during all other periods in assessing compliance. Any averaging period for which you do not have valid monitoring data and such data are required constitutes a deviation from the monitoring requirements.

§ 63.8620 How do I demonstrate continuous compliance with the emission limitations and work practice standards?

(a) You must demonstrate continuous compliance with each emission limit, operating limit, and work practice standard in Tables 1, 2, and 3 to this subpart that applies to you according to the methods specified in Table 6 to this subpart.

(b) For each kiln that is subject to the emission limits specified in Table 1 to this subpart and is equipped with an APCD that is not addressed in Table 2 to this subpart, or that is using process changes as a means of meeting the emission limits in Table 1 to this subpart, you must demonstrate continuous compliance with each emission limit in Table 1 to this subpart, and each operating limit established as required in § 63.8595(i)(2) according to the methods specified in your approved alternative monitoring procedures request, as described in §§ 63.8595(i)(1) and 63.8(f).

(c) You must report each instance in which you did not meet each emission limit and operating limit in this subpart that applies to you. This includes periods of startup, shutdown, malfunction, and routine control device maintenance. These instances are deviations from the emission limitations in this subpart. These deviations must be reported according to the requirements in § 63.8635.

(d) During periods of startup, shutdown, and malfunction, you must operate according to your SSMP.

(e) Consistent with §§ 63.6(e) and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating according to an SSMP that satisfies the requirements of § 63.6(e) and your OM&M plan. The Administrator will determine whether deviations that occur during a period of startup, shutdown, or malfunction are violations, according to the provisions in § 63.6(e).

(f) Deviations that occur during periods of control device maintenance covered by an approved routine control device maintenance exemption according to § 63.8570(e) are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with the approved routine control device maintenance exemption.

(g) You must demonstrate continuous compliance with the operating limits in Table 2 to this subpart for visible emissions (VE) from tunnel kilns equipped with DLA, DIFF, or DLS/FF by monitoring VE at each kiln stack according to the requirements in paragraphs (g)(1) through (3) of this section.

(1) Perform daily VE observations of each kiln stack according to the procedures of Method 22 of 40 CFR part 60, appendix A. You must conduct the Method 22 test while the affected source is operating under normal conditions. The duration of each Method 22 test must be at least 15 minutes.

(2) If VE are observed during any daily test conducted using Method 22 of 40 CFR part 60, appendix A, you must promptly initiate and complete corrective actions according to your OM&M plan. If no VE are observed in 30 consecutive daily Method 22 tests for any kiln stack, you may decrease the frequency of Method 22 testing from daily to weekly for that kiln stack. If VE are observed during any weekly test, you must promptly initiate and complete corrective actions according to your OM&M plan, resume Method 22 testing of that kiln stack on a daily basis, and maintain that schedule until no VE are observed in 30 consecutive daily tests, at which time you may again decrease the frequency of Method 22 testing to a weekly basis.

(3) If VE are observed during any test conducted using Method 22 of 40 CFR part 60, appendix A, you must report these deviations by following the requirements in § 63.8635.

Notifications, Reports, and Records

§ 63.8630 What notifications must I submit and when?

(a) You must submit all of the notifications in §§ 63.7(b) and (c), 63.8(f)(4), and 63.9 (b) through (e), (g)(1), and (h) that apply to you, by the dates specified.

(b) As specified in § 63.9(b)(2) and (3), if you start up your affected source before May 16, 2003, you must submit an Initial Notification not later than 120 calendar days after May 16, 2003.

(c) As specified in § 63.9(b)(3), if you start up your new or reconstructed affected source or affected source described in § 63.8540(f)(1) or § 63.8540(f)(2) on or after May 16, 2003, you must submit an Initial Notification not later than 120 calendar days after you become subject to this subpart.

(d) If you are required to conduct a performance test, you must submit a written notification of intent to conduct a performance test at least 60 calendar days before the performance test is scheduled to begin, as required in § 63.7(b)(1).

(e) If you are required to conduct a performance test or other initial compliance demonstration as specified in Tables 4 and 5 to this subpart, you must submit a Notification of Compliance Status as specified in § 63.9(h) and paragraphs (e)(1) through (3) of this section.

(1) For each compliance demonstration that includes a performance test conducted according to the requirements in Table 4 to this subpart, you must submit the Notification of Compliance Status, including the performance test results, before the close of business on the 60th calendar day following the completion of the performance test, according to § 63.10(d)(2).

(2) In addition to the requirements in § 63.9(h)(2)(i), you must include the information in paragraphs (e)(2)(i) and (ii) of this section in your Notification of Compliance Status:

(i) The operating limit parameter values established for each affected source with supporting documentation and a description of the procedure used to establish the values.

(ii) For each APCD that includes a fabric filter, if a bag leak detection system is used, analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 63.8600(e).

(3) For each compliance demonstration required in Table 5 to this subpart that does not include a performance test (*i.e.*, compliance demonstration for the work practice standard), you must submit the Notification of Compliance Status before the close of business on the 30th calendar day following the completion of the compliance demonstration.

(f) If you request a routine control device maintenance exemption according to § 63.8570(e), you must submit your request for the exemption no later than 30 days before the compliance date.

(g) If you own or operate an affected kiln that is subject to the work practice standards specified in Table 3 to this subpart, and you intend to use a fuel other than natural gas or equivalent to fire the affected kiln, you must submit a notification of alternative fuel use within 48 hours of the declaration of a period of natural gas curtailment or supply interruption, as defined in § 63.8665. The notification must include the information specified in paragraphs (g)(1) through (5) of this section.

(1) Company name and address.

(2) Identification of the affected kiln.

(3) Reason you are unable to use natural gas or equivalent fuel, including the date when the natural gas curtailment was declared or the natural gas supply interruption began.

(4) Type of alternative fuel that you intend to use.

(5) Dates when the alternative fuel use is expected to begin and end.

§ 63.8635 What reports must I submit and when?

(a) You must submit each report in Table 7 to this subpart that applies to you.

(b) Unless the Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date in Table 7 to this subpart and as specified in paragraphs (b)(1) through (5) of this section.

(1) The first compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.8545 and ending on June 30 or December 31, and lasting at least 6 months, but less than 12 months. For example, if your compliance date is March 1, then the first semiannual reporting period would begin on March 1 and end on December 31.

(2) The first compliance report must be postmarked or delivered no later than July 31 or January 31 for compliance periods ending on June 30 and December 31, respectively.

(3) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(4) Each subsequent compliance report must be postmarked or delivered no later than July 31 or January 31 for compliance periods ending on June 30 and December 31, respectively.

(5) For each affected source that is subject to permitting regulations pursuant to 40 CFR part 70 or 40 CFR part 71, and if the permitting authority has established dates for submitting semiannual reports pursuant to 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), you may submit the first and subsequent compliance reports according to the dates the permitting authority has established instead of according to the dates in paragraphs (b)(1) through (4) of this section.

(c) The compliance report must contain the information in paragraphs (c)(1) through (7) of this section.

(1) Company name and address.

(2) Statement by a responsible official with that official's name, title, and signature, certifying that, based on information and belief formed after reasonable inquiry, the statements and information in the report are true, accurate, and complete.

(3) Date of report and beginning and ending dates of the reporting period.

(4) If you had a startup, shutdown or malfunction during the reporting period and you took actions consistent with your SSMP and OM&M plan, the compliance report must include the information specified in § 63.10(d)(5)(i).

(5) A description of control device maintenance performed while the control device was offline and the kiln controlled by the control device was operating, including the information specified in paragraphs (c)(5)(i) through (iii) of this section.

(i) The date and time when the control device was shutdown and restarted.

(ii) Identification of the kiln that was operating and the number of hours that the kiln operated while the control device was offline.

(iii) A statement of whether or not the control device maintenance was included in your approved routine control device maintenance exemption developed as specified in § 63.8570(e). If the control device maintenance was included in your approved routine control device maintenance exemption, then you must report the information in paragraphs (c)(5)(iii)(A) through (C) of this section.

(A) The total amount of time that the kiln controlled by the control device operated during the current semiannual compliance period and during the previous semiannual compliance period.

(B) The amount of time that each kiln controlled by the control device operated while the control device was offline for maintenance covered under the routine control device maintenance exemption during the current semiannual compliance period and during the previous semiannual compliance period.

(C) Based on the information recorded under paragraphs (c)(5)(iii)(A) and (B) of this section, compute the annual percent of kiln operating uptime during which the control device was offline for routine maintenance using Equation 1 of this section.

$$RM = \frac{DT_p + DT_c}{KU_p + KU_c} (100) \qquad \text{(Eq. 1)}$$

Where:

RM=Annual percentage of kiln uptime during which control device is down for routine control device maintenance

DT_p=Control device downtime claimed under the routine control device maintenance exemption for the previous semiannual compliance period

DT_c=Control device downtime claimed under the routine control device maintenance exemption for the current semiannual compliance period

KU_p=Kiln uptime for the previous semiannual compliance period

KU_c=Kiln uptime for the current semiannual compliance period

(6) If there are no deviations from any emission limitations (emission limits or operating limits) or work practice standards that apply to you, the compliance report must contain a statement that there were no deviations from the emission limitations or work practice standards during the reporting period.

(7) If there were no periods during which the CMS was out-of-control as specified in your OM&M plan, the

compliance report must contain a statement that there were no periods during which the CMS was out-of-control during the reporting period.

(d) For each deviation from an emission limitation (emission limit or operating limit) that occurs at an affected source where you are not using a CMS to comply with the emission limitations in this subpart, the compliance report must contain the information in paragraphs (c)(1) through (5) and paragraphs (d)(1) and (2) of this section. This includes periods of startup, shutdown, malfunction, and routine control device maintenance.

(1) The total operating time of each affected source during the reporting period.

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(e) For each deviation from an emission limitation (emission limit or operating limit) occurring at an affected source where you are using a CMS to comply with the emission limitations in this subpart, you must include the information in paragraphs (c)(1) through (5) and paragraphs (e)(1) through (13) of this section. This includes periods of startup, shutdown, malfunction, and routine control device maintenance.

(1) The total operating time of each affected source during the reporting period.

(2) The date and time that each malfunction started and stopped.

(3) The date and time that each CMS was inoperative, except for zero (low-level) and high-level checks.

(4) The date, time, and duration that each CMS was out-of-control, including the pertinent information in your OM&M plan.

(5) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of startup, shutdown, or malfunction; during routine control device maintenance covered in your approved routine control device maintenance exemption; or during another period.

(6) A description of corrective action taken in response to a deviation.

(7) A summary of the total duration of the deviation during the reporting period and the total duration as a percent of the total source operating time during that reporting period.

(8) A breakdown of the total duration of the deviations during the reporting period into those that are due to startup, shutdown, control equipment problems, process problems, other known causes, and other unknown causes.

(9) A summary of the total duration of CMS downtime during the reporting period and the total duration of CMS downtime as a percent of the total source operating time during that reporting period.

(10) A brief description of the process units.

(11) A brief description of the CMS.

(12) The date of the latest CMS certification or audit.

(13) A description of any changes in CMS, processes, or control equipment since the last reporting period.

(f) If you have obtained a title V operating permit according to 40 CFR part 70 or 40 CFR part 71, you must report all deviations as defined in this subpart in the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A). If you submit a compliance report according to Table 7 to this subpart along with, or as part of, the semiannual monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), and the compliance report includes all required information concerning deviations from any emission limitation (including any operating limit), then submitting the compliance report will satisfy any obligation to report the same deviations in the semiannual monitoring report. However, submitting a compliance report will not otherwise affect any obligation you may have to report deviations from permit requirements to the permitting authority.

(g) If you own or operate an affected kiln that is subject to the work practice standard specified in Table 3 to this subpart, and you use a fuel other than natural gas or equivalent to fire the affected kiln, you must submit a report of alternative fuel use within 10 working days after terminating the use of the alternative fuel. The report must include the information in paragraphs (g)(1) through (6) of this section.

(1) Company name and address.

(2) Identification of the affected kiln.

(3) Reason for using the alternative fuel.

(4) Type of alternative fuel used to fire the affected kiln.

(5) Dates that the use of the alternative fuel started and ended.

(6) Amount of alternative fuel used.

§ 63.8640 What records must I keep?

(a) You must keep the records listed in paragraphs (a)(1) through (4) of this section.

(1) A copy of each notification and report that you submitted to comply with this subpart, including all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted, according to the requirements in § 63.10(b)(2)(xiv).

(2) The records in § 63.6(e)(3)(iii) through (v) related to startup, shutdown, and malfunction.

(3) Records of performance tests as required in § 63.10(b)(2)(viii).

(4) Records relating to control device maintenance and documentation of your approved routine control device maintenance exemption, if you request such an exemption under § 63.8570(e).

(b) You must keep the records required in Table 6 to this subpart to show continuous compliance with each emission limitation that applies to you.

(c) You must also maintain the records listed in paragraphs (c)(1) through (7) of this section.

(1) For each bag leak detection system, records of each alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

(2) For each deviation of an operating limit parameter value, the date, time, and duration of the deviation, a brief explanation of the cause of the deviation and the corrective action taken, and whether the deviation occurred during a period of startup, shutdown, or malfunction.

(3) For each kiln that is subject to the emission limits in Table 1, records of production rates on a fired-product weight basis.

(4) For each kiln that is subject to the emission limits in Table 1, records for any approved alternative monitoring or test procedures.

(5) For each kiln that is subject to the emission limits in Table 1, records of maintenance and inspections performed on the APCD.

(6) For each kiln that is subject to the emission limits in Table 1, current copies of your SSMP and OM&M plan, including any revisions, with records documenting conformance.

(7) Records that document compliance with any work practice standard that applies to you.

§ 63.8645 In what form and for how long must I keep my records?

(a) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(b) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record.

(c) You must keep each record onsite for at least 2 years after the date of each occurrence, measurement, maintenance,

corrective action, report, or record, according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

Other Requirements and Information

§ 63.8655 What parts of the General Provisions apply to me?

Table 8 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you.

§ 63.8660 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by us, the U.S. EPA, or a delegated authority such as your State, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency, in addition to the U.S. EPA, has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if implementation and enforcement of this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under section 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

(c) The authorities that cannot be delegated to State, local, or tribal agencies are as specified in paragraphs (c)(1) through (4) of this section.

(1) Approval of alternatives to the applicability requirements in §§ 63.8535 and 63.8540, the compliance date requirements in § 63.8545, and the non-opacity emission limitations in § 63.8555.

(2) Approval of major changes to test methods under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(3) Approval of major changes to monitoring under § 63.8(f) and as defined in § 63.90.

(4) Approval of major changes to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90.

§ 63.8665 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2, and in this section as follows:

Air pollution control device (APCD) means any equipment that reduces the quantity of a pollutant that is emitted to the air.

Bag leak detection system means an instrument that is capable of monitoring PM loadings in the exhaust of a fabric filter in order to detect bag failures. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light-scattering, light-transmittance, or other effects to monitor relative PM loadings.

Clay ceramics manufacturing facility means a plant site that manufactures pressed floor tile, pressed wall tile, other pressed tile, or sanitaryware (*e.g.*, sinks and toilets). Clay ceramics manufacturing facilities typically process clay, shale, and various additives, form the processed materials into tile or sanitaryware shapes, and dry and fire the ceramic products. Glazes are applied to many tile and sanitaryware products.

Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart including, but not limited to, any emission limitation (including any operating limit) or work practice standard;

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart for any affected source required to obtain such a permit; or

(3) Fails to meet any emission limitation (including any operating limit) or work practice standard in this subpart during startup, shutdown, or malfunction, regardless of whether or not such failure is permitted by this subpart.

Dry lime injection fabric filter (DIFF) means an APCD that includes continuous injection of hydrated lime or other sorbent into a duct or reaction chamber followed by a fabric filter.

Dry lime scrubber/fabric filter (DLS/FF) means an APCD that includes continuous injection of humidified hydrated lime or other sorbent into a reaction chamber followed by a fabric filter. These systems typically include recirculation of some of the sorbent.

Dry limestone adsorber (DLA) means an APCD that includes a limestone storage bin, a reaction chamber that is essentially a packed tower filled with limestone, and may or may not include a peeling drum that mechanically scrapes reacted limestone to regenerate the stone for reuse.

Emission limitation means any emission limit or operating limit.

Fabric filter means an APCD used to capture PM by filtering a gas stream through filter media; also known as a baghouse.

Initial startup means:

(1) For a new or reconstructed tunnel kiln controlled with a DLA, and for a tunnel kiln that would be considered reconstructed but for § 63.8540(f)(1) or § 63.8540(f)(2), the time at which the temperature in the kiln first reaches 260 °C (500 °F) and the kiln contains product; or

(2) For a new or reconstructed tunnel kiln controlled with a DIFF, DLS/FF, or WS, the time at which the kiln first reaches a level of production that is equal to 75 percent of the kiln design capacity or 12 months after the affected source begins firing clay ceramics, whichever is earlier.

Particulate matter (PM) means, for purposes of this subpart, emissions of PM that serve as a measure of total particulate emissions, as measured by Method 5 (40 CFR part 60, appendix A), and as a surrogate for metal HAP contained in the particulates including, but not limited to, antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium.

Period of natural gas curtailment or supply interruption means a period of time during which the supply of natural gas to an affected facility is halted for reasons beyond the control of the facility. An increase in the cost or unit price of natural gas does not constitute a period of natural gas curtailment or supply interruption.

Plant site means all contiguous or adjoining property that is under common control, including properties that are separated only by a road or other public right-of-way. Common control includes properties that are owned, leased, or operated by the same entity, parent entity, subsidiary, or any combination thereof.

Research and development kiln means any kiln whose purpose is to conduct research and development for new processes and products and is not engaged in the manufacture of products for commercial sale, except in a *de minimis* manner.

Responsible official means responsible official as defined in 40 CFR 70.2.

Startup means the setting in operation of an affected source and starting the production process.

Tunnel kiln means any continuous kiln that is not a roller kiln that is used to fire clay ceramics.

Tunnel kiln design capacity means the maximum amount of clay ceramics, in Mg (tons), that a kiln is designed to produce in one year divided by the number of hours in a year (8,760 hours). If a kiln is modified to increase the capacity, the design capacity is considered to be the capacity following modifications.

Wet scrubber (WS) means an APCD that uses water, which may include

caustic additives or other chemicals, as the sorbent. Wet scrubbers may use any of various design mechanisms to increase the contact between exhaust gases and the sorbent.

Work practice standard means any design, equipment, work practice, operational standard, or combination thereof, that is promulgated pursuant to section 112(h) of the Clean Air Act.

Tables to Subpart KKKKK of Part 63

As stated in § 63.8555, you must meet each emission limit in the following table that applies to you:

TABLE 1 TO SUBPART KKKKK OF PART 63.—EMISSION LIMITS

For each . . .	You must meet the following emission limits . . .	Or you must comply with the following . . .
1. New or reconstructed tunnel kiln with a design capacity less than 9.07 Mg/hr (10 tph) of fired product; each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(1); and each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(2).	a. HF emissions must not exceed 0.029 kilograms per megagram (kg/Mg) (0.057 pounds per ton (lb/ton)) of fired product.	Reduce uncontrolled HF emissions by at least 90 percent.
	b. HCl emissions must not exceed 0.13 kg/Mg (0.26 lb/ton) of fired product.	Reduce uncontrolled HCl emissions by at least 30 percent.
	c. PM emissions must not exceed 0.21 kg/Mg (0.42 lb/ton) of fired product.	Not applicable.
2. New or reconstructed tunnel kiln with a design capacity equal to or greater than 10 tph of fired product.	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product.	Reduce uncontrolled HF emissions by at least 90 percent.
	b. HCl emissions must not exceed 0.028 kg/Mg (0.056 lb/ton) of fired product.	Reduce uncontrolled HCl emissions by at least 85 percent.
	c. PM emissions must not exceed 0.060 kg/Mg (0.12 lb/ton) of fired product.	Not applicable.

As stated in § 63.8555, you must meet each operating limit in the following table that applies to you:

TABLE 2 TO SUBPART KKKKK OF PART 63.—OPERATING LIMITS

For each . . .	You must . . .
1. Kiln equipped with a DLA	a. Maintain the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test; and b. Maintain a sufficient amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times; maintain the limestone feeder setting at or above the level established during the performance test; and c. Use the same grade of limestone from the same source as was used during the performance test; maintain records of the source and grade of limestone; and d. Maintain no VE from the DLA stack.
2. Kiln equipped with a DIFF or DLS/FF.	a. If you use a bag leak detection system, initiate corrective action within 1 hour of a bag leak detection system alarm and complete corrective actions in accordance with your OM&M plan; operate and maintain the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period; or maintain no VE from the DIFF or DLS/FF stack; and b. Maintain free-flowing lime in the feed hopper or silo and to the APCD at all times for continuous injection systems; maintain the feeder setting at or above the level established during the performance test for continuous injection systems.
3. Kiln equipped with a WS	a. Maintain the average scrubber pressure drop for each 3-hour block period at or above the average pressure drop established during the performance test; and b. Maintain the average scrubber liquid pH for each 3-hour block period at or above the average scrubber liquid pH established during the performance test; and c. Maintain the average scrubber liquid flow rate for each 3-hour block period at or above the average scrubber liquid flow rate established during the performance test; and d. If chemicals are added to the scrubber water, maintain the average scrubber chemical feed rate for each 3-hour block period at or above the average scrubber chemical feed rate established during the performance test.

As stated in § 63.8555, you must comply with each work practice standard in the following table that applies to you:

TABLE 3 TO SUBPART KKKKK OF PART 63.—WORK PRACTICE STANDARDS

For . . .	You must . . .	According to one of the following requirements . . .
Each existing, new, or reconstructed periodic kiln, tunnel kiln, or roller kiln; each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(1); and each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(2).	Minimize fuel-based HAP emissions.	Use natural gas, or equivalent, as the kiln fuel, except during periods of natural gas curtailment or supply interruption, as defined in § 63.8665.

As stated in § 63.8595, you must conduct each performance test in the following table that applies to you:

TABLE 4 TO SUBPART KKKKK OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS

For each . . .	You must . . .	Using . . .	According to the following requirements . . .
1. New or reconstructed tunnel kiln; each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(1); and each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(2).	a. Select locations of sampling ports and the number of traverse points.	Method 1 or 1A of 40 CFR part 60, appendix A.	Sampling sites must be located at the outlet of the APCD and prior to any releases to the atmosphere for all affected sources. If you choose to meet the percent emission reduction requirements for HF or HCl, a sampling site must also be located at the APCD inlet.
	b. Determine velocities and volumetric flow rate.	Method 2 of 40 CFR part 60, appendix A.	You may use Method 2A, 2C, 2D, 2F, or 2G of 40 CFR part 60, appendix A, as appropriate, as an alternative to using Method 2 of 40 CFR part 60, appendix A.
	c. Conduct gas molecular weight analysis.	Method 3 of 40 CFR part 60, appendix A.	You may use Method 3A or 3B of 40 CFR part 60, appendix A, as appropriate, as an alternative to using Method 3 of 40 CFR part 60, appendix A.
	d. Measure moisture content of the stack gas.	Method 4 of 40 CFR part 60, appendix A.	
	e. Measure HF and HCl emissions.	Method 26A of 40 CFR part 60, appendix A; or	Conduct the test while operating at the maximum production level. You may use Method 26 of 40 CFR part 60, appendix A, as an alternative to using Method 26A of 40 CFR part 60, appendix A, when no acid PM (*e.g.*, HF or HCl dissolved in water droplets emitted by sources controlled by a WS) is present.
		Method 320 of 40 CFR part 63, appendix A.	Conduct the test while operating at the maximum production level. When using Method 320 of 40 CFR part 63, appendix A, you must follow the analyte spiking procedures of section 13 of Method 320 of 40 CFR part 63, appendix A, unless you can demonstrate that the complete spiking procedure has been conducted at a similar source.
	f. Measure PM emissions	Method 5 of 40 CFR part 60, appendix A.	Conduct the test while operating at the maximum production level.
2. Kiln that is complying with production-based emission limits.	Determine the production rate during each test run in order to determine compliance with production-based emission limits.	Production data collected during the performance tests (*e.g.*, the number of ceramic pieces and weight per piece in the kiln during a test run divided by the amount of time to fire a piece).	You must measure and record the production rate, on a fired-product weight basis, of the affected kiln for each of the three test runs.
3. Kiln equipped with a DLA.	a. Establish the operating limit for the average pressure drop across the DLA.	Data from the pressure drop measurement device during the performance test.	You must continuously measure the pressure drop across the DLA, determine and record the block average pressure drop values for the three test runs, and determine and record the 3-hour block average of the recorded pressure drop measurements for the three test runs.

TABLE 4 TO SUBPART KKKKK OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For each . . .	You must . . .	Using . . .	According to the following requirements . . .
	b. Establish the operating limit for the limestone feeder setting.	Data from the limestone feeder during the performance test.	You must ensure that you maintain an adequate amount of limestone in the limestone hopper, storage bin (located at the top of the DLA), and DLA at all times during the performance test. You must establish your limestone feeder setting one week prior to the performance test and maintain the feeder setting for the one-week period that precedes the performance test and during the performance test.
	c. Document the source and grade of limestone used.	Records of limestone purchase.	
4. Kiln equipped with a DIFF or DLS/FF	Establish the operating limit for the lime feeder setting.	Data from the lime feeder during the performance test.	For continuous lime injection systems, you must ensure that lime in the feed hopper or silo and to the APCD is free-flowing at all times during the performance test and record the feeder setting for the three test runs. If the feed rate setting varies during the three test runs, determine and record the average feed rate from the three test runs.
5. Kiln equipped with a WS	a. Establish the operating limit for the average scrubber pressure drop.	Data from the pressure drop measurement device during the performance test.	You must continuously measure the scrubber pressure drop, determine and record the block average pressure drop values for the three test runs, and determine and record the 3-hour block average of the recorded pressure drop measurements for the three test runs.
	b. Establish the operating limit for the average scrubber liquid pH.	Data from the pH measurement device during the performance test.	You must continuously measure the scrubber liquid pH, determine and record the block average pH values for the three test runs, and determine and record the 3-hour block average of the recorded pH measurements for the three test runs.
	c. Establish the operating limit for the average scrubber liquid flow rate.	Data from the flow rate measurement device during the performance test.	You must continuously measure the scrubber liquid flow rate, determine and record the block average flow rate values for the three test runs, and determine and record the 3-hour block average of the recorded flow rate measurements for the three test runs.
6. Kiln equipped with a WS that includes chemical addition to the water.	Establish the operating limit for the average scrubber chemical feed rate.	Data from the chemical feed rate measurement device during the performance test.	You must continuously measure the scrubber chemical feed rate, determine and record the block average chemical feed rate values for the three test runs, and determine and record the 3-hour block average of the recorded chemical feed rate measurements for the three test runs.

As stated in § 63.8605, you must demonstrate initial compliance with each emission limitation that applies to you according to the following table:

TABLE 5 TO SUBPART KKKKK OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS AND WORK PRACTICE STANDARDS

For each . . .	For the following . . .	You have demonstrated initial compliance if . . .
1. New or reconstructed tunnel kiln with a design capacity less than 9.07 Mg/hr (10 tph) of fired product; each tunnel kiln that would be considered reconstructed but for §63.8540(f)(1); and each tunnel kiln that would be considered reconstructed but for §63.8540(f)(2).	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product; or uncontrolled HF emissions must be reduced by at least 90 percent; and.	i. The HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in §63.8595(g)(1), do not exceed 0.029 kg/Mg (0.057 lb/ton); or uncontrolled HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 90 percent, according to the calculations in §63.8595(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HF emissions did not exceed 0.029 kg/Mg (0.057 lb/ton) or uncontrolled HF emissions were reduced by at least 90 percent.
	b. HCl emissions must not exceed 0.13 kg/Mg (0.26 lb/ton) of fired product; or uncontrolled HCl emissions must be reduced by at least 30 percent; and	i. The HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in §63.8595(g)(1), do not exceed 0.13 kg/Mg (0.26 lb/ton); or uncontrolled HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 30 percent, according to the calculations in §63.8595(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HCl emissions did not exceed 0.13 kg/Mg (0.26 lb/ton) or uncontrolled HCl emissions were reduced by at least 30 percent.
	c. PM emissions must not exceed 0.21 kg/Mg (0.42 lb/ton) of fired product.	i. The PM emissions measured using Method 5 of 40 CFR part 60, appendix A, over the period of the initial performance test, according to the calculations in §63.8595(g)(1), do not exceed 0.21 kg/Mg (0.42 lb/ton); and ii. You establish and have a record of the operating limits listed in Table 2 to this supbart over the 3-hour performance test during which PM emissions did not exceed 0.21 kg/Mg (0.42 lb/ton).
2. New or reconstructed tunnel kiln with a design capacity equal to or greater than 10 tph of fired product.	a. HF emissions must not exceed 0.029 kg/Mg (0.057 lb/ton) of fired product; or uncontrolled HF emissions must be reduced by at least 90 percent; and	i. The HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in §63.8595(g)(1), do not exceed 0.029 kg/Mg (0.057 lb/ton); or uncontrolled HF emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 90 percent, according to the calculations in §63.8595(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HF emissions did not exceed 0.029 kg/Mg (0.057 lb/ton) or uncontrolled HF emissions were reduced by at least 90 percent.
	b. HCl emissions must not exceed 0.028 kg/Mg (0.056 lb.ton) of fired product; or uncontrolled HCl emissions must be reduced by at least 85 percent; and	i. The HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test, according to the calculations in §63.8595(g)(1), do not exceed 0.028 kg/Mg (0.056 lb/ton); or uncontrolled HCl emissions measured using Method 26A of 40 CFR part 60, appendix A or Method 320 of 40 CFR part 63, appendix A over the period of the initial performance test are reduced by at least 85 percent, according to the calculations in §63.8595(g)(2); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which HCl emissions did not exceed 0.028 kg/Mg (0.056 lb/ton) or uncontrolled HCl emissions were reduced by at least 85 percent.
	c. PM emissions must not exceed 0.060 kg/Mg (0.12 lb/ton) of fired product.	i. The PM emissions measured using Method 5 of 40 CFR part 60, appendix A, over the period of the initial performance test, according to the calculations on §63.8595(g)(1), do not exceed 0.060 kg/Mg (0.12 lb/ton); and ii. You establish and have a record of the operating limits listed in Table 2 to this subpart over the 3-hour performance test during which PM emissions did not exceed 0.060 kg/Mg (0.12 lb/ton).

TABLE 5 TO SUBPART KKKKK OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS AND WORK PRACTICE STANDARDS—Continued

For each . . .	For the following . . .	You have demonstrated initial compliance if . . .
3. Existing, new, or reconstructed periodic kiln, tunel kiln, or roller kiln; each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(1); and each tunnel kiln that would be considered reconstructed but for § 63.8540(f)(2).	Minimize fuel-based HAP emissions.	You use natural gas, or equivalent, as the kiln fuel.

As stated in § 63.8620, you must demonstrate continuous compliance with each emission limit and operating limit that applies to you according to the following table:

TABLE 6 TO SUBPART KKKKK OF PART 63.—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS AND WORK PRACTICE STANDARDS

For each . . .	For the following . . .	You must demonstrate continuous compliance by . . .
1. Kiln equipped with a DLA	a. Each emission limit in Table 1 to this subpart and each operating limit in Item 1 of Table 2 to this subpart for kilns equipped with a DLA.	i. Collecting the DLA pressure drop data according to § 63.8600(a); reducing the DLA pressure drop data to 3-hour block averages according to § 63.8600(a); maintaining the average pressure drop across the DLA for each 3-hour block period at or above the average pressure drop established during the performance test; and ii. Verifying that the limestone hopper and storage bin (located at the top of the DLA) contain adequate limestone by performing a daily visual check; and iii. Recording the limestone feeder setting daily to verify that the feeder setting is being maintained at or above the level established during the performance test; and iv. Using the same grade of limestone from the same source as was used during the performance test; maintaining records of the source and type of limestone; and v. Performing VE observations of the DLA stack at the frequency specified in § 63.8620(g) using Method 22 of 40 CFR part 60, appendix A; maintaining no VE from the DLA stack.
2. Kiln equipped with a DIFF or DLS/FF.	a. Each emission limit in Table 1 to this subpart and each operating limit in Item 2 of Table 2 to this subpart for kilns equipped with DIFF or DLS/FF.	i. If you use a bag leak detection system, initiating corrective action within 1 hour of a bag leak detection system alarm and completing corrective actions in accordance with your OM&M plan; operating and maintaining the fabric filter such that the alarm is not engaged for more than 5 percent of the total operating time in a 6-month block reporting period; in calculating this operating time fraction, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted; if corrective action is required, each alarm is counted as a minimum of 1 hour; if you take longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken by you to initiate corrective action; or performing VE observations of the DIFF or DLS/FF stack at the frequency specified in § 63.8620(g) using Method 22 of 40 CFR part 60, appendix A; maintaining no VE from the DIFF or DLS/FF stack; and ii. Verifying that lime is free-flowing via a load cell, carrier gas/lime flow indicator, carrier gas pressure drop measurement system, or other system; recording all monitor or sensor output, and if lime is found not to be free flowing, promptly initiating and completing corrective actions in accordance with your OM&M plan; recording the feeder setting once each shift of operation to verify that the feeder setting is being maintained at or above the level established during the performance test.
3. Kiln equipped with a WS	a. Each emission limit in Table 1 to this subpart and each operating limit in Item 3 of Table 2 to this subpart for kilns equipped with WS.	i. Collecting the scrubber pressure drop data according to § 63.8600(a); reducing the scrubber pressure drop data to 3-hour block averages according to § 63.8600(a); maintaining the average scrubber pressure drop for each 3-hour block period at or above the average pressure drop established during the performance test; and ii. Collecting the scrubber liquid pH data according to § 63.8600(a); reducing the scrubber liquid pH data to 3-hour block averages according to § 63.8600(a); maintaining the average scrubber liquid pH for each 3-hour block period at or above the average scrubber liquid pH established during the performance test; and

TABLE 6 TO SUBPART KKKKK OF PART 63.—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS AND WORK PRACTICE STANDARDS—Continued

For each . . .	For the following . . .	You must demonstrate continuous compliance by . . .
		iii. Collecting the scrubber liquid flow rate data according to §63.8600(a); reducing the scrubber liquid flow rate data to 3-hour block averages according to §63.8600(a); maintaining the average scrubber liquid flow rate for each 3-hour block period at or above the average scrubber liquid flow rate established during the performance test; and iv. If chemicals are added to the scrubber water, collecting the scrubber chemical feed rate data according to §63.8600(a); reducing the scrubber chemical feed rate data to 3-hour block averages according to §63.8600(a); maintaining the average scrubber chemical feed rate for each 3-hour block period at or above the average scrubber chemical feed rate established during the performance test.
4. Existing, new, or reconstructed periodic kiln, tunnel kiln, or roller kiln; each tunnel kiln that would be considered reconstructed but for §63.8540 (f)(1); and each tunnel kiln that would be considered reconstructed but for §63.8540(f)(2).	Minimize fuel-based HAP emissions.	i. Maintaining records documenting your use of natural gas, or an equivalent fuel, as the kiln fuel at all times except during periods of natural gas curtailment or supply interruption; and ii. If you intend to use an alternative fuel, submitting a notification of alternative fuel use within 48 hours of the declaration of a period of natural gas curtailment or supply interruption, as defined in §63.8665; and iii. Submitting a report of alternative fuel use within 10 working days after terminating the use of the alternative fuel, as specified in §63.8635(g).

As stated in §63.8635, you must submit each report that applies to you according to the following table:

TABLE 7 TO SUBPART KKKKK OF PART 63.—REQUIREMENTS FOR REPORTS

You must submit . . .	The report must contain . . .	You must submit the report . . .
1. A compliance report	a. If there are no deviations from any emission limitations or work practice standards that apply to you, a statement that there were no deviations from the emission limitations or work practice standards during the reporting period. If there were no periods during which the CMS was out-of-control as specified in your OM&M plan, a statement that there were no periods during which the CMS was out-of-control during the reporting period.	Semiannually according to the requirements in §63.8635(b).
	b. If you have a deviation from any emission limitation (emission limit, operating limit) during the reporting period, the report must contain the information in §63.8635(d) or (e). If there were periods during which the CMS was out-of-control, as specified in your OM&M plan, the report must contain the information in §63.8635(e).	Semiannually according to the requirements in §63.8635(b).
	c. If you had a startup, shutdown, or malfunction during the reporting period and you took actions consistent with your SSMP, the compliance report must include the information in §63.10(d)(5)(i).	Semiannually according to the requirements in §63.8635(b).
2. An immediate startup, shutdown, and malfunction report if you took actions during a startup, shutdown, or malfunction during the reporting period that are not consistent with your SSMP.	a. Actions taken for the event according to the requirements in §63.10(d)(5)(ii).	By fax or telephone within 2 working days after starting actions inconsistent with the plan.
	b. The information in §63.10(d)(5)(ii)	By letter within 7 working days after the end of the event unless you have made alternative arrangements with the permitting authority.
3. A report of alternative fuel use	The information in §63.8635(g)	If you are subject to the work practice standards specified in Table 3 to this subpart, and you use an alternative fuel to fire an affected kiln, by letter within 10 working days after terminating the use of the alternative fuel.

As stated in §63.8655, you must comply with the General Provisions in §§63.1 through 63.15 that apply to you according to the following table:

TABLE 8 TO SUBPART KKKKK OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKKK

Citation	Subject	Brief description	Applies to subpart KKKKK
§63.1	Applicability	Initial applicability determination; applicability after standard established; permit requirements; extensions, notifications..	Yes.
§63.2	Definitions	Definitions for part 63 standards	Yes.
§63.3	Units and Abbreviations	Units and abbreviations for part 63 standards	Yes.
§63.4	Prohibited Activities	Compliance date; circumvention; severability	Yes.
§63.5	Construction/Reconstruction	Applicability; applications; approvals	Yes.
§63.6(a)	Applicability	General Provisions (GP) apply unless compliance extension; GP apply to area sources that become major.	Yes.
§63.6(b)(1)–(4)	Compliance Dates for New and Reconstructed Sources.	Standards apply at effective date; 3 years after effective date; upon startup; 10 years after construction or reconstruction commences for section 112(f).	Yes.
§63.6(b)(5)	Notification	Must notify if commenced construction or reconstruction after proposal.	Yes.
§63.6(b)(6)	[Reserved].		
§63.6(b)(7)	Compliance Dates for New and Reconstructed area Sources That Become Major.	Area sources that become major must comply with major source standards immediately upon becoming major, regardless of whether required to comply when they were area sources.	Yes.
§63.6(c)(1)–(2)	Compliance Dates for Existing Sources	Comply according to date in subpart, which must be no later than 3 years after effective date; for section 112(f) standards, comply within 90 days of effective date unless compliance extension.	Yes.
§63.6(c)(3)–(4)	[Reserved].		
§63.6(c)(5)	Compliance Dates for Existing Area Sources That Become Major.	Area sources that become major must comply with major source standards by date indicated in subpart or by equivalent time period (for example, 3 years).	Yes.
§63.6(d)	[Reserved].		
§63.6(e)(1)–(2)	Operation & Maintenance	Operate to minimize emissions at all times; correct malfunctions as soon as practicable; requirements independently enforceable; information Administrator will use to determine if operation and maintenance requirements were met.	Yes.
§63.6(e)(3)	Startup, Shutdown, and Malfunction Plan (SSMP).	Requirement for startup, shutdown, and malfunction (SSM) and SSMP; content of SSMP.	Yes.
§63.6(f)(1)	Compliance Except During SSM	You must comply with emission standards at all times except during SSM.	Yes.
§63.6(f)(2)–(3)	Methods for Determining Compliance	Compliance based on performance test, operation and maintenance plans, records, inspection.	Yes.
§63.6(g)	Alternative Standard	Procedures for getting an alternative standard	Yes.
§63.6(h)	Opacity/VE Standards	Requirements for opacity and VE standards	No, not applicable.
§63.6(i)	Compliance Extension	Procedures and criteria for Administrator to grant compliance extension.	Yes.
§63.6(j)	Presidential Compliance Exemption	President may exempt source category	Yes.
§63.7(a)(1)–(2)	Performance Test Dates	Dates for conducting initial performance testing and other compliance demonstrations; must conduct 180 days after first subject to rule.	Yes.
§63.7(a)(3)	Section 114 Authority	Administrator may require a performance test under CAA section 114 at any time.	Yes.
§63.7(b)(1)	Notification of Performance Test	Must notify Administrator 60 days before the test.	Yes.
§63.7(b)(2)	Notification of Rescheduling	Must notify Administrator 5 days before scheduled date of rescheduled date.	Yes.
§63.7(c)	Quality Assurance (QA)/Test Plan	Requirements; test plan approval procedures; performance audit requirements; internal and external QA procedures for testing.	Yes.
§63.7(d)	Testing Facilities	Requirements for testing facilities	Yes.
§63.7(e)(1)	Conditions for Conducting Performance Tests	Performance tests must be conducted under representative conditions.	No, §63.8595 specifies requirements.
		Cannot conduct performance tests during SSM; not a violation to exceed standard during SSM.	Yes.

TABLE 8 TO SUBPART KKKKK OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKKK—Continued

Citation	Subject	Brief description	Applies to subpart KKKKK
§63.7(e)(2)–(3)	Conditions for Conducting Performance Tests	Must conduct according to subpart and EPA test methods unless Administrator approves alternative; must have at least three test runs of at least 1 hour each; compliance is based on arithmetic mean of three runs; conditions when data from an additional test run can be used.	Yes.
§63.7(f)	Alternative Test Method	Procedures by which Administrator can grant approval to use an alternative test method.	Yes.
§63.7(g)	Performance Test Data Analysis	Must include raw data in performance test report; must submit performance test data 60 days after end of test with the notification of compliance status.	Yes.
§63.7(h)	Waiver of Tests	Procedures for Administrator to waive performance test.	Yes.
§63.8(a)(1)	Applicability of Monitoring Requirements	Subject to all monitoring requirements in subpart	Yes.
§63.8(a)(2)	Performance Specifications	Performance Specifications in appendix B of 40 CFR part 60 apply.	Yes.
§63.8(a)(3)	[Reserved].		
§63.8(a)(4)	Monitoring with Flares	Requirements for flares in §63.11 apply	No, not applicable.
§63.8(b)(1)	Monitoring	Must conduct monitoring according to standard unless Administrator approves alternative.	Yes.
§63.8(b)(2)–(3)	Multiple Effluents and Multiple Monitoring Systems.	Specific requirements for installing and reporting on monitoring systems.	Yes.
§63.8(c)(1)	Monitoring System Operation and Maintenance	Maintenance consistent with good air pollution control practices.	Yes.
§63.8(c)(1)(i)	Routine and Predictable SSM	Reporting requirements for SSM when action is described in SSMP.	Yes.
§63.8(c)(1)(ii)	SSM not in SSMP	Reporting requirements for SSM when action is not described in SSMP.	Yes.
§63.8(c)(1)(iii)	Compliance with Operation and Maintenance Requirements.	How Administrator determines if source complying with operation and maintenance requirements.	Yes.
§63.8(c)(2)–(3)	Monitoring System Installation	Must install to get representative emission and parameter measurements.	Yes.
§63.8(c)(4)	CMS Requirements	Requirements for CMS	No, §§63.8575 and 63.8615 specify requirements.
§63.8(c)(5)	Continuous Opacity Monitoring System (COMS) Minimum Procedures.	COMS minimum procedures	No, not applicable.
§63.8(c)(6)	CMS Requirements	Zero and high level calibration check requirements.	No, §63.8575 specifies requirements.
§63.8(c)(7)–(8)	CMS Requirements	Out-of-control periods	No, §63.8575 specifies requirements.
§63.8(d)	CMS Quality Control	Requirements for CMS quality control	No, §63.8575 specifies requirements.
§63.8(e)	CMS Performance Evaluation	Requirements for CMS performance evaluation	No, §63.8575 specifies requirements.
§63.8(f)(1)–(5)	Alternative Monitoring Method	Procedures for Administrator to approve alternative monitoring.	Yes.
§63.8(f)(6)	Alternative to Relative Accuracy Test	Procedures for Administrator to approve alternative relative accuracy test for continuous emission monitoring systems (CEMS).	No, not applicable.
§63.8(g)	Data Reduction	COMS and CEMS data reduction requirements	No, not applicable.
§63.9(a)	Notification Requirements	Applicability; State delegation	Yes.
§63.9(b)	Initial Notifications	Requirements for initial notifications	Yes.
§63.9(c)	Request for Compliance Extension	Can request if cannot comply by date or if installed BACT/LAER.	Yes.
§63.9(d)	Notification of Special Compliance Requirements for New Source.	For sources that commence construction between proposal and promulgation and want to comply 3 years after effective date.	Yes.
§63.9(e)	Notification of Performance Test	Notify Administrator 60 days prior	Yes.
§63.9(f)	Notification of VE/Opacity Test	Notify Administrator 30 days prior	No, not applicable.
§63.9(g)(1)	Additional Notifications When Using CMS	Notification of performance evaluation	Yes.
§63.9(g)(2)–(3)	Additional Notifications When Using CMS	Notification of COMS data use; notification that relative accuracy alternative criterion were exceeded..	No, not applicable.

TABLE 8 TO SUBPART KKKKK OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKKK—Continued

Citation	Subject	Brief description	Applies to subpart KKKKK
§ 63.9(h)	Notification of Compliance Status	Contents; submittal requirements	Yes.
§ 63.9(i)	Adjustment of Submittal Deadlines	Procedures for Administrator to approve change in when notifications must be submitted.	Yes.
§ 63.9(j)	Change in Previous information	Must submit within 15 days after the change	Yes.
§ 63.10(a)	Recordkeeping/Reporting	Applicability; general information	Yes.
§ 63.10(b)(1)	General Recordkeeping Requirements	General requirements	Yes.
§ 63.10(b)(2)(i)–(v)	Records Related to SSM	Requirements for SSM records	Yes.
§ 63.10(b)(2)(vi)–(xii) and (xiv)	CMS Records	Records when CMS is malfunctioning, inoperative or out-of-control.	Yes.
§ 63.10(b)(2)(xiii)	Records	Records when using alternative to relative accuracy test.	No, not applicable.
§ 63.10(b)(3)	Records	Applicability Determinations	Yes.
§ 63.10(c)(1)–(15)	Records	Additional records for CMS	No, §§ 63.8575 and 63.8640 specify requirements.
§ 63.10(d)(1) and (2)	General Reporting Requirements	Requirements for reporting; performance test results reporting.	Yes.
§ 63.10(d)(3)	Reporting Opacity or VE Observations	Requirements for reporting opacity and VE	No, not applicable.
§ 63.10(d)(4)	Progress Reports	Must submit progress reports on schedule if under compliance extension.	Yes.
§ 63.10(d)(5)	SSM Reports	Contents and submission	Yes.
§ 63.10(e)(1)–(3)	Additional CMS Reports	Requirements for CMS reporting	No, §§ 63.8575 and 63.8635 specify requirements.
§ 63.10(e)(4)	Reporting COMS data	Requirements for reporting COMS data with performance test data.	No, not applicable.
§ 63.10(f)	Waiver for Recordkeeping/Reporting	Procedures for Administrator to waive	Yes.
§ 63.11	Flares	Requirement for flares	No, not applicable.
§ 63.12	Delegation	State authority to enforce standards	Yes.
§ 63.13	Addresses	Addresses for reports, notifications, requests	Yes.
§ 63.14	Incorporation by Reference	Materials incorporated by reference	Yes.
§ 63.15	Availability of Information	Information availability; confidential information	Yes.

[FR Doc. 03–5739 Filed 5–15–03; 8:45 am]

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Friday,
May 16, 2003

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 409, 413, 440, and 483
Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities—Update; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 409, 413, 440, and 483

[CMS–1469–P]

RIN 0938–AL20

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities—Update

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2004, as required by statute. Annual updates to the PPS rates are required by section 1888(e) of the Social Security Act (the Act), as amended by the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA), and the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Benefits Improvement and Protection Act of 2000 (BIPA), relating to Medicare payments and consolidated billing for SNFs.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on July 7, 2003.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1469–P, PO Box 8013, Baltimore, MD 21244–8013.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses: Hubert H. Humphrey Building, Room 443-G, 200 Independence Avenue, SW., Washington, DC 20201, or Centers for Medicare & Medicaid Services, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–8013.

Comments mailed to those addresses designated for courier delivery may be delayed and could be considered late. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. Please refer to file code CMS–1469–P on each comment. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of this document, in Room C5–12–08 of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland, Monday through Friday of each week from 8:30 a.m. to 4 p.m. Please call (410) 786–7197 to make an appointment to view comments.

FOR FURTHER INFORMATION CONTACT:

John Davis, (410) 786–0008 (for information related to the Wage Index, and for information related to swing-bed providers).

Ellen Gay, (410) 786–4528 (for information related to the case-mix classification methodology, and for information related to swing-bed providers).

Bill Ullman, (410) 786–5667 (for information related to level of care determinations, consolidated billing, and general information).

SUPPLEMENTARY INFORMATION:

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To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

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In addition, because of the many terms to which we refer by abbreviation in this proposed rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

ADL	Activity of Daily Living
AHE	Average Hourly Earnings
ARD	Assessment Reference Date
BBA	Balanced Budget Act of 1997, Pub.L. 105–33
BBRA	Medicare, Medicaid and SCHIP Balanced Budget Refinement Act of 1999, Pub.L. 106–113
BEA	(U.S.) Bureau of Economic Analysis
BIPA	Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub.L. 106–554
CAH	Critical Access Hospital
CFR	Code of Federal Regulations
CMS	Centers for Medicare & Medicaid Services
CPT	(Physicians') Current Procedural Terminology
DRG	Diagnosis Related Group
FI	Fiscal Intermediary
FR	Federal Register
FY	Fiscal Year
GAO	General Accounting Office
HCPCS	Healthcare Common Procedure Coding System
ICD–9–CM	International Classification of Diseases, Ninth Edition, Clinical Modification

IFC	Interim Final Rule with Comment Period
MDS	Minimum Data Set
MEDPAR	Medicare Provider Analysis and Review File
MIP	Medicare Integrity Program
MSA	Metropolitan Statistical Area
NECMA	New England County Metropolitan Area
OIG	Office of the Inspector General
OMRA	Other Medicare Required Assessment
PCE	Personal Care Expenditures
PPI	Producer Price Index
PPS	Prospective Payment System
PRM	Provider Reimbursement Manual
RAI	Resident Assessment Instrument
RAP	Resident Assessment Protocol
RAVEN	Resident Assessment Validation Entry
RFA	Regulatory Flexibility Act, Pub. L. 96–354
RIA	Regulatory Impact Analysis
RUG	Resource Utilization Groups
SCHIP	State Children's Health Insurance Program
SNF	Skilled Nursing Facility
STM	Staff Time Measure
UMRA	Unfunded Mandates Reform Act, Pub. L. 104–4

I. Background

On July 31, 2002, we published a notice in the **Federal Register** (67 FR 49798) that set forth updates to the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2003. Annual updates to the PPS rates are required by section 1888(e) of the Social Security Act (the Act), as amended by the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (the BBRA) and the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (the BIPA), relating to Medicare payments and consolidated billing for SNFs.

A. Current System for Payment of Skilled Nursing Facility Services Under Part A of the Medicare Program

Section 4432 of the Balanced Budget Act of 1997 (the BBA) amended section 1888 of the Act to provide for the implementation of a per diem PPS for SNFs, covering all costs (routine, ancillary, and capital-related) of covered SNF services furnished to beneficiaries under Part A of the Medicare program, effective for cost reporting periods beginning on or after July 1, 1998. We propose to update the per diem payment rates for SNFs for FY 2004. Major elements of the SNF PPS include:

• *Rates.* Per diem Federal rates were established for urban and rural areas using allowable costs from FY 1995 cost reports. These rates also included an estimate of the cost of services that, before July 1, 1998, had been paid under Part B but were furnished to Medicare beneficiaries in a SNF during a Part A covered stay. The rates were adjusted annually using a SNF market basket index. Rates were case-mix adjusted using a classification system (Resource Utilization Groups, version III (RUG–III)) based on beneficiary assessments (using the Minimum Data Set (MDS) 2.0). The rates were also adjusted by the hospital wage index to account for geographic variation in wages. (In section II.C of this preamble, we discuss the wage index adjustment in detail.) A correction notice was published on December 27, 2002 (67 FR 79123) that announced corrections to several of the wage factors. Additionally, as noted in the July 31, 2002 update notice (67 FR 49798), section 101 of the BBRA and certain sections of the BIPA also affect the payment rate.

• *Transition.* The SNF PPS included an initial 3-year, phased transition that blended a facility-specific payment rate with the Federal case-mix adjusted rate. For each cost reporting period after a facility migrated to the new system, the facility-specific portion of the blend decreased and the Federal portion increased in 25 percentage point increments. For most facilities, the facility-specific rate was based on allowable costs from FY 1995; however, since the last year of the transition was FY 2001, all facilities were paid at the full Federal rate by the following fiscal year (FY 2002). Therefore, we are no longer including adjustment factors related to facility-specific rates for the coming fiscal year.

• *Coverage.* The establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage. However, because RUG–III classification is based, in part, on the beneficiary's need for skilled nursing care and therapy, we have attempted, where possible, to coordinate claims review procedures involving level of care determinations with the outputs of beneficiary assessment and RUG–III classifying activities. We discuss this coordination in greater detail in section II.E of this preamble. Another SNF benefit requirement is that the SNF in which the services are furnished must be certified by Medicare as meeting the requirements for program participation contained in section 1819 of the Act. This provision of the law defines a SNF as "* * * an institution (or a distinct part of an institution). * * *" In section VI of this preamble, we discuss a clarification that we propose to make in defining the term "distinct part" with respect to SNFs.

In addition, we are taking this opportunity to make a technical correction in a cross-reference that appears in § 409.20(c) of the regulations. Section 409.20 provides a general introduction to the subsequent sections (§ 409.21 through § 409.36) that set forth the specific requirements pertaining to the SNF benefit. However, in referring to the sections that follow, the cross-reference in § 409.20(c) concerning terminology inadvertently omits a reference to § 409.21, and we would now correct that omission by revising the cross-reference to read "§ 409.21 through § 409.36".

• *Consolidated Billing.* The SNF PPS includes a consolidated billing provision (described in greater detail in section IV of this proposed rule) that requires a SNF to submit consolidated Medicare bills for almost all of the services that its residents receive during the course of a covered Part A stay. (In addition, this provision places with the SNF the Medicare billing responsibility for physical, occupational, and speech-language therapy that the resident receives during a noncovered stay.) The statute excludes from the consolidated billing provision a small list of services—primarily those of physicians and certain other types of practitioners—which remain separately billable to Part B by the outside entity that furnishes them.

• *Application of the SNF PPS to SNF services furnished by swing-bed hospitals.* Section 1883 of the Act permits certain small, rural hospitals to enter into a Medicare swing-bed agreement, under which the hospital can use its beds to provide either acute or SNF care, as needed. For critical access hospitals (CAHs), Part A pays on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, in accordance with section 1888(e)(7) of the Act, such services furnished by non-CAH rural hospitals are paid under the SNF PPS, effective with cost reporting periods beginning on or after July 1, 2002. A more detailed discussion of this provision appears in section V of this proposed rule.

B. Requirements of the Balanced Budget Act of 1997 (the BBA) for Updating the Prospective Payment System for Skilled Nursing Facilities

Section 1888(e)(4)(H) of the Act requires that we publish in the **Federal Register:**

1. The unadjusted Federal per diem rates to be applied to days of covered SNF services furnished during the FY.

2. The case-mix classification system to be applied with respect to these services during the FY.

3. The factors to be applied in making the area wage adjustment with respect to these services.

In the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications in the RUG–III classification structure (see section II.E of this preamble).

Along with a number of other revisions discussed later in this preamble, this proposed rule provides the annual updates to the Federal rates as mandated by the Act.

C. The Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (the BBRA)

There were several provisions in the BBRA that resulted in adjustments to the SNF PPS. These provisions were described in detail in the final rule that we published in the **Federal Register** on July 31, 2000 (65 FR 46770). In particular, section 101 of the BBRA provided for a temporary 20 percent increase in the per diem adjusted payment rates for 15 specified RUG–III groups (SE3, SE2, SE1, SSC, SSB, SSA, CC2, CC1, CB2, CB1, CA2, CA1, RHC, RMC, and RMB). Under the law, this temporary increase remains in effect until the later of October 1, 2000, or the implementation of case-mix refinements in the PPS. Section 101 also included a 4 percent across-the-board increase in the adjusted Federal per diem payment rates each year for FYs 2001 and 2002, exclusive of the 20 percent increase. Accordingly, this 4 percent temporary increase has now expired.

We included further information on all of the provisions of the BBRA that affect the SNF PPS in Program Memoranda A–99–53 and A–99–61 (December 1999), and Program Memorandum AB–00–18 (March 2000). In addition, for swing-bed hospitals with more than 49 (but less than 100) beds, section 408 of the BBRA provided for the repeal of certain statutory restrictions on length of stay and aggregate payment for patient days, effective with the end of the SNF PPS transition period described in section 1888(e)(2)(E) of the Act. In the July 31, 2001 final rule (66 FR 39562), we made conforming changes to the regulations in § 413.114(d), effective for services furnished in cost reporting periods beginning on or after July 1, 2002.

D. The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (the BIPA)

The BIPA also included several provisions that resulted in adjustments to the PPS for SNFs. These provisions were described in detail in the final rule that we published in the **Federal Register** on July 31, 2001 (66 FR 39562) as follows:

- Section 203 of the BIPA exempted critical access hospital (CAH) swing-beds from the SNF PPS; we included further information on this provision in Program Memorandum A–01–09 (January 16, 2001).
- Section 311 of the BIPA eliminated the one percent reduction in the SNF market basket that the statutory update formula had previously specified for FY 2001, and changed the one percent reduction specified for FYs 2002 and 2003 to a 0.5 percent reduction. This section also required us to conduct a study of alternative case-mix classification systems for the SNF PPS, and to submit a report to the Congress by January 1, 2005.
- Section 312 of the BIPA provided for a temporary 16.66 percent increase in the nursing component of the case-mix adjusted Federal rate for services furnished on or after April 1, 2001, and before October 1, 2002. Accordingly, this temporary increase has now expired. This section also required the General Accounting Office (GAO) to conduct an audit of SNF nursing staff ratios and submit a report to the Congress on whether the temporary increase in the nursing component should be continued.
- Section 313 of the BIPA repealed the consolidated billing requirement for services (other than physical, occupational, and speech-language therapy) furnished to SNF residents during noncovered stays, effective January 1, 2001.
- Section 314 of the BIPA adjusted the payment rates for all of the rehabilitation RUGs to correct an anomaly under which the existing payment rates for the RHC, RMC, and RMB rehabilitation groups were higher than the rates for some other, more intensive rehabilitation RUGs.
- Section 315 of the BIPA authorized us to establish a geographic reclassification procedure that is specific to SNFs, but only after collecting the data necessary to establish a SNF wage index that is based on wage data from nursing homes.

We included further information on several of these provisions in Program Memorandum A–01–08 (January 16, 2001).

E. Skilled Nursing Facility Prospective Payment—General Overview

We implemented the Medicare SNF PPS for cost reporting periods beginning on or after July 1, 1998. Under the PPS, we pay SNFs through prospective, case-mix adjusted per diem payment rates applicable to all covered SNF services. These payment rates cover all the costs of furnishing covered skilled nursing services (routine, ancillary, and capital-related costs) other than costs associated with approved educational activities. Covered SNF services include post-hospital services for which benefits are provided under Part A and all items and services that, before July 1, 1998, had been paid under Part B (other than physician and certain other services specifically excluded under the BBA) but furnished to Medicare beneficiaries in a SNF during a covered Part A stay. A complete discussion of these provisions appears in the May 12, 1998 interim final rule (63 FR 26252).

1. Payment Provisions—Federal Rate

The PPS uses per diem Federal payment rates based on mean SNF costs in a base year updated for inflation to the first effective period of the PPS. We developed the Federal payment rates using allowable costs from hospital-based and freestanding SNF cost reports for reporting periods beginning in FY 1995. The data used in developing the Federal rates also incorporated an estimate of the amounts that would be payable under Part B for covered SNF services furnished to individuals during the course of a covered Part A stay in a SNF.

In developing the rates for the initial period, we updated costs to the first effective year of PPS (the 15-month period beginning July 1, 1998) using a SNF market basket, and then standardized for the costs of facility differences in case-mix and for geographic variations in wages. Providers that received new provider exemptions from the routine cost limits were excluded from the database used to compute the Federal payment rates, as well as costs related to payments for exceptions to the routine cost limits. In accordance with the formula prescribed in the BBA, we set the Federal rates at a level equal to the weighted mean of freestanding costs plus 50 percent of the difference between the freestanding mean and weighted mean of all SNF costs (hospital-based and freestanding) combined. We computed and applied separately the payment rates for facilities located in urban and rural areas. In addition, we adjusted the

portion of the Federal rate attributable to wage-related costs by a wage index.

The Federal rate also incorporates adjustments to account for facility case-mix, using a classification system that accounts for the relative resource utilization of different patient types. This classification system, Resource Utilization Groups, version III (RUG–III), uses beneficiary assessment data from the Minimum Data Set (MDS) completed by SNFs to assign beneficiaries to one of 44 RUG–III groups. The May 12, 1998 interim final rule (63 FR 26252) included a complete and detailed description of the RUG–III classification system, and a further discussion appears in section II.B of this preamble.

The Federal rates in this proposed rule reflect an update to the rates that we published in the July 31, 2002 **Federal Register** (67 FR 49798) equal to the full change in the SNF market basket index. According to section 1888(e)(4)(E)(ii)(IV) of the Act, for FY 2004, we would update the rate by adjusting the current rates by the full SNF market basket index.

2. Payment Provisions—Initial Transition Period

The SNF PPS included an initial, phased transition from a facility-specific rate (which reflected the individual facility's historical cost experience) to the Federal case-mix adjusted rate. The transition extended through the facility's first three cost reporting periods under the PPS, up to, and potentially including, the one that began in FY 2001. Furthermore, pursuant to section 102 of BBRA, a facility could nonetheless elect to be paid entirely under the Federal rates.

Accordingly, starting with cost reporting periods beginning in FY 2002, we base payments entirely on the Federal rates and, as mentioned previously in this preamble, we no longer include adjustment factors related to facility-specific rates for the coming fiscal year.

F. Skilled Nursing Facility Market Basket Index

Section 1888(e)(5) of the Act requires us to establish a SNF market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered SNF services. The SNF market basket index is used to update the Federal rates on an annual basis, and is discussed in greater detail in section III of this preamble.

II. Update of Payment Rates Under the Prospective Payment System for Skilled Nursing Facilities

A. Federal Prospective Payment System

This proposed rule sets forth a schedule of Federal prospective payment rates applicable to Medicare Part A SNF services beginning October 1, 2003. The schedule incorporates per diem Federal rates that provide Part A payment for all costs of services furnished to a beneficiary in a SNF during a Medicare-covered stay.

1. Costs and Services Covered by the Federal Rates

The Federal rates apply to all costs (routine, ancillary, and capital-related costs) of covered SNF services other than costs associated with approved educational activities as defined in § 413.85. Under section 1888(e)(2) of the Act, covered SNF services include post-hospital SNF services for which benefits are provided under Part A (the hospital insurance program), as well as all items and services (other than those services excluded by statute) that, before July 1, 1998, were paid under Part B (the supplementary medical insurance program) but furnished to Medicare beneficiaries in a SNF during a Part A covered stay. (These excluded service categories are discussed in greater detail in section V.B.2 of the May 12, 1998 interim final rule (63 FR 26295–97)).

2. Methodology Used for the Calculation of the Federal Rates

The proposed FY 2004 rates would reflect an update using the full amount of the latest market basket index. The FY 2004 market basket increase factor is 2.9 percent. Consistent with previous years, this factor may be revised in the final rule when later forecast data are available. For a complete description of the multi-step process, see the May 12, 1998 interim final rule (63 FR 26252). We note that in accordance with section 101(a) of the BBRA and section 314 of the BIPA, the existing, temporary increase in the per diem adjusted payment rates of 20 percent for certain specified RUGs (and 6.7 percent for certain others) remains in effect until the implementation of case-mix refinements. As we discuss elsewhere in this proposed rule, while we are proceeding with our ongoing research in this area, we are not proposing to implement case-mix refinements in this proposed rule.

We used the SNF market basket to adjust each per diem component of the Federal rates forward to reflect cost increases occurring between the midpoint of the Federal fiscal year beginning October 1, 2002, and ending September 30, 2003, and the midpoint of the Federal fiscal year beginning October 1, 2003, and ending September 30, 2004, to which the payment rates apply. In accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, the payment rates for FY 2004 are updated by a factor equal to the market basket index percentage increase to determine the payment rates for FY 2004. The rates would be further adjusted by a wage index budget neutrality factor, described later in this section. Tables 1 and 2 reflect the updated components of the unadjusted Federal rates for FY 2004.

TABLE 1.—UNADJUSTED FEDERAL RATE PER DIEM: URBAN

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$125.15	$94.27	$12.42	$63.87

TABLE 2.—UNADJUSTED FEDERAL RATE PER DIEM: RURAL

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy-non-case-mix	Non-case-mix
Per Diem Amount	$119.57	$108.70	$13.26	$65.06

B. Case-Mix Adjustment

Under the BBA, we must publish the SNF PPS case-mix classification methodology applicable for the next Federal FY before August 1 of each year. As noted in the following discussion, we are proceeding with our ongoing research regarding possible refinements in the existing case-mix classification system, but we are not proposing to implement the refinements in this proposed rule.

As discussed previously in this preamble, section 101(a) of the BBRA provided for a temporary 20 percent increase in the per diem adjusted payment rates for 15 specified RUG–III groups. This legislation specified that the 20 percent increase would be effective for SNF services furnished on or after April 1, 2000, and would continue until the later of: (1) October 1, 2000, or (2) implementation of a refined case-mix classification system under section 1888(e)(4)(G)(i) of the Act that would better account for medically complex patients.

In the SNF PPS proposed rule for FY 2001 (65 FR 19190, April 10, 2000), we proposed making an extensive, comprehensive set of refinements to the existing case-mix classification system that collectively would have significantly expanded the existing 44-group structure. However, when our subsequent validation analyses indicated that the refinements would afford only a limited degree of improvement in explaining resource utilization relative to the significant increase in complexity that they would entail, we decided not to implement them at that time (see the FY 2001 final rule published July 31, 2000 (65 FR 46773)). Nevertheless, since the BBRA provision had demonstrated a Congressional interest in improving the ability of the payment system to account for the care furnished to medically complex patients in SNFs, we continued to conduct research in this area.

The Congress subsequently enacted section 311(e) of the BIPA, which directed us to conduct a study of the different systems for categorizing patients in Medicare SNFs in a manner that accounts for the relative resource utilization of different patient types, and to issue a report with any appropriate recommendations to the Congress by January 1, 2005. The lengthy timeframe for conducting the study, and its broad mandate to consider various classification systems and the full range of patient types, stood in sharp contrast to the BBRA language regarding more incremental refinements to the existing case-mix classification system under section 1888(e)(4)(G)(i) of the Act, and made clear that implementing the latter type of refinements to the existing system in order to better account for medically complex patients need not await the completion of the more comprehensive changes envisioned in the BIPA. Accordingly, we considered the possibility of including such refinements as part of last year's annual update of the SNF payment rates.

However, in the July 31, 2002 update notice (67 FR 49801), we determined that, while the research gives a sound basis for developing improvements to the SNF PPS, we need additional time to review and analyze the implications. Therefore, we decided not to implement any case-mix refinements at that time, leaving the current classification system in place. This also left in place the temporary add-on payments enacted in section 101(a) of the BBRA.

Accordingly, the payment rates set forth in this proposed rule reflect the continued use of the 44-group RUG–III classification system discussed in the May 12, 1998 interim final rule (63 FR 26252). Consequently, in this proposed rule, we will also maintain the add-ons to the Federal rates for the specified RUG–III groups required by section 101(a) of the BBRA and subsequently modified by section 314 of the BIPA. The case-mix adjusted payment rates are listed separately for urban and rural SNFs in Tables 3 and 4, with the corresponding case-mix values. These tables do not reflect the add-ons to the specified RUG–III groups provided for in the BBRA, which are applied only after all other adjustments (wage and case-mix) have been made.

Meanwhile, we are continuing to explore both short-term and longer-range revisions to our case-mix classification methodology. In July 2001, we awarded a contract to the Urban Institute for performance of research to aid us in making incremental refinements to the case-mix classification system under section 1888(e)(4)(G)(i) of the Act and starting the case-mix study mandated by section 311(e) of the BIPA. The results of the research in which we are currently engaged will be included in the report to the Congress that section 311(e) of the BIPA requires us to submit by January 1, 2005. As we noted in the May 10, 2001 proposed rule (66 FR 23990), this research may also support a longer term goal of developing more integrated approaches for the payment and delivery system for Medicare post acute services generally. This broader, ongoing research project will pursue several avenues in studying various case-mix classification systems. We have encouraging preliminary results from incorporating comorbidities and complications into the classification strategy, and will thoroughly explore and evaluate this and other approaches in our ongoing work.

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Table 3
CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES
URBAN

RUG-III Category	Nursing Index	Therapy Index	Nursing Component	Therapy Component	Non-case Mix Therapy Comp	Non-case Mix Component	Total Rate
RUC	1.30	2.25	162.70	212.11		63.87	438.68
RUB	0.95	2.25	118.89	212.11		63.87	394.87
RUA	0.78	2.25	97.62	212.11		63.87	373.60
RVC	1.13	1.41	141.42	132.92		63.87	338.21
RVB	1.04	1.41	130.16	132.92		63.87	326.95
RVA	0.81	1.41	101.37	132.92		63.87	298.16
RHC	1.26	0.94	157.69	88.61		63.87	310.17
RHB	1.06	0.94	132.66	88.61		63.87	285.14
RHA	0.87	0.94	108.88	88.61		63.87	261.36
RMC	1.35	0.77	168.95	72.59		63.87	305.41
RMB	1.09	0.77	136.41	72.59		63.87	272.87
RMA	0.96	0.77	120.14	72.59		63.87	256.60
RLB	1.11	0.43	138.92	40.54		63.87	243.33
RLA	0.80	0.43	100.12	40.54		63.87	204.53
SE3	1.70		212.76		12.42	63.87	289.05
SE2	1.39		173.96		12.42	63.87	250.25
SE1	1.17		146.43		12.42	63.87	222.72
SSC	1.13		141.42		12.42	63.87	217.71
SSB	1.05		131.41		12.42	63.87	207.70
SSA	1.01		126.40		12.42	63.87	202.69
CC2	1.12		140.17		12.42	63.87	216.46
CC1	0.99		123.90		12.42	63.87	200.19
CB2	0.91		113.89		12.42	63.87	190.18
CB1	0.84		105.13		12.42	63.87	181.42
CA2	0.83		103.87		12.42	63.87	180.16
CA1	0.75		93.86		12.42	63.87	170.15
IB2	0.69		86.35		12.42	63.87	162.64
IB1	0.67		83.85		12.42	63.87	160.14
IA2	0.57		71.34		12.42	63.87	147.63
IA1	0.53		66.33		12.42	63.87	142.62
BB2	0.68		85.10		12.42	63.87	161.39
BB1	0.65		81.35		12.42	63.87	157.64

BA2	0.56		70.08	12.42	63.87	146.37
BA1	0.48		60.07	12.42	63.87	136.36
PE2	0.79		98.87	12.42	63.87	175.16
PE1	0.77		96.37	12.42	63.87	172.66
PD2	0.72		90.11	12.42	63.87	166.40
PD1	0.70		87.61	12.42	63.87	163.90
PC2	0.65		81.35	12.42	63.87	157.64
PC1	0.64		80.10	12.42	63.87	156.39
PB2	0.51		63.83	12.42	63.87	140.12
PB1	0.50		62.58	12.42	63.87	138.87
PA2	0.49		61.32	12.42	63.87	137.61
PA1	0.46		57.57	12.42	63.87	133.86

Table 4
CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES
RURAL

RUG-III Category	Nursing Index	Therapy Index	Nursing Component	Therapy Component	Non-case Mix Therapy Comp	Non-case Mix Component	Total Rate
RUC	1.30	2.25	155.44	244.58		65.06	465.08
RUB	0.95	2.25	113.59	244.58		65.06	423.23
RUA	0.78	2.25	93.26	244.58		65.06	402.90
RVC	1.13	1.41	135.11	153.27		65.06	353.44
RVB	1.04	1.41	124.35	153.27		65.06	342.68
RVA	0.81	1.41	96.85	153.27		65.06	315.18
RHC	1.26	0.94	150.66	102.18		65.06	317.90
RHB	1.06	0.94	126.74	102.18		65.06	293.98
RHA	0.87	0.94	104.03	102.18		65.06	271.27
RMC	1.35	0.77	161.42	83.70		65.06	310.18
RMB	1.09	0.77	130.33	83.70		65.06	279.09
RMA	0.96	0.77	114.79	83.70		65.06	263.55
RLB	1.11	0.43	132.72	46.74		65.06	244.52
RLA	0.80	0.43	95.66	46.74		65.06	207.46
SE3	1.70		203.27		13.26	65.06	281.59
SE2	1.39		166.20		13.26	65.06	244.52
SE1	1.17		139.90		13.26	65.06	218.22
SSC	1.13		135.11		13.26	65.06	213.43
SSB	1.05		125.55		13.26	65.06	203.87
SSA	1.01		120.77		13.26	65.06	199.09
CC2	1.12		133.92		13.26	65.06	212.24
CC1	0.99		118.37		13.26	65.06	196.69
CB2	0.91		108.81		13.26	65.06	187.13
CB1	0.84		100.44		13.26	65.06	178.76
CA2	0.83		99.24		13.26	65.06	177.56
CA1	0.75		89.68		13.26	65.06	168.00
IB2	0.69		82.50		13.26	65.06	160.82
IB1	0.67		80.11		13.26	65.06	158.43
IA2	0.57		68.15		13.26	65.06	146.47
IA1	0.53		63.37		13.26	65.06	141.69
BB2	0.68		81.31		13.26	65.06	159.63
BB1	0.65		77.72		13.26	65.06	156.04

BA2	0.56		66.96		13.26	65.06	145.28
BA1	0.48		57.39		13.26	65.06	135.71
PE2	0.79		94.46		13.26	65.06	172.78
PE1	0.77		92.07		13.26	65.06	170.39
PD2	0.72		86.09		13.26	65.06	164.41
PD1	0.70		83.70		13.26	65.06	162.02
PC2	0.65		77.72		13.26	65.06	156.04
PC1	0.64		76.52		13.26	65.06	154.84
PB2	0.51		60.98		13.26	65.06	139.30
PB1	0.50		59.79		13.26	65.06	138.11
PA2	0.49		58.59		13.26	65.06	136.91
PA1	0.46		55.00		13.26	65.06	133.32

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C. Wage Index Adjustment to Federal Rates

Section 1888(e)(4)(G)(ii) of the Act requires that we adjust the Federal rates to account for differences in area wage levels, using a wage index that we find appropriate. Since the inception of a PPS for SNFs, we have used hospital wage data in developing a wage index to be applied to SNFs. We propose to continue that practice for FY 2004.

Section 315 of the BIPA authorizes us to establish a reclassification system for SNFs, similar to the hospital methodology. This geographic reclassification system cannot be implemented until we have collected the data necessary to establish an area wage index for SNFs based on their wage data. We presented a comprehensive discussion of this wage data in the May 10, 2001 proposed rule (66 FR 23984) and the July 31, 2001 final rule (66 FR 39562).

In the May 10, 2001 proposed rule, we published a wage index prototype based on SNF data, along with the wage index based on the hospital wage data that was used in the preceding year's final rule (July 31, 2000, 65 FR 46770). In addition, we included a discussion of the wage index computations for the SNF prototype. We also indicated our concern about the reliability of the existing data used in establishing a SNF wage index, in view of the significant variations in the SNF-specific wage data and the large number of SNFs that are unable to provide adequate wage and hourly data. Accordingly, we expressed the belief that a wage index based on hospital wage data remains the best and most appropriate to use in adjusting payments to SNFs, since both hospitals and SNFs compete in the same labor markets.

In the July 31, 2001 final rule (66 FR 39579), we indicated that we had decided not to adopt the SNF-specific wage index prototype from the proposed rule, citing concerns such as the significant amount of volatility in the data. In addition, while we acknowledged that auditing all SNFs would provide more accurate and reliable data, we observed that this would place a burden on providers in terms of recordkeeping and completion of the cost report worksheet. We also noted that adopting such an approach would require a significant commitment of resources by us and by our contractors:

> Developing a desk review and audit program similar to that required in the hospital setting would require significant resources. The fiscal intermediaries (FIs) that are involved in preparing the hospital wage data currently spend considerable resources to ensure the accuracy of the wage data submitted by approximately 6,000 hospitals. This process involves editing, reviewing, auditing, and performing desk reviews of the data. Requiring FIs to do the same for the approximately 14,000 SNFs would nearly triple the FIs' workload and budgets in this area. (66 FR 39579).

While we continue to believe that the development of a SNF-specific wage index potentially could improve the accuracy of SNF payments, we do not regard an undertaking of this magnitude as being feasible within the current level of programmatic resources. However, we remain willing to consider the adoption of a SNF-specific wage index should sufficient staffing and budgetary resources to support it become available in the future.

We also propose to continue use of the FY 2003 wage index to adjust SNF PPS payments beginning October 1, 2003. The wage indexes published on July 31, 2002 (67 FR 49798) have undergone a number of changes to reflect certain changes in the data that were not foreseen prior to publication. For example, the Killeen-Temple, Texas Metropolitan Statistical Area (MSA) had two changes to its wage index during the course of the year. While this is consistent with the regulations governing mid-year corrections in the hospital wage index, it results in uncertainty for SNFs in knowing the wage index that will be applied to their payments at the beginning of the year. Such changes also prevent us from calculating the most accurate wage index budget neutrality factor, discussed later in this section. It is our intent that, for each future year, we will use a wage index based on the most recently published final hospital wage index data. In using the most recently published final data, we can be assured that the wage index published in each year's update will be used throughout the year to adjust payments. Therefore, providers and other interested parties who use the wage indexes to prepare budget and payment forecasts can be assured that the wage index will not change, thus also assuring the prospective nature of the SNF payment system. The policy of using the most recently published hospital wage index would also conform to the approach currently used in Medicare payment systems for other provider types, including home health agencies (HHAs) and inpatient rehabilitation hospitals.

The wage index adjustment would be applied to the proposed labor-related portion of the Federal rate, which is 76.435 percent of the total rate. This percentage reflects the labor-related relative importance for FY 2004. The labor-related relative importance is calculated from the SNF market basket, and approximates the labor-related portion of the total costs after taking into account historical and projected price changes between the base year and FY 2004. The price proxies that move the different cost categories in the market basket do not necessarily change at the same rate, and the relative importance captures these changes. Accordingly, the relative importance figure more closely reflects the cost share weights for FY 2004 than the base year weights from the SNF market basket.

We calculate the labor-related relative importance for FY 2004 in four steps. First, we compute the FY 2004 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2004 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2004 relative importance for each cost category by multiplying this ratio by the base year (FY 1997) weight. Finally, we sum the FY 2004 relative importance for each of the labor-related cost categories (wages and salaries, employee benefits, nonmedical professional fees, labor-intensive services, and capital-related expenses) to produce the FY 2004 labor-related relative importance. Tables 5 and 6 show the Federal rates by labor-related and non-labor-related components.

TABLE 5.—CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT

RUG III category	Total rate	Labor portion	Non-labor portion
RUC	438.68	335.31	103.37
RUB	394.87	301.82	93.05
RUA	373.60	285.56	88.04
RVC	338.21	258.51	79.70
RVB	326.95	249.90	77.05
RVA	298.16	227.90	70.26
RHC	310.17	237.08	73.09
RHB	285.14	217.95	67.19
RHA	261.36	199.77	61.59
RMC	305.41	233.44	71.97
RMB	272.87	208.57	64.30
RMA	256.60	196.13	60.47
RLB	243.33	185.99	57.34
RLA	204.53	156.33	48.20
SE3	289.05	220.94	68.11
SE2	250.25	191.28	58.97
SE1	222.72	170.24	52.48
SSC	217.71	166.41	51.30
SSB	207.70	158.76	48.94
SSA	202.69	154.93	47.76
CC2	216.46	165.45	51.01

TABLE 5.—CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG III category	Total rate	Labor portion	Non-labor portion
CC1	200.19	153.02	47.17
CB2	190.18	145.36	44.82
CB1	181.42	138.67	42.75
CA2	180.16	137.71	42.45
CA1	170.15	130.05	40.10
IB2	162.64	124.31	38.33
IB1	160.14	122.40	37.74
IA2	147.63	112.84	34.79
IA1	142.62	109.01	33.61
BB2	161.39	123.36	38.03
BB1	157.64	120.49	37.15
BA2	146.37	111.88	34.49
BA1	136.36	104.23	32.13
PE2	175.16	133.88	41.28
PE1	172.66	131.97	40.69
PD2	166.40	127.19	39.21
PD1	163.90	125.28	38.62
PC2	157.64	120.49	37.15
PC1	156.39	119.54	36.85
PB2	140.12	107.10	33.02
PB1	138.87	106.15	32.72
PA2	137.61	105.18	32.43
PA1	133.86	102.32	31.54

TABLE 6.—CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT

RUG III category	Total rate	Labor portion	Non-labor portion
RUC	465.08	355.48	109.60
RUB	423.23	323.50	99.73
RUA	402.90	307.96	94.94
RVC	353.44	270.15	83.29
RVB	342.68	261.93	80.75
RVA	315.18	240.91	74.27
RHC	317.90	242.99	74.91
RHB	293.98	224.70	69.28
RHA	271.27	207.35	63.92
RMC	310.18	237.09	73.09
RMB	279.09	213.32	65.77
RMA	263.55	201.44	62.11
RLB	244.52	186.90	57.62
RLA	207.46	158.57	48.89
SE3	281.59	215.23	66.36
SE2	244.52	186.90	57.62
SE1	218.22	166.80	51.42
SSC	213.43	163.14	50.29
SSB	203.87	155.83	48.04
SSA	199.09	152.17	46.92
CC2	212.24	162.23	50.01
CC1	196.69	150.34	46.35
CB2	187.13	143.03	44.10
CB1	178.76	136.64	42.12
CA2	177.56	135.72	41.84
CA1	168.00	128.41	39.59
IB2	160.82	122.92	37.90
IB1	158.43	121.10	37.33
IA2	146.47	111.95	34.52
IA1	141.69	108.30	33.39
BB2	159.63	122.01	37.62
BB1	156.04	119.27	36.77

TABLE 6.—CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG III category	Total rate	Labor portion	Non-labor portion
BA2	145.28	111.04	34.24
BA1	135.71	103.73	31.98
PE2	172.78	132.06	40.72
PE1	170.39	130.24	40.15
PD2	164.41	125.67	38.74
PD1	162.02	123.84	38.18
PC2	156.04	119.27	36.77
PC1	154.84	118.35	36.49
PB2	139.30	106.47	32.83
PB1	138.11	105.56	32.55
PA2	136.91	104.65	32.26
PA1	133.32	101.90	31.42

Section 1888(e)(4)(G)(ii) of the Act also requires that we apply this wage index in a manner that does not result in aggregate payments that are greater or lesser than would otherwise be made in the absence of the wage adjustment. In this sixth PPS year (Federal rates effective October 1, 2003), we are reapplying, or applying, the wage index applicable to SNF payments using the hospital wage data applicable to FY 2003 payments (as discussed earlier in this section) and applying an adjustment to fulfill the budget neutrality requirement. This requirement will be met by multiplying each of the components of the unadjusted Federal rates by a factor equal to the ratio of the volume weighted mean wage adjustment factor (using the wage index from the previous year) to the volume weighted mean wage adjustment factor, using the wage index for the FY beginning October 1, 2003. The same volume weights are used in both the numerator and denominator and will be derived from 1997 Medicare Provider Analysis and Review File (MEDPAR) data. The wage adjustment factor used in this calculation is defined as the labor share of the rate component multiplied by the wage index plus the non-labor share. Because the wage index applicable to FY 2004 is the same as that for FY 2003 and new data on the distribution of days by MSA is not yet available, the proposed budget neutrality factor for this year is 1.000. However, this may change in the final rule. In order to give the public a sense of the magnitude of this adjustment, last year's factor was 0.9997.

Finally, since we propose to use the FY 2003 wage index, we are republishing it in this proposed rule. The wage index applicable to FY 2004 can be found in Table 7 and Table 8 of this proposed rule. The tables reflect the mid-year corrections made to the hospital wage data since the publication of the SNF update notice for FY 2003 payments (please see our correction notice that was published in the **Federal Register** on December 27, 2002 (67 FR 79123)).

TABLE 7.—WAGE INDEX FOR URBAN AREAS

Urban area (constituent counties or county equivalents)	Wage index
0040 Abilene, TX	0.7792
Taylor, TX	
0060 Aguadilla, PR	0.4587
Aguada, PR	
Aguadilla, PR	
Moca, PR	
0080 Akron, OH	0.9600
Portage, OH	
Summit, OH	
0120 Albany, GA	1.0594
Dougherty, GA	
Lee, GA	
0160 Albany-Schenectady-Troy, NY	0.8384
Albany, NY	
Montgomery, NY	
Rensselaer, NY	
Saratoga, NY	
Schenectady, NY	
Schoharie, NY	
0200 Albuquerque, NM	0.9315
Bernalillo, NM	
Sandoval, NM	
Valencia, NM	
0220 Alexandria, LA	0.7859
Rapides, LA	
0240 Allentown-Bethlehem-Easton, PA	0.9735
Carbon, PA	
Lehigh, PA	
Northampton, PA	
0280 Altoona, PA	0.9225
Blair, PA	
0320 Amarillo, TX	0.9034
Potter, TX	
Randall, TX	
0380 Anchorage, AK	1.2358
Anchorage, AK	
0440 Ann Arbor, MI	1.1103
Lenawee, MI	
Livingston, MI	
Washtenaw, MI	
0450 Anniston, AL	0.8044
Calhoun, AL	
0460 Appleton-Oshkosh-Neenah, WI	0.8997
Calumet, WI	
Outagamie, WI	
Winnebago, WI	
0470 Arecibo, PR	0.4337
Arecibo, PR	
Camuy, PR	
Hatillo, PR	
0480 Asheville, NC	0.9876
Buncombe, NC	
Madison, NC	
0500 Athens, GA	1.0211
Clarke, GA	
Madison, GA	
Oconee, GA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
0520 Atlanta, GA	0.9991
Barrow, GA	
Bartow, GA	
Carroll, GA	
Cherokee, GA	
Clayton, GA	
Cobb, GA	
Coweta, GA	
De Kalb, GA	
Douglas, GA	
Fayette, GA	
Forsyth, GA	
Fulton, GA	
Gwinnett, GA	
Henry, GA	
Newton, GA	
Paulding, GA	
Pickens, GA	
Rockdale, GA	
Spalding, GA	
Walton, GA	
0560 Atlantic City-Cape May, NJ	1.1017
Atlantic City, NJ	
Cape May, NJ	
0580 Auburn-Opelika, AL	0.8325
Lee, AL	
0600 Augusta-Aiken, GA–SC	1.0264
Columbia, GA	
McDuffie, GA	
Richmond, GA	
Aiken, SC	
Edgefield, SC	
0640 Austin-San Marcos, TX	0.9637
Bastrop, TX	
Caldwell, TX	
Hays, TX	
Travis, TX	
Williamson, TX	
0680 Bakersfield, CA	0.9877
Kern, CA	
0720 Baltimore, MD	0.9929
Anne Arundel, MD	
Baltimore, MD	
Baltimore City, MD	
Carroll, MD	
Harford, MD	
Howard, MD	
Queen Annes, MD	
0733 Bangor, ME	0.9664
Penobscot, ME	
0743 Barnstable-Yarmouth, MA	1.3202
Barnstable, MA	
0760 Baton Rouge, LA	0.8294
Ascension, LA	
East Baton Rouge, LA	
Livingston, LA	
West Baton Rouge, LA	
0840 Beaumont-Port Arthur, TX	0.8324
Hardin, TX	
Jefferson, TX	
Orange, TX	
0860 Bellingham, WA	1.2282
Whatcom, WA	
0870 Benton Harbor, MI	0.8965
Berrien, MI	
0875 Bergen-Passaic, NJ	1.2150
Bergen, NJ	
Passaic, NJ	
0880 Billings, MT	0.9022
Yellowstone, MT	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
0920 Biloxi-Gulfport-Pascagoula, MS	0.8757
Hancock, MS	
Harrison, MS	
Jackson, MS	
0960 Binghamton, NY	0.8341
Broome, NY	
Tioga, NY	
1000 Birmingham, AL	0.9222
Blount, AL	
Jefferson, AL	
St. Clair, AL	
Shelby, AL	
1010 Bismarck, ND	0.7972
Burleigh, ND	
Morton, ND	
1020 Bloomington, IN	0.8907
Monroe, IN	
1040 Bloomington-Normal, IL	0.9109
McLean, IL	
1080 Boise City, ID	0.9310
Ada, ID	
Canyon, ID	
1123 Boston-Worcester-Lawrence-Lowell-Brockton, MA–NH	1.1229
Bristol, MA	
Essex, MA	
Middlesex, MA	
Norfolk, MA	
Plymouth, MA	
Suffolk, MA	
Worcester, MA	
Hillsborough, NH	
Merrimack, NH	
Rockingham, NH	
Strafford, NH	
1125 Boulder-Longmont, CO	0.9689
Boulder, CO	
1145 Brazoria, TX	0.8535
Brazoria, TX	
1150 Bremerton, WA	1.0944
Kitsap, WA	
1240 Brownsville-Harlingen-San Benito, TX	0.8880
Cameron, TX	
1260 Bryan-College Station, TX	0.8821
Brazos, TX	
1280 Buffalo-Niagara Falls, NY	0.9365
Erie, NY	
Niagara, NY	
1303 Burlington, VT	1.0052
Chittenden, VT	
Franklin, VT	
Grand Isle, VT	
1310 Caguas, PR	0.4371
Caguas, PR	
Cayey, PR	
Cidra, PR	
Gurabo, PR	
San Lorenzo, PR	
1320 Canton-Massillon, OH	0.8932
Carroll, OH	
Stark, OH	
1350 Casper, WY	0.9690
Natrona, WY	
1360 Cedar Rapids, IA	0.9056
Linn, IA	
1400 Champaign-Urbana, IL	1.0635
Champaign, IL	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
1440 Charleston-North Charleston, SC	0.9235
Berkeley, SC	
Charleston, SC	
Dorchester, SC	
1480 Charleston, WV	0.8898
Kanawha, WV	
Putnam, WV	
1520 Charlotte-Gastonia-Rock Hill, NC–SC	0.9875
Cabarrus, NC	
Gaston, NC	
Lincoln, NC	
Mecklenburg, NC	
Rowan, NC	
Stanly, NC	
Union, NC	
York, SC	
1540 Charlottesville, VA	1.0438
Albemarle, VA	
Charlottesville City, VA	
Fluvanna, VA	
Greene, VA	
1560 Chattanooga, TN–GA	0.8976
Catoosa, GA	
Dade, GA	
Walker, GA	
Hamilton, TN	
Marion, TN	
1580 Cheyenne, WY	0.8628
Laramie, WY	
1600 Chicago, IL	1.1044
Cook, IL	
De Kalb, IL	
Du Page, IL	
Grundy, IL	
Kane, IL	
Kendall, IL	
Lake, IL	
McHenry, IL	
Will, IL	
1620 Chico-Paradise, CA	0.9745
Butte, CA	
1640 Cincinnati, OH–KY–IN	0.9381
Dearborn, IN	
Ohio, IN	
Boone, KY	
Campbell, KY	
Gallatin, KY	
Grant, KY	
Kenton, KY	
Pendleton, KY	
Brown, OH	
Clermont, OH	
Hamilton, OH	
Warren, OH	
1660 Clarksville-Hopkinsville, TN–KY	0.8406
Christian, KY	
Montgomery, TN	
1680 Cleveland-Lorain-Elyria, OH	0.9670
Ashtabula, OH	
Geauga, OH	
Cuyahoga, OH	
Lake, OH	
Lorain, OH	
Medina, OH	
1720 Colorado Springs, CO	0.9916
El Paso, CO	
1740 Columbia, MO	0.8496

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
Boone, MO	
1760 Columbia, SC	0.9307
Lexington, SC	
Richland, SC	
1800 Columbus, GA–AL	0.8374
Russell, AL	
Chattanoochee, GA	
Harris, GA	
Muscogee, GA	
1840 Columbus, OH	0.9751
Delaware, OH	
Fairfield, OH	
Franklin, OH	
Licking, OH	
Madison, OH	
Pickaway, OH	
1880 Corpus Christi, TX	0.8729
Nueces, TX	
San Patricio, TX	
1890 Corvallis, OR	1.1453
Benton, OR	
1900 Cumberland, MD–WV	0.7847
Allegany, MD	
Mineral, WV	
1920 Dallas, TX	0.9998
Collin, TX	
Dallas, TX	
Denton, TX	
Ellis, TX	
Henderson, TX	
Hunt, TX	
Kaufman, TX	
Rockwall, TX	
1950 Danville, VA	0.8859
Danville City, VA	
Pittsylvania, VA	
1960 Davenport-Moline-Rock Island, IA–IL	0.8835
Scott, IA	
Henry, IL	
Rock Island, IL	
2000 Dayton-Springfield, OH	0.9282
Clark, OH	
Greene, OH	
Miami, OH	
Montgomery, OH	
2020 Daytona Beach, FL	0.9071
Flagler, FL	
Volusia, FL	
2030 Decatur, AL	0.8973
Lawrence, AL	
Morgan, AL	
2040 Decatur, IL	0.8055
Macon, IL	
2080 Denver, CO	1.0601
Adams, CO	
Arapahoe, CO	
Broomfield, CO	
Denver, CO	
Douglas, CO	
Jefferson, CO	
2120 Des Moines, IA	0.8791
Dallas, IA	
Polk, IA	
Warren, IA	
2160 Detroit, MI	1.0448
Lapeer, MI	
Macomb, MI	
Monroe, MI	
Oakland, MI	
St Clair, MI	
Wayne, MI	
2180 Dothan, AL	0.8137
Dale, AL	
Houston, AL	
2190 Dover, DE	0.9356
Kent, DE	
2200 Dubuque, IA	0.8795
Dubuque, IA	
2240 Duluth-Superior, MN–WI	1.0368
St Louis, MN	
Douglas, WI	
2281 Dutchess County, NY	1.0684
Dutchess, NY	
2290 Eau Claire, WI	0.8952
Chippewa, WI	
Eau Claire, WI	
2320 El Paso, TX	0.9265
El Paso, TX	
2330 Elkhart-Goshen, IN	0.9722
Elkhart, IN	
2335 Elmira, NY	0.8416
Chemung, NY	
2340 Enid, OK	0.8376
Garfield, OK	
2360 Erie, PA	0.8925
Erie, PA	
2400 Eugene-Springfield, OR	1.0944
Lane, OR	
2440 Evansville-Henderson, IN–KY	0.8177
Posey, IN	
Vanderburgh, IN	
Warrick, IN	
Henderson, KY	
2520 Fargo-Moorhead, ND–MN	0.9684
Clay, MN	
Cass, ND	
2560 Fayetteville, NC	0.8889
Cumberland, NC	
2580 Fayetteville-Springdale-Rogers, AR	0.8100
Benton, AR	
Washington, AR	
2620 Flagstaff, AZ–UT	1.0682
Coconino, AZ	
Kane, UT	
2640 Flint, MI	1.1135
Genesee, MI	
2650 Florence, AL	0.7792
Colbert, AL	
Lauderdale, AL	
2655 Florence, SC	0.8780
Florence, SC	
2670 Fort Collins-Loveland, CO	1.0066
Larimer, CO	
2680 Ft Lauderdale, FL	1.0297
Broward, FL	
2700 Fort Myers-Cape Coral, FL	0.9680
Lee, FL	
2710 Fort Pierce-Port St Lucie, FL	0.9823
Martin, FL	
St Lucie, FL	
2720 Fort Smith, AR–OK	0.7895
Crawford, AR	
Sebastian, AR	
Sequoyah, OK	
2750 Fort Walton Beach, FL	0.9693
Okaloosa, FL	
2760 Fort Wayne, IN	0.9457
Adams, IN	
Allen, IN	
De Kalb, IN	
Huntington, IN	
Wells, IN	
Whitley, IN	
2800 Fort Worth-Arlington, TX	0.9446
Hood, TX	
Johnson, TX	
Parker, TX	
Tarrant, TX	
2840 Fresno, CA	1.0169
Fresno, CA	
Madera, CA	
2880 Gadsden, AL	0.8505
Etowah, AL	
2900 Gainesville, FL	0.9871
Alachua, FL	
2920 Galveston-Texas City, TX	0.9465
Galveston, TX	
2960 Gary, IN	0.9584
Lake, IN	
Porter, IN	
2975 Glens Falls, NY	0.8281
Warren, NY	
Washington, NY	
2980 Goldsboro, NC	0.8892
Wayne, NC	
2985 Grand Forks, ND–MN	0.8897
Polk, MN	
Grand Forks, ND	
2995 Grand Junction, CO	0.9456
Mesa, CO.	
3000 Grand Rapids-Muskegon-Holland, MI	0.9525
Allegan, MI	
Kent, MI	
Muskegon, MI	
Ottawa, MI	
3040 Great Falls, MT	0.8950
Cascade, MT	
3060 Greeley, CO	0.9237
Weld, CO	
3080 Green Bay, WI	0.9502
Brown, WI	
3120 Greensboro-Winston-Salem-High Point, NC	0.9282
Alamance, NC	
Davidson, NC	
Davie, NC	
Forsyth, NC	
Guilford, NC	
Randolph, NC	
Stokes, NC	
Yadkin, NC	
3150 Greenville, NC	0.9100
Pitt, NC	
3160 Greenville-Spartanburg-Anderson, SC	0.9122
Anderson, SC	
Cherokee, SC	
Greenville, SC	
Pickens, SC	
Spartanburg, SC	
3180 Hagerstown, MD	0.9268
Washington, MD	
3200 Hamilton-Middletown, OH	0.9418
Butler, OH	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
3240 Harrisburg-Lebanon-Carlisle, PA	0.9223
Cumberland, PA	
Dauphin, PA	
Lebanon, PA	
Perry, PA	
3283 Hartford, CT	1.1549
Hartford, CT	
Litchfield, CT	
Middlesex, CT	
Tolland, CT	
3285 Hattiesburg, MS	0.7659
Forrest, MS	
Lamar, MS	
3290 Hickory-Morganton-Lenoir, NC	0.9028
Alexander, NC	
Burke, NC	
Caldwell, NC	
Catawba, NC	
3320 Honolulu, HI	1.1457
Honolulu, HI	
3350 Houma, LA	0.8317
Lafourche, LA	
Terrebonne, LA	
3360 Houston, TX	0.9892
Chambers, TX	
Fort Bend, TX	
Harris, TX	
Liberty, TX	
Montgomery, TX	
Waller, TX	
3400 Huntington-Ashland, WV–KY–OH	0.9636
Boyd, KY	
Carter, KY	
Greenup, KY	
Lawrence, OH	
Cabell, WV	
Wayne, WV	
3440 Huntsville, AL	0.8903
Limestone, AL	
Madison, AL	
3480 Indianapolis, IN	0.9717
Boone, IN	
Hamilton, IN	
Hancock, IN	
Hendricks, IN	
Johnson, IN	
Madison, IN	
Marion, IN	
Morgan, IN	
Shelby, IN	
3500 Iowa City, IA	0.9587
Johnson, IA	
3520 Jackson, MI	0.9532
Jackson, MI	
3560 Jackson, MS	0.8607
Hinds, MS	
Madison, MS	
Rankin, MS	
3580 Jackson, TN	0.9275
Chester, TN	
Madison, TN	
3600 Jacksonville, FL	0.9381
Clay, FL	
Duval, FL	
Nassau, FL	
St. Johns, FL	
3605 Jacksonville, NC	0.8239
Onslow, NC	
3610 Jamestown, NY	0.7976
Chautaqua, NY	
3620 Janesville-Beloit, WI	0.9849
Rock, WI	
3640 Jersey City, NJ	1.1190
Hudson, NJ	
3660 Johnson City-Kingsport-Bristol, TN–VA	0.8268
Carter, TN	
Hawkins, TN	
Sullivan, TN	
Unicoi, TN	
Washington, TN	
Bristol City, VA	
Scott, VA	
Washington, VA	
3680 Johnstown, PA	0.8329
Cambria, PA	
Somerset, PA	
3700 Jonesboro, AR	0.7749
Craighead, AR	
3710 Joplin, MO	0.8613
Jasper, MO	
Newton, MO	
3720 Kalamazoo-Battle Creek, MI	1.0595
Calhoun, MI	
Kalamazoo, MI	
Van Buren, MI	
3740 Kankakee, IL	1.0790
Kankakee, IL	
3760 Kansas City, KS–MO	0.9736
Johnson, KS	
Leavenworth, KS	
Miami, KS	
Wyandotte, KS	
Cass, MO	
Clay, MO	
Clinton, MO	
Jackson, MO	
Lafayette, MO	
Platte, MO	
Ray, MO	
3800 Kenosha, WI	0.9686
Kenosha, WI	
3810 Killeen-Temple, TX	1.0399
Bell, TX	
Coryell, TX	
3840 Knoxville, TN	0.8970
Anderson, TN	
Blount, TN	
Knox, TN	
Loudon, TN	
Sevier, TN	
Union, TN	
3850 Kokomo, IN	0.8971
Howard, IN	
Tipton, IN	
3870 La Crosse, WI–MN	0.9400
Houston, MN	
La Crosse, WI	
3880 Lafayette, LA	0.8452
Acadia, LA	
Lafayette, LA	
St. Landry, LA	
St. Martin, LA	
3920 Lafayette, IN	0.9278
Clinton, IN	
Tippecanoe, IN	
3960 Lake Charles, LA	0.7965
Calcasieu, LA	
3980 Lakeland-Winter Haven, FL	0.9357
Polk, FL	
4000 Lancaster, PA	0.9078
Lancaster, PA	
4040 Lansing-East Lansing, MI	0.9726
Clinton, MI	
Eaton, MI	
Ingham, MI	
4080 Laredo, TX	0.8472
Webb, TX	
4100 Las Cruces, NM	0.8745
Dona Ana, NM	
4120 Las Vegas, NV–AZ	1.1521
Mohave, AZ	
Clark, NV	
Nye, NV	
4150 Lawrence, KS	0.8323
Douglas, KS	
4200 Lawton, OK	0.8315
Comanche, OK	
4243 Lewiston-Auburn, ME	0.9179
Androscoggin, ME	
4280 Lexington, KY	0.8581
Bourbon, KY	
Clark, KY	
Fayette, KY	
Jessamine, KY	
Madison, KY	
Scott, KY	
Woodford, KY	
4320 Lima, OH	0.9483
Allen, OH	
Auglaize, OH	
4360 Lincoln, NE	0.9892
Lancaster, NE	
4400 Little Rock-North Little Rock, AR	0.9097
Faulkner, AR	
Lonoke, AR	
Pulaski, AR	
Saline, AR	
4420 Longview-Marshall, TX	0.8629
Gregg, TX	
Harrison, TX	
Upshur, TX	
4480 Los Angeles-Long Beach, CA	1.2001
Los Angeles, CA	
4520 Louisville, KY–IN	0.9276
Clark, IN	
Floyd, IN	
Harrison, IN	
Scott, IN	
Bullitt, KY	
Jefferson, KY	
Oldham, KY	
4600 Lubbock, TX	0.9646
Lubbock, TX	
4640 Lynchburg, VA	0.9219
Amherst, VA	
Bedford City, VA	
Bedford, VA	
Campbell, VA	
Lynchburg City, VA	
4680 Macon, GA	0.9204
Bibb, GA	
Houston, GA	
Jones, GA	
Peach, GA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
Twiggs, GA	
4720 Madison, WI	1.0467
Dane, WI	
4800 Mansfield, OH	0.8900
Crawford, OH	
Richland, OH	
4840 Mayaguez, PR	0.4914
Anasco, PR	
Cabo Rojo, PR	
Hormigueros, PR	
Mayaguez, PR	
Sabana Grande, PR	
San German, PR	
4880 McAllen-Edinburg-Mission, TX	0.8428
Hidalgo, TX	
4890 Medford-Ashland, OR	1.0498
Jackson, OR	
4900 Melbourne-Titusville-Palm Bay, FL	1.0253
Brevard, Fl	
4920 Memphis, TN–AR–MS	0.8920
Crittenden, AR	
De Soto, MS	
Fayette, TN	
Shelby, TN	
Tipton, TN	
4940 Merced, CA	0.9742
Merced, CA	
5000 Miami, FL	0.9802
Dade, FL	
5015 Middlesex-Somerset-Hunterdon, NJ	1.1213
Hunterdon, NJ	
Middlesex, NJ	
Somerset, NJ	
5080 Milwaukee-Waukesha, WI	0.9893
Milwaukee, WI	
Ozaukee, WI	
Washington, WI	
Waukesha, WI	
5120 Minneapolis-St. Paul, MN–WI	1.0903
Anoka, MN	
Carver, MN	
Chisago, MN	
Dakota, MN	
Hennepin, MN	
Isanti, MN	
Ramsey, MN	
Scott, MN	
Sherburne, MN	
Washington, MN	
Wright, MN	
Pierce, WI	
St. Croix, WI	
5140 Missoula, MT	0.9157
Missoula, MT	
5160 Mobile, AL	0.8108
Baldwin, AL	
Mobile, AL	
5170 Modesto, CA	1.0498
Stanislaus, CA	
5190 Monmouth-Ocean, NJ	1.0674
Monmouth, NJ	
Ocean, NJ	
5200 Monroe, LA	0.8137
Ouachita, LA	
5240 Montgomery, AL	0.7734
Autauga, AL	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
Elmore, AL	
Montgomery, AL	
5280 Muncie, IN	0.9284
Delaware, IN	
5330 Myrtle Beach, SC	0.8976
Horry, SC	
5345 Naples, FL	0.9754
Collier, FL	
5360 Nashville, TN	0.9578
Cheatham, TN	
Davidson, TN	
Dickson, TN	
Robertson, TN	
Rutherford, TN	
Sumner, TN	
Williamson, TN	
Wilson, TN	
5380 Nassau-Suffolk, NY	1.3357
Nassau, NY	
Suffolk, NY	
5483 New Haven-Bridgeport-Stamford-Waterbury-Danbury, CT	1.2408
Fairfield, CT	
New Haven, CT	
5523 New London-Norwich, CT	1.1767
New London, CT	
5560 New Orleans, LA	0.9046
Jefferson, LA	
Orleans, LA	
Plaquemines, LA	
St. Bernard, LA	
St. Charles, LA	
St. James, LA	
St. John The Baptist, LA	
St. Tammany, LA	
5600 New York, NY	1.4414
Bronx, NY	
Kings, NY	
New York, NY	
Putnam, NY	
Queens, NY	
Richmond, NY	
Rockland, NY	
Westchester, NY	
5640 Newark, NJ	1.1381
Essex, NJ	
Morris, NJ	
Sussex, NJ	
Union, NJ	
Warren, NJ	
5660 Newburgh, NY–PA	1.1387
Orange, NY	
Pike, PA	
5720 Norfolk-Virginia Beach-Newport News, VA–NC	0.8574
Currituck, NC	
Chesapeake City, VA	
Gloucester, VA	
Hampton City, VA	
Isle of Wight, VA	
James City, VA	
Mathews, VA	
Newport News City, VA	
Norfolk City, VA	
Poquoson City, VA	
Portsmouth City, VA	
Suffolk City, VA	
Virginia Beach City, VA	
Williamsburg City, VA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
York, VA	
5775 Oakland, CA	1.5072
Alameda, CA	
Contra Costa, CA	
5790 Ocala, FL	0.9402
Marion, FL	
5800 Odessa-Midland, TX	0.9397
Ector, TX	
Midland, TX	
5880 Oklahoma City, OK	0.8900
Canadian, OK	
Cleveland, OK	
Logan, OK	
McClain, OK	
Oklahoma, OK	
Pottawatomie, OK	
5910 Olympia, WA	1.0960
Thurston, WA	
5920 Omaha, NE–IA	0.9978
Pottawattamie, IA	
Cass, NE	
Douglas, NE	
Sarpy, NE	
Washington, NE	
5945 Orange County, CA	1.1474
Orange, CA	
5960 Orlando, FL	0.9640
Lake, FL	
Orange, FL	
Osceola, FL	
Seminole, FL	
5990 Owensboro, KY	0.8344
Daviess, KY	
6015 Panama City, FL	0.8865
Bay, FL	
6020 Parkersburg-Marietta, WV–OH	0.8127
Washington, OH	
Wood, WV	
6080 Pensacola, FL	0.8610
Escambia, FL	
Santa Rosa, FL	
6120 Peoria-Pekin, IL	0.8739
Peoria, IL	
Tazewell, IL	
Woodford, IL	
6160 Philadelphia, PA–NJ	1.0713
Burlington, NJ	
Camden, NJ	
Gloucester, NJ	
Salem, NJ	
Bucks, PA	
Chester, PA	
Delaware, PA	
Montgomery, PA	
Philadelphia, PA	
6200 Phoenix-Mesa, AZ	0.9820
Maricopa, AZ	
Pinal, AZ	
6240 Pine Bluff, AR	0.7962
Jefferson, AR	
6280 Pittsburgh, PA	0.9365
Allegheny, PA	
Beaver, PA	
Butler, PA	
Fayette, PA	
Washington, PA	
Westmoreland, PA	
6323 Pittsfield, MA	1.0235
Berkshire, MA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
6340 Pocatello, ID	0.9372
Bannock, ID	
6360 Ponce, PR	0.5169
Guayanilla, PR	
Juana Diaz, PR	
Penuelas, PR	
Ponce, PR	
Villalba, PR	
Yauco, PR	
6403 Portland, ME	0.9794
Cumberland, ME	
Sagadahoc, ME	
York, ME	
6440 Portland-Vancouver, OR–WA	1.0667
Clackamas, OR	
Columbia, OR	
Multnomah, OR	
Washington, OR	
Yamhill, OR	
Clark, WA	
6483 Providence-Warwick-Pawtucket, RI	1.0854
Bristol, RI	
Kent, RI	
Newport, RI	
Providence, RI	
Washington, RI	
6520 Provo-Orem, UT	0.9984
Utah, UT	
6560 Pueblo, CO	0.8820
Pueblo, CO	
6580 Punta Gorda, FL	0.9218
Charlotte, FL	
6600 Racine, WI	0.9334
Racine, WI	
6640 Raleigh-Durham-Chapel Hill, NC	0.9990
Chatham, NC	
Durham, NC	
Franklin, NC	
Johnston, NC	
Orange, NC	
Wake, NC	
6660 Rapid City, SD	0.8846
Pennington, SD	
6680 Reading, PA	0.9295
Berks, PA	
6690 Redding, CA	1.1135
Shasta, CA	
6720 Reno, NV	1.0648
Washoe, NV	
6740 Richland-Kennewick-Pasco, WA	1.1491
Benton, WA	
Franklin, WA	
6760 Richmond-Petersburg, VA	0.9477
Charles City County, VA	
Chesterfield, VA	
Colonial Heights City, VA	
Dinwiddie, VA	
Goochland, VA	
Hanover, VA	
Henrico, VA	
Hopewell City, VA	
New Kent, VA	
Petersburg City, VA	
Powhatan, VA	
Prince George, VA	
Richmond City, VA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
6780 Riverside-San Bernardino, CA	1.1365
Riverside, CA	
San Bernardino, CA	
6800 Roanoke, VA	0.8614
Botetourt, VA	
Roanoke, VA	
Roanoke City, VA	
Salem City, VA	
6820 Rochester, MN	1.2139
Olmsted, MN	
6840 Rochester, NY	0.9194
Genesee, NY	
Livingston, NY	
Monroe, NY	
Ontario, NY	
Orleans, NY	
Wayne, NY	
6880 Rockford, IL	0.9625
Boone, IL	
Ogle, IL	
Winnebago, IL	
6895 Rocky Mount, NC	0.9228
Edgecombe, NC	
Nash, NC	
6920 Sacramento, CA	1.1500
El Dorado, CA	
Placer, CA	
Sacramento, CA	
A6960 Saginaw-Bay City-Midland, MI	0.9650
Bay, MI	
Midland, MI	
Saginaw, MI	
6980 St Cloud, MN	0.9700
Benton, MN	
Stearns, MN	
7000 St Joseph, MO	0.9544
Andrews, MO	
Buchanan, MO	
7040 St Louis, MO–IL	0.8855
Clinton, IL	
Jersey, IL	
Madison, IL	
Monroe, IL	
St. Clair, IL	
Franklin, MO	
Jefferson, MO	
Lincoln, MO	
St. Charles, MO	
St. Louis, MO	
St. Louis City, MO	
Warren, MO	
Sullivan City, MO	
7080 Salem, OR	1.0500
Marion, OR	
Polk, OR	
7120 Salinas, CA	1.4623
Monterey, CA	
7160 Salt Lake City-Ogden, UT	0.9945
Davis, UT	
Salt Lake, UT	
Weber, UT	
7200 San Angelo, TX	0.8374
Tom Green, TX	
7240 San Antonio, TX	0.8753
Bexar, TX	
Comal, TX	
Guadalupe, TX	
Wilson, TX	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
7320 San Diego, CA	1.1131
San Diego, CA	
7360 San Francisco, CA	1.4142
Marin, CA	
San Francisco, CA	
San Mateo, CA	
7400 San Jose, CA	1.4145
Santa Clara, CA	
7440 San Juan-Bayamon, PR	0.4741
Aguas Buenas, PR	
Barceloneta, PR	
Bayamon, PR	
Canovanas, PR	
Carolina, PR	
Catano, PR	
Ceiba, PR	
Comerio, PR	
Corozal, PR	
Dorado, PR	
Fajardo, PR	
Florida, PR	
Guaynabo, PR	
Humacao, PR	
Juncos, PR	
Los Piedras, PR	
Loiza, PR	
Luguillo, PR	
Manati, PR	
Morovis, PR	
Naguabo, PR	
Naranjito, PR	
Rio Grande, PR	
San Juan, PR	
Toa Alta, PR	
Toa Baja, PR	
Trujillo Alto, PR	
Vega Alta, PR	
Vega Baja, PR	
Yabucoa, PR	
7460 San Luis Obispo-Atascadero-Paso Robles, CA	1.1271
San Luis Obispo, CA	
7480 Santa Barbara-Santa Maria-Lompoc, CA	1.0481
Santa Barbara, CA	
7485 Santa Cruz-Watsonville, CA	1.3646
Santa Cruz, CA	
7490 Santa Fe, NM	1.0712
Los Alamos, NM	
Santa Fe, NM	
7500 Santa Rosa, CA	1.3046
Sonoma, CA	
7510 Sarasota-Bradenton, FL	0.9425
Manatee, FL	
Sarasota, FL	
7520 Savannah, GA	0.9376
Bryan, GA	
Chatham, GA	
Effingham, GA	
7560 Scranton-Wilkes-Barre-Hazleton, PA	0.8599
Columbia, PA	
Lackawanna, PA	
Luzerne, PA	
Wyoming, PA	
7600 Seattle-Bellevue-Everett, WA	1.1474
Island, WA	
King, WA	
Snohomish, WA	

TABLE 7.—WAGE INDEX FOR URBAN AREAS—Continued

Urban area (constituent counties or county equivalents)	Wage index
7610 Sharon, PA	0.7869
Mercer, PA	
7620 Sheboygan, WI	0.8697
Sheboygan, WI	
7640 Sherman-Denison, TX	0.9255
Grayson, TX	
7680 Shreveport-Bossier City, LA	0.8987
Bossier, LA	
Caddo, LA	
Webster, LA	
7720 Sioux City, IA–NE	0.9046
Woodbury, IA	
Dakota, NE	
7760 Sioux Falls, SD	0.9257
Lincoln, SD	
Minnehaha, SD	
7800 South Bend, IN	0.9802
St. Joseph, IN	
7840 Spokane, WA	1.0852
Spokane, WA	
7880 Springfield, IL	0.8659
Menard, IL	
Sangamon, IL	
7920 Springfield, MO	0.8424
Christian, MO	
Greene, MO	
Webster, MO	
8003 Springfield, MA	1.0927
Hampden, MA	
Hampshire, MA	
8050 State College, PA	0.8941
Centre, PA	
8080 Steubenville-Weirton, OH–WV	0.8804
Jefferson, OH	
Brooke, WV	
Hancock, WV	
8120 Stockton-Lodi, CA	1.0506
San Joaquin, CA	
8140 Sumter, SC	0.8273
Sumter, SC	
8160 Syracuse, NY	0.9714
Cayuga, NY	
Madison, NY	
Onondaga, NY	
Oswego, NY	
8200 Tacoma, WA	1.0940
Pierce, WA	
8240 Tallahassee, FL	0.8504
Gadsden, FL	
Leon, FL	
8280 Tampa-St Petersburg-Clearwater, FL	0.9065
Hernando, FL	
Hillsborough, FL	
Pasco, FL	
Pinellas, FL	
8320 Terre Haute, IN	0.8599
Clay, IN	
Vermillion, IN	
Vigo, IN	
8360 Texarkana, AR-Texarkana, TX	0.8088
Miller, AR	
Bowie, TX	
8400 Toledo, OH	0.9810
Fulton, OH	
Lucas, OH	
Wood, OH	
8440 Topeka, KS	0.9199
Shawnee, KS	
8480 Trenton, NJ	1.0432
Mercer, NJ	
8520 Tucson, AZ	0.8911
Pima, AZ	
8560 Tulsa, OK	0.8332
Creek, OK	
Osage, OK	
Rogers, OK	
Tulsa, OK	
Wagoner, OK	
8600 Tuscaloosa, AL	0.8130
Tuscaloosa, AL	
8640 Tyler, TX	0.9521
Smith, TX	
8680 Utica-Rome, NY	0.8465
Herkimer, NY	
Oneida, NY	
8720 Vallejo-Fairfield-Napa, CA	1.3354
Napa, CA	
Solano, CA	
8735 Ventura, CA	1.1096
Ventura, CA	
8750 Victoria, TX	0.8756
Victoria, TX	
8760 Vineland-Millville-Bridgeton, NJ	1.0031
Cumberland, NJ	
8780 Visalia-Tulare-Porterville, CA	0.9418
Tulare, CA	
8800 Waco, TX	0.8073
McLennan, TX	
8840 Washington, DC–MD–VA–WV	1.0851
District of Columbia, DC	
Calvert, MD	
Charles, MD	
Frederick, MD	
Montgomery, MD	
Prince Georges, MD	
Alexandria City, VA	
Arlington, VA	
Clarke, VA	
Culpeper, VA	
Fairfax, VA	
Fairfax City, VA	
Falls Church City, VA	
Fauquier, VA	
Fredericksburg City, VA	
King George, VA	
Loudoun, VA	
Manassas City, VA	
Manassas Park City, VA	
Prince William, VA	
Spotsylvania, VA	
Stafford, VA	
Warren, VA	
Berkeley, WV	
Jefferson, WV	
8920 Waterloo-Cedar Falls, IA	0.8069
Black Hawk, IA	
8940 Wausau, WI	0.9782
Marathon, WI	
8960 West Palm Beach-Boca Raton, FL	0.9939
Palm Beach, FL	
9000 Wheeling, OH–WV	0.7670
Belmont, OH	
Marshall, WV	
Ohio, WV	
9040 Wichita, KS	0.9520
Butler, KS	
Harvey, KS	
Sedgwick, KS	
9080 Wichita Falls, TX	0.8498
Archer, TX	
Wichita, TX	
9140 Williamsport, PA	0.8544
Lycoming, PA	
9160 Wilmington-Newark, DE–MD	1.1173
New Castle, DE	
Cecil, MD	
9200 Wilmington, NC	0.9640
New Hanover, NC	
Brunswick, NC	
9260 Yakima, WA	1.0569
Yakima, WA	
9270 Yolo, CA	0.9434
Yolo, CA	
9280 York, PA	0.9026
York, PA	
9320 Youngstown-Warren, OH	0.9358
Columbiana, OH	
Mahoning, OH	
Trumbull, OH	
9340 Yuba City, CA	1.0276
Sutter, CA	
Yuba, CA	
9360 Yuma, AZ	0.8589
Yuma, AZ	

TABLE 8.—WAGE INDEX FOR RURAL AREAS

Rural area	Wage index
Alabama	0.7660
Alaska	1.2293
Arizona	0.8493
Arkansas	0.7666
California	0.9899
Colorado	0.9015
Connecticut	1.2394
Delaware	0.9128
Florida	0.8827
Georgia	0.8230
Guam	0.9611
Hawaii	1.0255
Idaho	0.8747
Illinois	0.8204
Indiana	0.8755
Iowa	0.8315
Kansas	0.7900
Kentucky	0.8079
Louisiana	0.7580
Maine	0.8874
Maryland	0.8946
Massachusetts	1.1288
Michigan	0.9009
Minnesota	0.9151
Mississippi	0.7680
Missouri	0.7881
Montana	0.8481
Nebraska	0.8204
Nevada	0.9577
New Hampshire	0.9839

TABLE 8.—WAGE INDEX FOR RURAL AREAS—Continued

Rural area	Wage index
New Jersey [1]	.....
New Mexico	0.8872
New York	0.8542
North Carolina	0.8669
North Dakota	0.7788
Ohio	0.8613
Oklahoma	0.7590
Oregon	1.0259
Pennsylvania	0.8462
Puerto Rico	0.4356
Rhode Island [1]	.....
South Carolina	0.8607
South Dakota	0.7815
Tennessee	0.7877
Texas	0.7821
Utah	0.9312
Vermont	0.9345
Virginia	0.8504
Virgin Islands	0.7845
Washington	1.0179
West Virginia	0.7975
Wisconsin	0.9162
Wyoming	0.9007

[1] All counties within the State are classified urban.

D. Updates to the Federal Rates

In accordance with section 1888(e)(4)(E) of the Act, the proposed payment rates listed here reflect an update equal to the full SNF market basket, which equals 2.9 percent. We will continue to publish the rates, wage index, and case-mix classification methodology in the **Federal Register** before August 1 preceding the start of each succeeding fiscal year We discuss the Federal rate update factor in greater detail in section III.B of this preamble.

E. Relationship of RUG–III Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed in § 413.345, we include in each update of the Federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care, as provided in § 40930. This designation reflects an administrative presumption under the current 44-group RUG–III classification system. Our presumption is that any beneficiary who is correctly assigned to one of the upper 26 RUG–III groups in the initial 5-day, Medicare-required assessment is automatically classified as meeting the SNF level of care definition up to the assessment reference date for that assessment.

Any beneficiary assigned to any of the lower 18 groups is not automatically classified as either meeting or not meeting the definition, but instead receives an individual level of care determination using the existing administrative criteria This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 26 groups during the immediate post-hospital period require a covered level of care, which would be significantly less likely for those beneficiaries assigned to one of the lower 18 groups.

In this proposed rule, we are continuing the existing designation of the upper 26 RUG–III groups for purposes of this administrative presumption Accordingly, we are designating the following RUG–III classifications:

- All groups within the Ultra High Rehabilitation category;
- All groups within the Very High Rehabilitation category;
- All groups within the High Rehabilitation category;
- All groups within the Medium Rehabilitation category;
- All groups within the Low Rehabilitation category;
- All groups within the Extensive Services category;
- All groups within the Special Care category; and
- All groups within the Clinically Complex category.

F. Initial Three-Year Transition Period

As noted previously, the rates that we now propose are for the sixth year of the SNF PPS. As a result, the PPS is no longer operating under the initial three-year transition period from facility-specific to Federal rates; therefore, payment now equals 100 percent of the adjusted Federal per diem rate

G. Example of Computation of Adjusted PPS Rates and SNF Payment

Using the model SNF (XYZ) described in Table 9, the following shows the adjustments made to the Federal per diem rate to compute the provider's actual per diem PPS payment. XYZ's 12-month cost reporting period begins October 1, 2004. XYZ's total PPS payment would equal $20,017. The Labor and Non-labor columns are derived from Table 5. In addition, the adjustments for certain specified RUG–III groups enacted in section 101(a) of the BBRA (as amended by section 314 of the BIPA) remain in effect, and are reflected in Table 9.

TABLE 9.—SNF XYZ: LOCATED IN STATE COLLEGE, PA

[Wage Index: 0.8941]

RUG group	Labor	Wage index	Adj. labor	Non-labor	Adj. rate	Percent adjustment	Medicare days	Payment
RVC	$258.51	0.8941	$231.13	$79.70	$310.83	[1] $331.66	14	$4,643
RHA	199.77	0.8941	178.61	61.59	240.20	[1] 256.29	16	4,101
SSC	166.41	0.8941	148.79	51.30	200.09	[2] 240.11	30	7,203
IA2	112.84	0.8941	100.89	34.79	135.68	135.68	30	4,070
Total	.....	.....	.....	.....	.....	.....	90	20,017

[1] Reflects a 6.7 percent adjustment from section 314 of the BIPA.
[2] Reflects a 20 percent adjustment from section 101(a) of the BBRA.

III. The Skilled Nursing Facility Market Basket Index

Section 1888(e)(5)(A) of the Act requires us to establish an SNF market basket index (input price index) that reflects changes over time in the prices of an appropriate mix of goods and services included in the SNF PPS. This proposed rule incorporates the latest available projections of the SNF market basket index. The final rule will incorporate updated projections based on the latest available projections at that time. Accordingly, we have developed an SNF market basket index that encompasses the most commonly used cost categories for SNF routine services, ancillary services, and capital-related expenses. In the July 31, 2001 **Federal Register** (66 FR 39562), we included a complete discussion on the rebasing of the SNF market basket to FY 1997. There are 21 separate cost categories and respective price proxies. These cost

categories were illustrated in Table 10.A, Table 10.B, and Appendix A, along with other relevant information, in the July 31, 2001 **Federal Register**.

Each year, we calculate a revised labor-related share based on the relative importance of labor-related cost categories in the input price index. Table 10 summarizes the updated labor-related share for FY 2004. The forecasted rates of growth used to compute the proposed SNF market basket percentage described in section II.D of this proposed rule are shown in Table 11.

TABLE 10.—FY 2004 LABOR-RELATED SHARE

Cost category	FY 2003 relative importance	FY 2004 relative importance
Wages and Salaries	54.796	55.143
Employee Benefits	11.232	11.269
Nonmedical Professional Fees	2.652	2.661
Labor-intensive Services	4.124	4.137
Capital-related	3.324	3.226
Total	76.128	76.435

TABLE 11.—SNF TOTAL COST MARKET BASKET CHANGE FY 1998 THROUGH FY 2004

Fiscal years beginning October 1	Skilled nursing facility total cost market basket
October 1997, FY 1998	2.8
October 1998, FY 1999	3.0
October 1999, FY 2000	4.0
October 2000, FY 2001	4.9
October 2001, FY 2002	3.4
October 2002, FY 2003	3.1
October 2003, FY 2004	2.9

Source: (Table 10) Global Insights, Inc., DRI–WEFA, 4th Quarter, 2002.
Source: (Table 11) Global Insights Inc., DRI–WEFA, 4th Quarter, 2002.
@USAMACRO/MODTREND@CISSIM/CNTL25R2.SIM
Released by CMS, OACT, National Health Statistics Group.

A. Use of the Skilled Nursing Facility Market Basket Percentage

Section 1888(e)(5)(B) of the Act defines the SNF market basket percentage as the percentage change in the SNF market basket index, as described in the previous section, from the average index level of the prior fiscal year to the average index level of the current fiscal year. For the Federal rates established in this proposed rule, this percentage increase in the SNF market basket index would be used to compute the update factor occurring between FY 2003 and FY 2004. We used the Global Insights, Inc. (formerly DRI–WEFA), 4th quarter 2002 forecasted percentage increase in the FY 1997-based SNF market basket index for routine, ancillary, and capital-related expenses, described in the previous section, to compute the update factor.

B. Federal Rate Update Factor

Section 1888(e)(4)(E)(ii)(IV) of the Act requires that the update factor used to establish the FY 2004 Federal rates be at a level equal to the full market basket percentage change. Accordingly, to establish the update factor, we determined the total growth from the average market basket level for the period of October 1, 2002 through September 30, 2003 to the average market basket level for the period of October 1, 2003 through September 30, 2004. Using this process, the update factor for FY 2004 SNF Federal rates is 2.9 percent.

We used this revised update factor to compute the Federal portion of the SNF PPS rate shown in Tables 1 and 2.

IV. Consolidated Billing

As established by section 4432(b) of the BBA, the consolidated billing requirement places with the SNF the Medicare billing responsibility for virtually all of the services that the SNF's residents receive, except for a small number of services that the statute specifically identifies as being excluded from this provision. Section 103 of the BBRA amended this provision by further excluding a number of high-cost, low probability services (identified by Healthcare Common Procedure Coding System (HCPCS) codes) within several broader categories that otherwise remained subject to the provision. Section 313 of the BIPA further amended this provision by repealing its Part B aspect, that is, its applicability to services furnished to a resident during a SNF stay that Medicare does not cover. (However, physical, occupational, and speech-language therapy remain subject to consolidated billing, regardless of whether the resident who receives these services is in a covered Part A stay.)

To date, the Congress has enacted no further legislation affecting the consolidated billing provision. However, as we noted in the proposed rule of April 10, 2000 (65 FR 19232), section 1888(e)(2)(A)(iii) of the Act, as added by section 103 of the BBRA, not only identified for exclusion from this provision a number of particular service codes within four specified categories (that is, chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices), but " * * * also gives the Secretary the authority to designate additional, individual services for exclusion within each of the specified service categories." In that proposed rule, we also noted that the BBRA Conference report (H.R. Conf. Rep. No. 106–479 at 854) characterizes the individual services that this legislation targets for exclusion as "* * * high-cost, low probability events that could have devastating financial impacts because their costs far exceed the payment [SNFs] receive under the prospective payment system * * *" According to the conferees, section 103(a) "is an attempt to exclude from the PPS certain services and costly items that are provided infrequently in SNFs * * *" By contrast, we noted that the Congress declined to designate for exclusion any of the remaining services within those four categories (thus leaving all of those services subject to SNF consolidated billing), because they are relatively inexpensive and are furnished routinely in SNFs.

As we further explained in the final rule of July 31, 2000 (65 FR 46790), any additional service codes that we might designate for exclusion under our discretionary authority must meet the same criteria that the Congress used in identifying the original codes excluded from consolidated billing under section 103(a) of the BBRA: they must fall within one of the four service categories specified in the BBRA, and they also must meet the same standards of high cost and low probability in the SNF setting. Accordingly, we characterized this statutory authority to identify additional service codes for exclusion "* * * as essentially affording the flexibility to revise the list of excluded codes in response to changes of major significance that may occur over time (for example, the development of new medical technologies or other advances in the state of medical practice)" (65 FR 46791). In view of the amount of time that has elapsed since we made that statement, we believe it is appropriate at this point to invite public comments that identify codes in any of these four service categories representing recent medical advances that might meet the BBRA criteria for exclusion from SNF consolidated billing.

We note that the original BBRA legislation (as well as the implementing regulations) identified a set of excluded services by means of specifying HCPCS codes that were in effect as of a particular date (that is, July 1, 1999).

Identifying the excluded services in this manner made it possible for us to utilize a Program Memorandum as the vehicle for accomplishing routine updates of the excluded codes, in order to reflect any minor revisions that might subsequently occur in the coding system itself (for example, the assignment of a different code number to the same service). Accordingly, for any new services that would actually represent a substantive change in the scope of services that are excluded from the SNF consolidated billing provision, we would identify these additional excluded services by means of the HCPCS codes that are in effect as of a specific date (in this case, October 1, 2002). By making any new exclusions in this manner, we could similarly accomplish routine future updates of these additional codes through the issuance of a Program Memorandum.

V. Application of the SNF PPS to SNF Services Furnished by Swing-Bed Hospitals

In the July 31, 2001 final rule (66 FR 39562), we announced the conversion of swing-bed hospitals to the SNF PPS, effective with the start of the provider's first cost reporting period beginning on or after July 1, 2002. We selected this date consistent with the statutory provision to integrate swing-bed hospitals into the SNF PPS by the end of the SNF transition period, that is, June 30, 2002.

By July 31, 2003, the SNF PPS will cover all swing-bed hospitals. Therefore, all rates and wage indexes outlined in earlier sections of this notice for SNF PPS also apply to all swing-bed hospitals. A complete discussion of assessment schedules, the MDS and the transmission software, Raven-SB for Swing Beds can be found in the July 31, 2001 final rule (66 FR 39562). The latest changes in the MDS for swing-bed hospitals are listed on our SNF PPS Web site, *http://.www.cms.hhs.gov/providers/snfpps/default.asp.*

VI. Distinct Part Definition

While some SNFs function as separate, independent entities, we have recognized since the inception of the Medicare program that it is also possible for a SNF to operate as a component, or "distinct part," of a larger organization. As indicated in the discussion below, the predominant organizational form for such distinct part SNFs has been that of a component of a hospital that furnishes SNF services within the larger hospital complex. However, most program requirements that address SNF distinct parts have focused on operating and cost reporting procedures, without precisely defining what a "distinct part" is. The definition of a distinct part is particularly meaningful in today's environment, since entities other than hospitals are increasingly exploring diversification to provide SNF services. In addition, the growing frequency of hospital mergers (in which each of the merging hospitals brings its own distinct part SNF into the merger) has created situations where the newly-merged hospital entity includes the merger of components that are furnishing SNF services at two different physical locations; that is, the creation of a "composite" distinct part SNF. Moreover, such a hospital might additionally purchase a freestanding SNF for use in placing those of its inpatients who are ready for hospital discharge.

As a result of these changes in facility practices, it has become increasingly important to document the assumptions used historically to survey and certify distinct part units. The purpose of this portion of the proposed rule is to clarify the definition of a "distinct part," to provide more precise guidance to providers and State licensure and certification agencies. This guidance will assist providers in understanding the criteria that govern the financial and organizational structure of such entities, which will facilitate the application and certification process. In this proposed rule, we also explain how the survey and certification requirements are being applied to distinct parts in separate physical locations.

This proposal is not expected to have any adverse financial impact on hospitals or other entities exploring or operating distinct part SNFs. In fact, clarifying our expectations regarding operating criteria could enable providers to identify as duplicative or unnecessary certain procedures that they may have adopted before these clarifications were available, but that are not actually required by our programs. We are also evaluating ways to ensure that the survey and certification process includes ongoing monitoring of changes in distinct part status, and we invite comments on appropriate ways to accomplish this.

Similarly, we do not anticipate any negative impact on beneficiary access to care or on the quality of care furnished in distinct part SNFs. Distinct part SNFs already operate under the same benefit, eligibility, and coverage regulations as freestanding SNFs, and beneficiaries who reside in a distinct part SNF also have the same rights and protections as beneficiaries residing in freestanding SNFs. In fact, in this proposed rule, we clarify how certain resident rights and protections should be administered in composite distinct part SNFs. We anticipate that this clarification of our expectations will promote improved provider compliance with these program requirements.

A. Background

As noted in section I.A of this preamble, services are covered under the Part A SNF benefit only when furnished in a SNF that Medicare has certified as meeting the requirements for program participation contained in section 1819 of the Act. This section of the Act defines a SNF in terms of being "* * * an institution (or a distinct part of an institution) * * *." The committee report that accompanied the original Medicare legislation (cited below) contained the following explanation of the distinct part concept as applied to "posthospital extended care facilities," or SNFs: "* * * A posthospital extended care facility could be an institution, such as a skilled nursing home, or a distinct part of an institution, such as a ward or wing of a hospital or a section of a facility another part of which might serve as an old-age home." (Senate Finance Committee Rep. No. 404, 89th Cong., 1st Sess. 31–32 (1965)).

Under the reasonable cost payment methodology that applied to covered Part A SNF stays prior to the inception of the SNF PPS, a determination that a SNF was a distinct part of a hospital (or "hospital-based") rather than a freestanding facility directly affected the amount of the SNF's Medicare payment. This is because that payment methodology set higher limits on routine service costs for hospital-based SNFs than for freestanding facilities.

In the **Federal Register** of September 4, 1980 (45 FR 58701), we defined a "hospital-based SNF" for this purpose as being an integral and subordinate part of a hospital that is operated with other departments of the hospital under common licensure, governance, and professional supervision, with all services of both the hospital and the SNF being fully integrated. In addition, we included the following specific criteria:

- The SNF and hospital are subject to the bylaws and operating decisions of a common governing board;
- The SNF and hospital are financially integrated as evidenced by the cost report, which must reflect the certified or noncertified SNF beds of the hospital, the allocation of hospital overhead to the SNF through the required stepdown methodology, and common billing for all services of both facilities.

• While colocation is not an essential factor, the distance between the two facilities must be reasonable.

• The existence of a transfer agreement or a shared service agreement between the SNF and the hospital does not determine a SNF to be hospital-based and is not considered in determining the status of the facility.

We recognize that the April 7, 2000 final rule for the PPS for outpatient hospital services promulgated a set of criteria for use in determining whether an entity is "provider-based" (65 FR 18504), including several criteria that were similar to the 1980 hospital-based criteria for SNFs. However, SNFs are not subject to the provider-based regulations (see § 413.65(a)(1)(ii)(D)).

B. Proposed Revision

It has been noted that the regulations at § 413.65 already set forth detailed criteria for determining provider-based status in other settings, but that no similar regulations exist with regard to SNFs. The need to clarify the criteria for identifying distinct parts is especially pronounced in the context of survey and certification procedures.

In addition, the concept of a distinct part is actually broader than that of a "hospital-based" facility, in that the former can encompass situations in which a SNF is a part of a larger institution that is not a hospital (for example, a domiciliary or "board and care" facility). Further, the distinct part concept applies to Medicaid nursing facilities (NFs) as well as to SNFs, and involves not only payment issues, but also the requirements specified in the regulations at part 483, subpart B (the requirements for program participation for long-term care facilities (that is, SNFs and NFs)). Further, while the regulations at § 483.5 (which define a long-term care facility in this context) refer to the existence of "distinct part" SNFs and NFs, they do not currently contain a specific definition of this term.

Accordingly, in this proposed rule, we propose to add a number of specific criteria that would serve to determine whether a SNF or NF can be designated as a distinct part of a hospital or other entity, in the requirements for participation for long-term care facilities in subpart B of part 483. These proposed revisions would essentially reflect the 1980 "hospital-based" criteria discussed previously (which focus primarily on such elements as common ownership and control, financial integration, and location), and would also incorporate existing criteria included in the State Operations Manual and in Survey and Certification Letters into a single regulation. We also propose to make a number of conforming changes elsewhere in subpart B of part 483 of the regulations (specifically §§ 483.10 and 483.12), as well as to other distinct part references that appear in parts 413 and 440.

At § 483.5, we would define a distinct part as a physically identifiable component of an institution (for example, a hospital, or a board and care facility) or institutional complex (for example, a hospital or continuing care retirement community that includes various subprovider units and occupies several buildings) that is certified as meeting the applicable statutory requirements for SNFs or NFs in sections 1819 or 1919 of the Act, respectively, as well as the participation requirements for long-term care facilities set forth in subpart B of part 483. A SNF or NF distinct part may be comprised of one or more buildings or designated parts of buildings (that is, wings, wards, or floors) that are located in the same physical area immediately adjacent to the institution's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are within close proximity of the main buildings, and any other areas that we determine, on an individual basis, to be part of the institution's campus. A distinct part must include all of the beds within the designated area, and cannot consist of a random collection of individual rooms or beds that are scattered throughout the physical plant.

In addition, we would set forth a number of specific criteria for use in determining whether a SNF or NF can be considered a distinct part of a larger institution, as follows:

• The SNF or NF must be operated under common ownership and control (that is, common governance) by the institution of which it is a distinct part, as evidenced by the following:

(1) The SNF or NF is wholly owned by the institution of which it is a distinct part;

(2) The SNF or NF is subject to the by-laws and operating decisions of a common governing body;

(3) The institution of which the SNF or NF is a distinct part has final responsibility for the distinct part's administrative decisions and personnel policies, and final approval for the distinct part's personnel actions; and

(4) The SNF or NF functions as an integral and subordinate part of the institution to which it is based, with significant common resource usage of buildings, equipment, personnel, and services.

• The administrator of the SNF or NF reports to and is directly accountable to the management of the institution of which the SNF or NF is a distinct part.

• The SNF or NF must have a designated medical director who is responsible for implementing care policies and coordinating medical care, and who is directly accountable to the management of the institution of which it is a distinct part.

• The SNF or NF is financially integrated with the institution of which it is a distinct part, as evidenced by the sharing of income and expenses with that institution, and the reporting of its costs on that institution's cost report.

• A single institution can have a maximum of only one distinct part SNF and one distinct part NF. (If an institution exercises the option to have both a distinct part SNF and a distinct part NF, its SNF and NF distinct parts may overlap entirely, partially, or not at all. Further, if the SNF and NF distinct parts partially overlap, the area of overlap would not represent a separate, dually-certified "SNF/NF.")

• An institution cannot designate itself as a SNF or NF distinct part, but instead must submit a written request to us to determine if it may be considered a distinct part, along with documentation that demonstrates that it meets the criteria set forth above. The effective date of approval of a distinct part is the date that we determine all requirements (including enrollment with the fiscal intermediary) are met for approval, and cannot be made retroactive. If a distinct part is established without our notification and approval, CMS will determine the distinct part has not been appropriately designated as such from the date that the entity began its operation. CMS must approve all proposed changes in the number of beds in the approved distinct part. (Such modifications would be subject to the applicable requirements governing changes in bed size or location in SNFs and NFs, as set forth in section 2337 of the Provider Reimbursement Manual, Part 1 (CMS Pub. 15–1), and in section 3202 of the State Operations Manual (CMS Pub. 7).)

We note that our proposed definition of distinct parts does not represent an additional burden on SNFs; rather, it would simply add increased clarity and specificity to the process of determining distinct part status. We believe that establishing more definitive criteria in this area will actually help reduce the existing burden on SNFs by adding greater clarity and predictability to the process of determining a SNF's distinct part status.

Further, we note that the numerous requests that we have received for clarification of the distinct part criteria have arisen, in part, from a June 4, 1996, memorandum in which we reiterated our longstanding interpretation that sections 1819(a) and 1919(a) of the Act allow for a maximum of one distinct part SNF (and one distinct part NF) within a single institution. We issued this memorandum in response to an increasing number of situations involving the merger of two hospitals on separate campuses, each of which brings its own distinct part SNF into the merger. Under our policy of allowing only one distinct part SNF per institution, such a merger would result in the creation of a single distinct part SNF consisting of two noncontiguous units in different locations (as opposed, for example, to a distinct part consisting of noncontiguous wards, wings, or floors that are all located within the same building or campus).

In this proposed rule, we refer to such a configuration as a "composite distinct part." A composite distinct part could also be created when a hospital that already has a distinct part SNF acquires an additional nursing home that is not co-located on the hospital's campus. This, in turn, has raised a number of questions and concerns regarding the treatment of such entities under the survey and certification process, which we now propose to address as well.

Accordingly, we propose to establish certain additional criteria that would apply specifically to a composite distinct part SNF or NF of a hospital, or of a nonhospital organization such as a continuing care retirement community (CCRC). Under these criteria, a composite distinct part would be treated as a single distinct part of the institution to which it is based and, as such, would have only one provider agreement. It should be noted that in establishing criteria specific to composite distinct parts, it is not our intent to create a new category of nursing homes, but rather, simply to address certain survey and certification issues that arise from the use of this particular type of configuration. By explicitly recognizing composite distinct parts, we can help ensure that survey and other program oversight functions are coordinated and uniformly administered. Since the designation of a composite distinct part is not designed to supersede or replace existing policies, the use of a composite SNF or NF configuration is limited to facilities within the same State. Further, in order to ensure quality of care and quality of life for all residents, the constituent components of a composite distinct part would be required to meet all of the participation requirements set forth in subpart B of part 483 independently in each location.

We also wish to take this opportunity to provide clarification regarding the logistics of applying the survey and certification process to a composite distinct part that consists of components in different locations. Specifically, we note that for such facilities, surveyors will place particular emphasis on the following requirements, which must be met independently in each location of the composite distinct part:

- Posting of resident's rights (§ 483.10(b));
- Posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups (§ 483.10(b)(7)(iii));
- Prominently displayed facility information (§ 483.10(b)(10));
- Readily available survey results (§ 483.10(g));
- Organized resident and family groups (§ 483.15(c));
- Equal access by residents to activities and social services (§ 483.15(b), § 483.15(f), and § 483.15(g));
- Except where waived, the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week (§ 483.30(b));
- Designating a person to serve as director of food services who receives frequently scheduled consultation from a qualified dietitian, unless a qualified dietitian is employed on a full-time basis (§ 483.35(a)); and
- The physical environment requirements, including life safety, and provisions for space and equipment in dining, health services, recreation and program areas, to enable staff to provide residents with needed services as required by these standards and as identified in each resident's plan of care (§ 483.15(h) and § 483.70).

We also propose to amend the regulations at § 483.12, to establish a resident's right to remain in (or return to) the same location of the composite distinct part to which he or she was originally admitted. To avoid any confusion regarding the distinct part criteria applicable to SNFs, we would amend the provider-based regulations at § 413.65(a)(1)(ii)(D) to include a cross-reference to the new distinct part criteria. Currently, the regulations at § 413.65(a)(1)(ii)(D) indicate only that provider-based determinations under these regulations do not apply to SNFs. We would amend § 413.65(a)(1)(ii)(D) by adding a parenthetical statement indicating that determinations for SNFs are made under the regulations at § 483.5.

We are also taking this opportunity to correct a typographical error that currently appears in the regulations text at § 483.20(k)(1) (regarding the required comprehensive care plan for long-term care facility residents), in which the word "describe" is misspelled as "describer."

VII. Provisions of the Proposed Rule

In this proposed rule, we propose to make the following revisions to the existing text of the regulations:

- In § 409.20, we would make a technical correction to the cross-reference that appears in paragraph (c).
- We would revise § 483.5 to include specific definitions of the terms "distinct part" and "composite distinct part." In addition, we would make conforming changes elsewhere in subpart B of part 483 of the regulations, as well as in parts 413 and 440, and we would correct a typographical error that currently appears in the regulations text at § 483.20(k)(1).

VIII. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

IX. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, (the Act) the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely assigns responsibility of duties) 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 proposed rule is a major rule, as defined in Title 5, United States Code, section 804(2), because we estimate the

impact of the update will be to increase payments to SNFs by approximately $400 million. The update set forth in this proposed rule applies to payments in FY 2004. Accordingly, the analysis that follows describes the impact of this one fiscal year only. In accordance with the requirements of the Act, we will publish a notice for each subsequent fiscal year that will provide for an update to the payment rates and that will include an associated impact analysis.

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 SNFs and most other providers and suppliers are small entities, either by their nonprofit status or by having revenues of $11.5 million or less in any 1 year. For purposes of the RFA, approximately 53 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards with total revenues of $11.5 million or less in any 1 year (for further information, see 65 FR 69432, November 17, 2000). Individuals and States are not included in the definition of a small entity.

This proposed rule would update the SNF PPS rates published in the July 31, 2002 update notice (67 FR 49798), thereby increasing aggregate payments by an estimated $400 million. Accordingly, we certify that this proposed rule would not have a significant impact on 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. For a proposed rule, this analysis must conform to the provisions of section 603 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. Because the payment rates set forth in this proposed rule also affect rural hospital swing-bed services, we believe that this proposed rule would have an impact on small rural hospitals (this impact is discussed later in this section). However, because this incremental increase in payments for Medicare swing-bed services is relatively minor in comparison to overall rural hospital revenues, this notice will not have a significant impact on the overall operations of these 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 an expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This proposed rule would have no substantial effect on State, local, or tribal governments. We believe the private sector cost of this proposed rule falls below these thresholds as well.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates 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. As stated above, this proposed rule would have no substantial effect on State and local governments.

The purpose of this proposed rule is not to initiate significant policy changes with regard to the SNF PPS; rather, it is to provide an update to the rates for FY 2004 and to address a number of policy issues related to the PPS. We believe that the revisions and clarifications mentioned elsewhere in the preamble (for example, with respect to determining distinct part status) will have, at most, only a negligible overall effect upon the regulatory impact estimate specified in the rule. As such, these revisions would not represent an additional burden to the industry.

B. Anticipated Effects

This proposed rule sets forth updates of the SNF PPS rates contained in the July 31, 2002 update (67 FR 49798). The impact analysis of this proposed rule represents the projected effects of the changes in the SNF PPS from FY 2003 to FY 2004. We estimate the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as days or case-mix.

This analysis incorporates the latest estimates of growth in service use and payments under the Medicare SNF benefit, based on the latest available Medicare claims from 2001. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, very susceptible to forecasting errors due to other changes in the forecasted impact time period. Some examples of such possible events are newly-legislated general Medicare program funding changes by the Congress, or changes specifically related to SNFs. In addition, changes to the Medicare program may continue to be made as a result of the BBA, the BBRA, the BIPA, or new statutory provisions. Although these changes may not be specific to the SNF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon SNFs.

As mentioned previously, we propose to continue use of the FY 2003 wage index to adjust SNF PPS payments beginning October 1, 2003, in order to assure that the wage index published in each year's update will be used throughout the year to adjust payments. Therefore, the wage index has not changed and provides no additional impact on payment rates.

In accordance with section 1888(e)(4)(E) of the Act, the payment rates for FY 2004 are updated by a factor equal to the market basket index percentage increase to determine the payment rates for FY 2004. We note that in accordance with section 101(a) of the BBRA and section 314 of the BIPA, the existing, temporary increase in the per diem adjusted payment rates of 20 percent for certain specified RUGs (and 6.7 percent for certain others) remains in effect until the implementation of case-mix refinements. Because there have been no other revisions or clarifications affecting the payment rates for this proposed rule, the amount of the full market basket update is the only impact on facility payment rates. This leads to an increase in payments to SNFs of approximately $400 million (including approximately $6.4 million for swing-bed facilities, as discussed below), which is the full impact of this proposed rule with respect to SNFs.

Since the impact is limited to the 2.9 percentage increase due to the market basket update, the impact is the same for every facility without regard to Census region, ownership type, or urban/rural designation. For this reason, we have not included an impact table as we have in previous years.

With regard to the specific impact on swing-bed providers, in the July 31, 2002 update notice (67 FR 49798), we projected payments for these providers under the SNF PPS by first using the MEDPAR analog to assign 1999 claims records to a RUG-III group, then applying FY 2003 payment rates to calculate annual estimated payments.

For the purpose of this proposed rule, we have used the MEDPAR analog classification, and estimated current SNF PPS reimbursement as if the swing-bed providers were fully phased into the SNF PPS in FY 2002. Then, using the

same MEDPAR analog classifications, we applied the FY 2004 changes for a fully phased-in swing-bed population. We estimate that the overall impact on swing-bed facilities will be an increase in payments of approximately 2.9 percent, or $6.4 million.

C. Alternatives Considered

Section 1888(e) of the Act establishes the SNF PPS for the payment of Medicare SNF services for cost reporting periods beginning on or after July 1, 1998. This section of the statute prescribes a detailed formula for calculating payment rates under the SNF PPS, and does not provide for the use of any alternative methodology. It specifies that the base year cost data to be used for computing the RUG-III payment rates must be from FY 1995 (October 1, 1994, through September 30, 1995.) In accordance with the statute, we also incorporated a number of elements into the SNF PPS, such as case-mix classification methodology, the MDS assessment schedule, a market basket index, a wage index, and the urban and rural distinction used in the development or adjustment of the Federal rates. Further, section 1888(e)(4)(H) of the Act specifically requires us to publish the payment rates for each new fiscal year in the **Federal Register**, and to do so prior to the August 1 that precedes the start of the new fiscal year. Accordingly, based upon the prescriptive nature of the statute, we are not pursuing alternatives.

D. Conclusion

For the reasons set forth in the preceding discussion, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this proposed rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

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

List of Subjects

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 440

Grants programs—health, Medicaid.

42 CFR Part 483

Grants programs—health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 409—HOSPITAL INSURANCE BENEFITS

1. The authority citation for part 409 continues to read as follows:

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

Subpart C—Posthospital SNF Care

2. In § 409.20, the introductory text to paragraph (c) is revised to read as follows:

§ 409.20 Coverage of services.

* * * * *

(c) * * *

In § 409.21 through § 409.36—.

* * * * *

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i) and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww).

SUBPART E—PAYMENTS TO PROVIDERS

2. In § 413.65, paragraph (a)(1)(ii)(D) is revised to read as follows:

§ 413.65 Requirements for a determination that a facility or organization has provider-based status.

(a) *Scope and definitions.* (1) *Scope.*

(ii) * * *

(D) Skilled nursing facilities (SNFs) (determinations for SNFs are made in accordance with the criteria set forth in § 483.5 of this chapter).

* * * * *

PART 440—SERVICES: GENERAL PROVISIONS

1. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—Definitions

2. In § 440.40, paragraph (a)(1)(ii)(A) is revised to read as follows:

§ 440.40 Nursing facility services for individuals age 21 or older (other than services in an institution for mental disease), EPSDT, and family planning services and supplies.

(a) * * *

(1) * * *

(ii) * * *

(A) A facility or distinct part (as defined in § 483.5(b) of this chapter) that is certified to meet the requirements for participation under subpart B of part 483 of this chapter, as evidenced by a valid agreement between the Medicaid agency and the facility for providing nursing facility services and making payments for services under the plan; or

* * * * *

2. In § 440.155(c), the introductory text is revised to read as follows:

§ 440.155 Nursing facility services, other than in institutions for mental diseases.

* * * * *

(c) "Nursing facility services" may include services provided in a distinct part (as defined in § 483.5(b) of this chapter) of a facility other than a nursing facility if the distinct part (as defined in § 483.5(b) of this chapter)—

* * * * *

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

1. The authority citation for part 483 continues to read as follows:

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

Subpart B—Requirements for Long Term Care Facilities

2. Section 483.5 is revised to read as follows:

§ 483.5 Definitions.

(a) *Facility defined.* For purposes of this subpart, *facility* means a skilled nursing facility (SNF) that meets the requirements of sections 1819 (a), (b), (c), and (d) of the Act, or a nursing facility (NF) that meets the requirements of sections 1919 (a), (b), (c), and (d) of the Act. "Facility" may include a distinct part of an institution (as defined in paragraph (b) of this section and specified in § 440.40 and § 440.155 of this chapter), but does not include an institution for the mentally retarded or persons with related conditions

described in § 440.150 of this chapter. For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity that participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution. For Medicare, a SNF (see section 1819(a)(1) of the Act), and for Medicaid, a NF (see section 1919(a)(1) of the Act) may not be an institution for mental diseases as defined in § 435.1009 of this chapter.

(b) *Distinct part.*

(1) *Definition.* A distinct part SNF or NF is a physically identifiable component of an institution (for example, a hospital) or institutional complex (for example, a hospital that includes various subprovider units and occupies several buildings) that meets the requirements of this paragraph and of paragraph (b)(2) of this section, and is certified as meeting the applicable statutory requirements for SNFs or NFs in sections 1819 or 1919 of the Act, respectively. A SNF or NF distinct part may be comprised of one or more buildings or designated parts of buildings (that is, wings, wards, or floors) that are: in the same physical area immediately adjacent to the institution's main buildings; other areas and structures that are not strictly contiguous to the main buildings but are located within close proximity of the main buildings; and any other areas that CMS determines on an individual basis, to be part of the institution's campus. A distinct part must include all of the beds within the designated area, and cannot consist of a random collection of individual rooms or beds that are scattered throughout the physical plant. The term "distinct part" also includes a composite distinct part that meets the additional requirements of paragraph (c) of this section.

(2) *Requirements.* In addition to meeting the participation requirements for long-term care facilities set forth elsewhere in this subpart, a SNF or NF also must meet all of the following requirements in order to be designated as a distinct part of an institution for payment or other purposes:

(i) The SNF or NF must be operated under common ownership and control (that is, common governance) by the institution of which it is a distinct part, as evidenced by the following:

(A) The SNF or NF is wholly owned by the institution of which it is a distinct part.

(B) The SNF or NF is subject to the by-laws and operating decisions of a common governing body.

(C) The institution of which the SNF or NF is a distinct part has final responsibility for the distinct part's administrative decisions and personnel policies, and final approval for the distinct part's personnel actions.

(D) The SNF or NF functions as an integral and subordinate part of the institution to which it is based, with significant common resource usage of buildings, equipment, personnel, and services.

(ii) The administrator of the SNF or NF reports to and is directly accountable to the management of the institution of which the SNF or NF is a distinct part.

(iii) The SNF or NF must have a designated medical director who is responsible for implementing care policies and coordinating medical care, and who is directly accountable to the management of the institution of which it is a distinct part.

(iv) The SNF or NF is financially integrated with the institution of which it is a distinct part, as evidenced by the sharing of income and expenses with that institution, and the reporting of its costs on that institution's cost report.

(v) A single institution can have a maximum of only one distinct part SNF and one distinct part NF.

(vi) An institution cannot designate itself as an SNF or NF distinct part, but instead must submit a written request to CMS to determine if it may be considered a distinct part, along with documentation that demonstrates that it meets the criteria set forth above. The effective date of approval of a distinct part is the date that CMS determines all requirements (including enrollment with the fiscal intermediary) are met for approval, and cannot be made retroactive. If a distinct part is established without CMS's notification and approval, CMS will determine the distinct part has not been appropriately designated as such from the date that the entity began its operation. CMS must approve all proposed changes in the number of beds in the approved distinct part.

(c) *Composite distinct part.*

(1) *Definition.* A composite distinct part is a distinct part consisting of two or more noncontiguous components that are not located within the same campus, as defined in § 413.65(a)(2) of this chapter.

(2) *Requirements.* In addition to meeting the requirements of paragraph (b) of this section, a composite distinct part also must meet all of the following requirements:

(i) An SNF or NF that is a composite of more than one location will be treated as a single distinct part of the institution to which it is based. As such, the composite distinct part will have only one provider agreement.

(ii) If there is a change of ownership of a composite distinct part SNF or NF, the assignment of the provider agreement to the new owner will apply to all of the approved locations that comprise the composite distinct part SNF or NF.

(iii) If two or more hospitals (each with a distinct part SNF or NF) merge, CMS must approve the existing SNFs or NFs as meeting the requirements of this paragraph before they can be merged and considered a single distinct part of the hospital that survives the merger. In making such a determination, CMS will consider whether its approval or disapproval of a proposed merger promotes the effective and efficient use of public monies without sacrificing the quality of care.

(iv) To ensure quality of care and quality of life for all residents, the various components of a composite distinct part must meet all of the requirements for participation independently in each location.

3. In § 483.10, the following new paragraph (b)(12) is added to read as follows:

§ 483.10 Resident rights.

* * * * *

(b) * * *

(12) *Admission to a composite distinct part.* In its admission agreement, a facility that is a composite distinct part (as defined in § 483.5(c) of this subpart) must disclose its physical configuration, including the various locations that comprise the composite distinct part, and must specify the policies that apply to room changes between its different locations under § 483.12(a)(8) of this subpart.

* * * * *

4. In § 483.12, the following changes are made:

A. A new paragraph (a)(8) is added.

B. A new paragraph (b)(4) is added.

The additions read as follows:

§ 483.12 Admission, transfer, and discharge rights.

(a) * * *

(8) *Room changes in a composite distinct part.* Room changes in a facility that is a composite distinct part (as defined in § 483.5(c) of this subpart) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations.

* * * * *

(b) * * *

(4) *Readmission to a composite distinct part.* When the nursing facility

to which a resident is readmitted is a composite distinct part (as defined in § 483.5(c) of this subpart), the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which he or she resided previously. If a bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed there.

* * * * *

§ 483.20 [Amended]

3. In § 483.20(k)(1), the word "describer" is revised to read "describe".

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare-Hospital Insurance Program; and No. 93.774, Medicare-Supplementary Medical Insurance Program)

Dated: January 29, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: April 21, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–11854 Filed 5–8–03; 1:10 pm]

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Federal Register

Friday,
May 16, 2003

Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for FY 2004; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1474–P]

RIN 0938–AL95

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for FY 2004

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

ACTION: Proposed rule.

SUMMARY: This proposed rule updates the prospective payment rates for inpatient rehabilitation facilities (IRFs) for Federal fiscal year 2004 as required under section 1886(j)(3)(C) of the Social Security Act (the Act). Section 1886(j)(5) of the Act requires the Secretary of Health and Human Services (the Secretary) to publish in the **Federal Register** on or before August 1 before each fiscal year, the classification and weighting factors for the IRF case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year. In addition, in this proposed rule, we are proposing new policies, and changing or clarifying existing policies regarding the prospective payment system (PPS) within the authority granted under sections 1886(j) and 1886(d) of the Act.

DATES: We will consider comments if we receive them at the appropriate addresses, as provided below, no later than 5 p.m. on July 7, 2003.

ADDRESSES: In commenting, please refer to file code CMS–1474–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission or e-mail.

Mail written comments (one original and two copies) to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1474–P, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays. If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.) Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Robert Kuhl, (410) 786–4597, Pete Diaz (410) 786–1235 or Nora Hoban, (410) 786–0675.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–9994.

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Table of Contents

I. Background

A. Requirements for Updating the Prospective Payment Rates for Inpatient Rehabilitation Facilities (IRFs)

On August 7, 2001, we published a final rule entitled "Medicare Program; Prospective Payment System for Inpatient Rehabilitation Facilities (CMS–1069–F)" in the **Federal Register** (66 FR 41316), that established a PPS for IRFs as authorized under section 1886(j) of the Act and codified at subpart P of part 412 of the Medicare regulations. In the August 7, 2001 final rule, we set forth per discharge Federal prospective payment rates for fiscal year (FY) 2002 that provided payment for inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs) but not costs of approved educational activities, bad debts, and other services or items that are outside the scope of the IRF PPS. The provisions of that final rule were effective for cost reporting periods beginning on or after January 1, 2002. (On July 1, 2002, we also published a correcting amendment to the final rule (CMS–1069–F2) in the **Federal Register** (67 FR 44073). Any reference to the August 7, 2001 final rule in this proposed rule includes the provisions effective in the correcting amendment.)

Section 1886(j)(5) of the Act and § 412.628 of the regulations require the Secretary to publish in the **Federal Register**, on or before August 1 of the preceding fiscal year, the classifications and weighting factors for the IRF case-mix groups (CMGs) and a description of the methodology and data used in computing the prospective payment rates for the upcoming fiscal year. On August 1, 2002, we published a notice in the **Federal Register** (67 FR 49928) to update the IRF Federal prospective payment rates from FY 2002 to FY 2003 using the methodology described in § 412.624 of the regulations. As stated in that notice, we used the same classifications and weighting factors for the IRF CMGs that were set forth in the August 7, 2001 final rule to update the IRF Federal prospective payment rates from FY 2002 to FY 2003. The FY 2003 Federal prospective payment rates are effective for discharges on or after October 1, 2002 and before October 1, 2003.

In this proposed rule, we are proposing to update the IRF Federal prospective payment rates from FY 2003 to FY 2004 using the methodology described in § 412.624 of the regulations. See section VI of this proposed rule for further discussion of the proposed FY 2004 Federal prospective payment rates. The proposed FY 2004 Federal prospective payment rates will be effective for discharges on or after October 1, 2003 and before October 1, 2004.

B. General Overview of the Current IRF PPS

Section 4421 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33), as amended by section 125 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113), and by section 305 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554), provides for the implementation of a per discharge PPS, through new section 1886(j) of the Act, for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (IRFs). Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs) but not costs of approved educational activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the August 7, 2001 final rule (66 FR 41316), we provide below a general description of the IRF PPS.

The IRF PPS, as described in the August 7, 2001 final rule, uses Federal prospective payment rates across 100 distinct CMGs. Ninety-five CMGs were constructed using rehabilitation impairment categories, functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). Five special CMGs were constructed to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors account for the relative difference in resource use across all CMGs. Within each CMG, the weighting factors were "tiered" based on the estimated effect that the existence of certain comorbidities have on resource use.

The Federal PPS rates were established using a standardized payment amount (also referred to as the budget neutral conversion factor in the August 7, 2001 final rule (66 FR 41364 through 41367)). For each of the tiers within a CMG, the relative weighting factors were applied to the budget neutral conversion factor to compute the unadjusted Federal prospective payment rates. Adjustments that account for geographic variations in wages (wage index), the percentage of low-income patients (LIPs), and location in a rural area would be applied to the IRF's unadjusted Federal prospective payment rates. In addition, adjustments would be made to account for the early transfer of a patient, interrupted stays, and high cost outliers.

Lastly, the IRF's final prospective payment amount would be determined under the transition methodology prescribed in section 1886(j) of the Act. Specifically, for cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, section 1886(j)(1) of the Act and § 412.626 of the regulations provide that IRFs transition into the prospective payment systems receiving a "blended payment." For cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, these blended payments consisted of 66⅔ percent of the Federal IRF PPS rate and 33⅓ percent of the payment that the IRF would have been paid had the IRF PPS not been implemented. However, during the transition period, an IRF with a cost reporting period beginning on or after January 1, 2002 and before October 1, 2002 could have elected to bypass this blended payment

and be paid 100 percent of the Federal IRF PPS rate. For cost reporting periods beginning on or after October 1, 2002 (FY 2003), however, the transition methodology expired, and payments for all IRFs consist of 100 percent of the Federal IRF PPS.

We established a CMS website that contains useful information regarding the IRF PPS. The website URL is *www.cms.hhs.gov/providers/irfpps/default.asp* and may be accessed to download or view publications, software, and other information pertinent to the IRF PPS.

C. Operational Overview of the Current IRF PPS

As described in the August 7, 2001 final rule, upon the admission and discharge of a Medicare Part A fee-for-service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument, the Inpatient Rehabilitation Facility—Patient Assessment Instrument (IRF-PAI). All required data must be electronically encoded into the IRF's PAI software product. Generally, the software product includes patient grouping programming called the GROUPER software. The GROUPER software uses specific PAI data elements to classify (or group) the patient into a distinct CMG and account for the existence of any relevant comorbidities. The GROUPER software produces a 5-digit CMG number. The first digit is an alpha-character that indicates the comorbidity tier. The last 4 digits represent the distinct CMG number. (Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the GROUPER software, are available at the CMS website at *www.cms.hhs.gov/providers/irfpps/default.asp).*

Once the patient is discharged, the IRF completes the Medicare claim (UB–92 or its equivalent) using the 5-digit CMG number and sends it to the appropriate Medicare fiscal intermediary (FI). (Claims submitted to Medicare must comply with the electronic claim requirements contained at *www.cms.hhs.gov/providers/edi/default.asp*, as reported in the Health Insurance Portability and Accountability Act (HIPAA) program claim memoranda issued by CMS and also published at that web site, and as listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600. Instructions for the limited number of claims submitted to Medicare on paper are located in section 3604 of Part 3 of the Medicare Intermediary Manual.) The Medicare FI processes the claim through its software system. This software system includes pricing programming called the PRICER software. The PRICER software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths and then applies the applicable adjustments to account for the IRF's wage index, percentage of LIPs, rural location, and outlier payments.

D. Proposals for FY 2004

In this proposed rule, we are proposing to update the data used to compute the IRF wage indices. In the August 7, 2001 final rule, we used FY 1997 acute care hospital wage data to compute the IRF wage indices for FY 2002. The August 1, 2002 notice that set forth the updated FY 2003 IRF Federal prospective payment rates also used 1997 acute care hospital wage data to compute the FY 2003 IRF wage indices.

In this proposed rule, we are proposing to update the IRF wage indices for FY 2004 by using FY 1999 acute care hospital data. We believe that the FY 1999 acute care hospital data are the best available because they are currently the most recent complete final data. However, any adjustments or updates made under section 1886(j)(6) of the Act must be made in a budget neutral manner. Therefore, in section VI of this proposed rule, we are proposing a methodology to update the wage indices for FY 2004 using 1999 acute care hospital data in a budget neutral manner.

In this proposed rule, we are also proposing to update the underlying data used to compute the IRF market basket index. As explained in Appendix D of the August 7, 2001 final rule, we used 1992 cost report data as the underlying data to develop the excluded hospital with capital market basket that formed the basis of the FY 2002 and FY 2003 IRF market basket index. In section VI of this proposed rule, we are proposing to use 1997 cost report data, the most recent data available, to form the basis of the FY 2004 IRF market basket index.

In section II of this proposed rule, we are proposing to modify or clarify certain criteria for a hospital or a hospital unit to be classified as an IRF. As stated in the August 7, 2001 final rule, we did not change the survey and certification procedures applicable to entities seeking classification as an IRF. Currently, to be paid under the IRF PPS, a hospital or unit of a hospital must first be deemed to be excluded from the diagnosis-related group (DRG)-based acute care hospital PPS under the general requirements in subpart B of part 412 of the regulations. Second, the excluded hospital or unit must meet the conditions for payment under the IRF PPS at § 412.604 of the regulations.

Lastly, we are proposing, in various sections of this proposed rule, to modify or clarify existing provisions of the IRF PPS. However, we are not proposing refinements to the FY 2002 case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments, due to the lack of available data to make such changes.

II. Requirements and Conditions for Payment Under the IRF PPS

As issued in the August 7, 2001 final rule, § 412.604 "Conditions for payment under the prospective payment system for inpatient rehabilitation facilities" describes the conditions that must be met for an IRF to be paid under the IRF PPS. Section 412.604(a) states the general requirements for payment to be made under the IRF PPS and the effects on Medicare payment if the conditions described therein are not met. Section 412.604(b) states the existing regulatory provisions that must be met for a hospital or unit of a hospital to be excluded from the acute care inpatient hospital PPS and to be classified as an IRF. Section 412.604(c) requires an IRF to complete a patient assessment instrument for each Medicare Part A fee-for-service patient admitted. Section 412.604(d) describes the limitations on IRFs for charging beneficiaries that receive Medicare covered services. Section 412.604(e) describes the requirements associated with furnishing inpatient hospital services directly or under arrangement. Section 412.604(f) states the reporting and recordkeeping requirements that IRFs must meet.

In this section of the proposed rule, we describe proposed changes, if any, to the conditions or underlying requirements of § 412.604.

Section 412.604(a) General Requirements

Under paragraph (a)(2), we propose to change the word "we" to "CMS or its Medicare fiscal intermediary" to read as follows:

"If an inpatient rehabilitation facility fails to comply fully with these conditions with respect to inpatient hospital services furnished to one or more Medicare Part A fee-for-service beneficiaries, CMS or its Medicare fiscal intermediary may, as appropriate—

(i) Withhold (in full or in part) or reduce Medicare payment to the inpatient rehabilitation facility until the facility provides adequate assurances of compliance; or

(ii) Classify the inpatient rehabilitation facility as an inpatient hospital that is subject to the conditions of subpart C of this part and is paid under the prospective payment systems specified in § 412.1(a)(1)."

Section 412.604(b) Inpatient Rehabilitation Facilities Subject to the Prospective Payment System

Section 412.604(b) states that, "subject to the special payment provisions of § 412.22(c), an inpatient rehabilitation facility must meet the general criteria set forth in § 412.22 and the criteria to be classified as a rehabilitation hospital or rehabilitation unit set forth in § 412.23(b), § 412.25, and § 412.29 for exclusion from the inpatient hospital prospective payment systems specified in § 412.1(a)(1)." The general criteria set forth in § 412.22 and the criteria to be classified as a rehabilitation hospital or rehabilitation unit set forth in § 412.23(b), § 412.25, and § 412.29 are under subpart B of part 412 of the regulations. In the August 7, 2001 final rule implementing the IRF PPS, we did not make any changes to the exclusion criteria and requirements to be classified as an IRF under subpart B of part 412. Since the implementation of the IRF PPS, a number of questions have been raised on the application of some of these requirements and the necessity of other criteria. Below, we will discuss each requirement as it relates to the classification of an IRF.

A. Background of Subpart B Provisions

Section 601 of the Social Security Amendments of 1983 (Pub. L. 98–21) added section 1886 to the Act that established a PPS for acute care inpatient hospital services for cost reporting periods beginning on or after October 1, 1983. Under section 1886(d)(1)(B) of the Act, several types of hospitals and units of hospitals are excluded from the inpatient hospital PPS. Sections 1886(d)(1)(B)(ii) and 1886(d)(1)(B) of the Act specify that rehabilitation hospitals and rehabilitation units of hospitals (as defined by the Secretary) are excluded from the inpatient PPS.

Extensive discussion and public comments on developing the criteria under which a hospital or unit of a hospital can be excluded from the inpatient PPS as an IRF began with the September 1, 1983 publication of the interim final rule with comment period in the **Federal Register** (48 FR 39752). (That interim final rule discussed the provisions necessary to implement section 1886 of the Act.) On January 3, 1984, we published a final rule (49 FR 234) that responded to public comments on the provisions of the September 1, 1983 interim final rule and established the initial set of criteria that must be met by a hospital or unit of a hospital seeking exclusion from the inpatient hospital PPS as an IRF. Since the publication of these earlier rules, the criteria to be an IRF have been revised and codified at subpart B of part 412 of the current Medicare regulations.

Section 412.20 Hospital Services Subject to the Prospective Payment Systems

In the August 7, 2001 final rule, we added § 412.20(b) stating that covered inpatient hospital services furnished to Medicare beneficiaries by a rehabilitation hospital or rehabilitation unit that meet the conditions of § 412.604 are paid under the PPS described in subpart P of this part.

In this proposed rule, we are proposing to redesignate current § 412.20(b) as paragraph (b)(1) of § 412.20 and add paragraph (b)(2) to ensure that inpatient hospital services will not be paid under the IRF PPS if the services are paid by a health maintenance organization (HMO) or competitive medical plan (CMP) that elects not to have CMS make payments to an IRF for services, which are inpatient hospital services, furnished to the HMO's or CMP's Medicare enrollees under part 417 of this chapter. This proposed provision is similar to the provision at § 412.20(b)(3) that prohibits payments under the acute care hospital PPS for similar HMO or CMP services.

Section 412.22 Excluded Hospitals and Hospital Units: General Rules

Section 412.22(h) describes the requirements to be a satellite facility that is excluded from the acute care hospital PPS. The following describes our proposal to eliminate the provision that limits the bed size of a satellite IRF.

In the July 30, 1999 **Federal Register** (64 FR 41540), we revised § 412.22(h) to require that in order to be excluded from the acute care hospital inpatient PPS, a satellite of a hospital: (1) Effective for cost reporting periods beginning on or after October 1, 2002, is not under the control of the governing body or chief executive officer of the hospital in which it is located, and furnishes inpatient care through the use of medical personnel who are not under the control of the medical staff or chief medical officer of the hospital in which it is located; (2) must maintain admission and discharge records that are separately identified from those of the hospital in which it is located and are readily available; (3) cannot commingle beds with beds of the hospital in which it is located; (4) must be serviced by the same FI as the hospital of which it is a part; (5) must be treated as a separate cost center of the hospital of which it is a part; (6) for cost reporting and apportionment purposes, must use an accounting system that properly allocates costs and maintains adequate data to support the basis of allocation; and (7) must report costs in the cost report of the hospital of which it is a part, covering the same fiscal period and using the same method of apportionment as the hospital of which it is a part. In addition, the satellite facility must independently comply with the qualifying criteria for exclusion from the acute care hospital inpatient PPS. Lastly, the total number of State-licensed and Medicare-certified beds (including those of the satellite facility) for a hospital (other than a children's hospital) that was excluded from the acute care hospital inpatient PPS for the most recent cost reporting period beginning before October 1, 1997, may not exceed the hospital's number of beds on the last day of that cost reporting period.

In § 412.22(h)(1), we define a satellite as "a part of a hospital that provides inpatient services in a building also used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital." Satellite arrangements exist when an existing hospital that is excluded from the acute care hospital inpatient PPS and that is either a freestanding hospital or a hospital-within-a-hospital under § 412.22(e) shares space in a building or on a campus occupied by another hospital in order to establish an additional location for the excluded hospital. The July 30, 1999 acute care hospital inpatient PPS final rule (64 FR 41532–41534) includes a detailed discussion of our policies regarding Medicare payments for satellite facilities of hospitals excluded from the acute care hospital inpatient PPS.

In accordance with section 1886(b) of the Act, as amended by sections 4414 and 4416 of Pub. L. 105–33, we established two different target limits on payments to excluded hospitals, depending upon when the IRF was established. The target amount limit for an IRF with a cost reporting period beginning before October 1, 1997 was set at the 75th percentile of the target amounts of IRFs, as specified in § 413.40(c)(4)(iii), updated to the applicable cost reporting period. For IRFs with a cost reporting period beginning on or after October 1, 1997, under section 4416 of Pub. L. 105–33, the payment amount for the hospital's

first two 12-month cost reporting periods, as specified at § 413.40(f)(2)(ii)(A) and (B), could not exceed 110 percent of the national median of target amounts of IRFs for cost reporting periods ending during FY 1996, updated by the hospital market basket increase percentage to the first cost reporting period in which the IRF receives payment.

Because we were concerned that a number of pre-1997 excluded hospitals (including IRFs), governed by § 413.40(c)(4)(iii), would seek to create satellite arrangements in order to avoid the effect of the lower payment caps that would apply to new hospitals under § 413.40(f)(2)(ii), we established rules regarding the exclusion of and payments to satellites of existing facilities. If the number of beds in the hospital or unit (including both the base hospital or unit and the satellite location) exceeds the number of State-licensed and Medicare-certified beds in the hospital or unit on the last day of the hospital's or unit's last cost reporting period beginning before October 1, 1997, the facility would be paid under the acute care hospital inpatient DRG system. Therefore, while an excluded hospital or unit could "transfer" bed capacity from a base facility to a satellite, if it increased total bed capacity beyond the level it had in the most recent cost reporting period before October 1, 1997 (see 64 FR 41532–41533, July 30, 1999), the hospital will not be paid as a hospital excluded from the acute care hospital inpatient PPS. However, no similar limitation was imposed with respect to the number of total beds in excluded hospitals and units and satellite facilities of those excluded hospitals and units established after October 1, 1997, since those excluded hospitals and units were subject to the lower payment limits of section 4416 of Pub. L. 105–33, and would, therefore, not benefit from the higher payment cap on target amounts under § 413.40(c)(4) by creating a satellite facility.

On March 22, 2002, we published a proposed rule in the **Federal Register** (67 FR 13416) that set forth the proposed Medicare PPS for long-term care hospitals (LTCHs). Discussion of the comments received on that LTCH proposed rule and our responses were published in a final rule on August 30, 2002 **Federal Register** (67 FR 55954). Specific comments received were discussed on page 56013 of the LTCH final rule that urged us to eliminate the bed-number criteria in § 412.22(h)(2)(i) for pre-1997 IRFs since the applicable PPS is fully phased in. The rationale for the bed-number criteria provision at § 412.22(h)(2)(i) was the potential for circumventing the PPS by creating a satellite location that could have their payment based on a higher TEFRA target amount cap. However, once an IRF's payment under the IRF PPS does not include a TEFRA-based payment (referred to as the facility-specific payment under the transition period described in § 412.626) and is based on 100 percent of the Federal prospective payment rate, we believe that the need for the bed-number criteria does not exist because IRF prospective payments will be the same regardless of when the IRF was established. Because all IRFs will be paid 100 percent of the proposed FY 2004 Federal prospective payment rates, we are proposing to eliminate the bed-number criteria by amending § 412.22(h) for freestanding satellite IRFs. We are also proposing to eliminate the bed-number criteria for IRF satellite units of a hospital by amending § 412.25(e) to conform with the proposed change in § 412.22(h).

Section 412.23 Excluded Hospitals: Classifications

Classification as an IRF—"The 75 Percent Rule"

Under the § 412.23(b)(2) of the regulations, a facility may be classified as an IRF if it can show that during its most recent 12-month cost reporting period it served an inpatient population of whom at least 75 percent required intensive rehabilitation services for the treatment of one or more of the following conditions:

1. Stroke.
2. Spinal cord injury.
3. Congenital deformity.
4. Amputation.
5. Major multiple trauma.
6. Fracture of femur (hip fracture).
7. Brain injury.
8. Polyarthritis, including rheumatoid arthritis.
9. Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease.
10. Burns.

Under § 412.604(b), the requirement at § 412.23(b)(2) must be met as one of the conditions for payment under the IRF PPS. However, even before the implementation of the IRF PPS, the rehabilitation industry expressed an interest in having CMS re-examine the regulatory criteria used to determine the classification of a unit or hospital as an IRF. Recently this interest has focused on the regulatory requirement at § 412.23(b)(2) commonly known as the "75 Percent Rule."

B. Regulatory Background of the 75 Percent Rule

We initially stipulated the "75 percent" requirement in the September 1, 1983, interim final rule with comment period entitled "Medicare Program; Prospective Payments for Medicare Inpatient Hospital Services" (48 FR 39752). That rule implemented the Social Security Amendments of 1983 (Pub. L. 98–21), changing the method of payment for inpatient hospital services from a cost-based, retrospective reimbursement system to a diagnosis specific PPS. However, the rule stipulated that in accordance with sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act both a rehabilitation unit, which is a distinct part of a hospital, and a rehabilitation hospital were excluded from the inpatient hospital PPS. We noted that sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act also gave the Secretary discretion in defining what is a "rehabilitation unit" and a "rehabilitation hospital."

In order to define a rehabilitation hospital we consulted with the Joint Commission on Accreditation of Hospitals (JCAH), and other accrediting organizations. (JCAH is currently known as the Joint Commission on Accreditation of Hospital Organizations.) The criteria we included in our definition of a rehabilitation hospital incorporated some of the accreditation requirements of these organizations. The definition also included other criteria, which we believed distinguished a rehabilitation hospital from a hospital that furnished general medical and surgical services as well as some rehabilitation services. One criterion was that "The hospital must be primarily engaged in furnishing intensive rehabilitation services as demonstrated by patient medical records showing that, during the hospital's most recently completed 12-month cost reporting period, at least 75 percent of the hospital's inpatients were treated for one or more conditions specified in these regulations that typically require intensive inpatient rehabilitation." (48 FR 39756) This requirement was originally specified in § 405.471(c)(2)(ii) of the regulations. We included this requirement, as a defining feature of a rehabilitation hospital, because we believed "that examining the types of conditions for which a hospital's inpatients are treated, and the proportion of patients treated for conditions that typically require intensive inpatient rehabilitation, will help distinguish those hospitals in which the provisions of rehabilitation

services is a primary, rather than a secondary, goal." (48 FR 39756) Using a similar line of reasoning, we made compliance with the 75 percent rule one of the characteristics that defined a rehabilitation unit.

The original medical conditions specified in § 405.471(c)(2)(ii) were stroke, spinal cord injury, congenital deformity, amputation, major multiple trauma, fracture of femur (hip fracture), brain injury, and polyarthritis, including rheumatoid arthritis. This list of 8 medical conditions was partly based upon the information contained in a document entitled "Sample Screening Criteria for Review of Admissions to Comprehensive Medical Rehabilitation Hospitals/Units." This document was a product of the Committee on Rehabilitation Criteria for PSRO of the American Academy of Physical Medicine and Rehabilitation and the American Congress of Rehabilitation Medicine. In addition, we received input from with the National Association of Rehabilitation Facilities, and the American Hospital Association.

On January 3, 1984, we published a final rule entitled "Medicare Program; Prospective Payment for Medicare Inpatient Hospital Services" (49 FR 234). On page 240 of that final rule, we summarized comments that requested inclusion of neurological disorders, burns, chronic pain, pulmonary disorders, and cardiac disorders in the 75 percent rule's list of medical conditions. Our analysis of these comments led us to agree that neurological disorders (including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease) and burns should be added to the 75 percent rule's original list of 8 medical conditions. (49 FR 240) We did not agree with comments that we lower from 75 to 60 the percentage of patients that must meet one of the medical conditions. Nor did we agree with comments urging us to use IRF resource consumption, instead of a percentage of patients that must have one or more of the specified medical conditions, to help define what is an IRF. (49 FR 239–240) We also rejected suggestions, which proposed that when an IRF could not meet the 75 percent rule the facility could still be defined as an IRF based on the types of services it furnished.

On August 31, 1984, we published a final rule entitled "Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1985 Rates" (49 FR 34728). In that rule we explained how the 75 percent rule applied to a new rehabilitation unit or rehabilitation hospital, or when a rehabilitation unit wanted to expand its size by adding beds.

On March 29, 1985, we published a final rule entitled "Medicare Program; Prospective Payment System for Hospital Inpatient Services; Redesignation of Rules" (50 FR 12740). That rule redesignated provisions of § 405.471 that addressed the 75 percent rule into § 412.23.

On August 30, 1991, we published a final rule entitled "Medicare Program; Changes to the Inpatient Hospital Prospective Payment System and Fiscal Year 1992 Rates" (56 FR 43196). Since October 1, 1983, the regulations allowed a new rehabilitation hospital or new rehabilitation unit, or an existing excluded rehabilitation unit which was to be expanded by the addition of new beds, to be excluded from the acute care PPS if, in addition to meeting other requirements, it submitted a written certification that during its first cost reporting period it would be in compliance with the 75 percent rule. The August 30, 1991, rule specified that if these facilities were later found to have not complied with the 75 percent rule CMS would determine the amount of actual payment under the exclusion, compute what we would have paid for the facility's services to Medicare patients under the acute care hospital PPS, and recover any difference in accordance with the rules on the recoupment of overpayments.

On September 1, 1992, we published a final rule entitled "Medicare Program; Changes to Hospital Inpatient Prospective Payment Systems and Fiscal Year 1993 Rates" (57 FR 39746). In the rule we acknowledged that, for various reasons, a new rehabilitation hospital or a new rehabilitation unit might need to begin operations at some time other than at the start of its regular cost reporting period. Therefore, we specified such an IRF could submit a written certification that it would comply with the 75 percent rule for both a partial cost reporting period of up to 11 months, as well as the subsequent full 12-month cost reporting period.

On September 1, 1994, we published a final rule entitled "Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and FY 1995 Rates" (59 FR 45330). In that rule, we stated that we had miscellaneous comments requesting that oncology cases, pulmonary disorders, cardiac disorders, and chronic pain be added to the 75 percent rule's list of medical conditions. (59 FR 45393) We responded that although the 75 percent rule had not been addressed in the associated May 27, 1994, proposed rule we would take these miscellaneous comments into consideration if we decided to make changes to the 75 percent rule.

When we published the August 7, 2001 final rule (66 FR 41316), we acknowledged we had received comments requesting that we update the 75 percent rule's list of medical conditions, or eliminate the 75 percent rule. (66 FR 41321) We responded that in our IRF PPS proposed rule we had not proposed changing the 75 percent rule, believed that the existing 75 percent rule was appropriate, and, therefore, would not be revising the 75 percent rule. However, we also stated that data obtained after we implemented the IRF PPS could lead us to reconsider revising the 75 percent rule.

C. CMS Evaluation of the 75 Percent Rule

In the spring of 2002 we surveyed the fiscal intermediaries (FIs) in order to ascertain what methods were being used to verify if IRFs were complying with the 75 percent rule. Analysis of the survey data made us aware that inconsistent methods were being used to determine if an IRF was in compliance with the 75 percent rule, and that some IRFs were not being reviewed to determine if they were in compliance with the 75 percent rule. These survey results led us to become concerned that some IRFs may be out of compliance with the regulations. In addition, we were concerned that some FIs might be using methods to verify compliance with the 75 percent rule, which may cause an IRF to incorrectly be found out of compliance with the rule; this would thus cause an IRF to inappropriately lose its classification as an IRF. Therefore, on June 7, 2002, we suspended enforcement of the 75 percent rule until we conducted a careful examination of this area and determined whether changes were needed to the regulation, and the operating procedures that govern how compliance with the regulation is verified.

In addition to our review of FI administrative procedures, we conducted an analysis of CMS administrative data to attempt to estimate overall compliance with the regulation. We examined both IRF–PAI data and claims from the years 1998, 1999, and 2002. Before discussing the results of this analysis, we note that the data does have some limitations. First, it is not possible to discern from the diagnosis data on the IRF–PAI or the claim whether or not there was a medical need to furnish the patient "intensive rehabilitation." The diagnosis is a determination of a

patient's clinical status, but that is different from determining that there is a medical necessity to furnish treatment to a patient in an IRF as opposed to another type of treatment setting. In addition, it was not possible in many cases to map the diagnosis code on the claim data to one of the ten medical conditions listed in § 412.23(b) because a large percentage of claims have an ICD–9–CM diagnosis code that is a general code indicating only care involving the use of rehabilitation procedures instead of a specific diagnosis.

Chart 1 "Estimates of Compliance with the 75 Percent Rule" below shows the estimated percent of facilities with 75 percent of cases falling into the 10 conditions (13.35 percent) using 2002 available patient assessment data. Appendix A provides the technical detail regarding the method used to determine the percent of IRFs in calendar year 2002 that complied with the 75 percent rule. We believe our findings may tend to undercount cases falling within the 10 conditions because the IRF–PAI assessment process was first implemented during 2002. We believe that learning the IRF–PAI assessment process probably resulted in IRFs erring when coding the impairment group on the IRF–PAI assessment form. Nevertheless, we believe the analysis is useful for providing an estimate of the overall compliance with this regulatory requirement. Our findings showed that overall about 50 percent of cases fall within the 10 conditions specified in the rule and the number of facilities meeting the requirement based upon Medicare discharges rather than all discharges is very low. In addition, it shows the estimated percent of facilities that meet lower thresholds. Finally, our analysis also found that a facility's Medicare case mix was a good predictor of case mix for non-Medicare IRF patients.

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Chart 1 Estimates on Compliance With the 75 Percent Rule (2002 Data)

Hospital Characteristic	Total Number	45% Rule Percent	55% Rule Percent	65% Rule Percent	75% Rule Percent
Total	**1170**	**71.87**	**44.19**	**25.17**	**13.35**
Census Division					
1. New England	38	76.3	28.9	7.9	2.6
2. Middle Atlantic	170	47.6	22.4	10	4.1
3. South Atlantic	143	74.8	36.4	15.4	7.0
4. East North Central	220	76.8	53.2	29.1	12.3
5. East South Central	66	77.3	36.4	15.2	1.5
6. West North Central	99	78.8	58.6	41.4	27.3
7. West South Central	235	66.4	30.2	11.1	3.4
8. Mountain	78	70.5	51.3	33.3	21.8

Chart 1 Estimates on Compliance With the 75 Percent Rule (2002 Data)					
		45% Rule	55% Rule	65% Rule	75% Rule
Hospital Characteristic	Total Number	Percent	Percent	Percent	Percent
9. Pacific	121	95.9	86.8	71.1	48.8
Unit/Freestanding Facility					
Unit	95456	72.7	47.6	28.3	15.4
Freestanding	214	68.7	28.5	11.2	4.7
Teaching Status					
Teaching	145	71.7	46.2	32.4	18.6
Non-Teaching	845	73.5	43.6	24.6	13.1
Missing	180	65	45	22.2	10.6
Disproportionate Share Hospital (DSH)					
< 0.05	226	67.3	40.7	21.7	10.2
0.05 - 0.1	339	66.1	39.2	21.8	10.9
0.1 - 0.2	313	76	41.9	23.3	13.7
> = 0.2	145	88.3	64.1	43.4	24.1
Missing	147	68	45.6	24.5	12.9
Facility Control					
Voluntary	700	73.4	47.9	28.4	15.3
Proprietary	259	69.1	30.9	12.7	5
Government	135	77.8	48.9	30.4	18.5
Missing	76	57.9	46.1	28.9	15.8
Size					
Small	309	70.2	49.2	28.2	17.2
Medium	502	74.8	44.2	25.8	12.5
Large	201	70.9	35.2	19.6	9.5
Missing	158	67.7	44.9	24.7	13.9
Urban/Rural					
Large Urban	493	71.6	46.7	29.6	15
Other Urban	404	73.8	42.1	22	12.4
Rural	170	74.1	40.6	19.4	10
Missing	103	63.1	45.6	26.2	15.5

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While our estimate of compliance with the 75 percent rule is somewhat limited by the data available, we do believe it clearly demonstrates low compliance of the 75 percent rule by IRFs. Though IRFs are now paid under a PPS, the 75 percent rule still serves the relevant function of distinguishing IRFs from other types of inpatient facilities, thus facilitating compliance with sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act. Making this distinction is also critical to fulfilling the requirements of section

1886(j)(1)(A), which requires Medicare to make payments to IRFs under a PPS specifically designed for the services they furnish. Specifically, the 75 percent rule has the effect of limiting the type of patient that can be cared for in facilities identified as IRFs. This limitation serves to ensure that only patients requiring this type of specialized and more expensive care receive it. The medical conditions listed in the 75 percent rule are conditions in which patients require the services of rehabilitation professionals with specialized skills and experiences that may not be available in other settings.

The largest group of patients treated in rehabilitation hospitals but not considered in this analysis to meet the 75 percent rule is patients with major joint replacements, specifically knee and hip replacements. Joint replacement patients have been more commonly admitted to rehabilitation hospitals in some areas of the country, and nationally, less than one quarter of Medicare beneficiaries are admitted to IRFs after surgery. Although some joint replacement patients may have "polyarthritis," or another of the ten conditions specified in the 75 percent rule requiring intensive inpatient rehabilitation, these cases were generally not counted towards a facility's compliance with the 75 percent rule. Provider representatives also have requested that conditions classified into the cardiac and pulmonary RICs be added to the list of conditions in the 75 percent rule. These two RICs currently represent about 8 percent of beneficiaries serviced in IRFs using the 2002 patient assessment data. We note that many private insurers do not cover acute inpatient rehabilitation care (in IRFs) for many of these patients whose rehabilitation needs can be met in an alternative setting such as a skilled nursing facility. We request comments on any conditions that necessitate the intensive, multidisciplinary care that IRFs are required to provide.

As mentioned previously, we surveyed the FIs to determine the methods they were using to verify compliance with the 75 percent rule. Our analysis of that survey data led us to suspend enforcement of the 75 percent rule. The process for determining compliance with the 75 percent rule needs to be improved. However, we believe that currently there is no need to amend the regulation because it still appropriately functions to help distinguish an IRF from other types of inpatient treatment settings. We will instead be improving the method FIs use to verify compliance with the 75 percent rule, and ensuring that FIs are consistent in how they verify compliance with the 75 percent rule.

When we suspended enforcement of the 75 percent rule we specified that the suspension of enforcement was not applicable to a facility that was first seeking classification as an IRF in accordance with § 412.23(b)(8) or § 412.30(b)(2). A facility first seeking classification as an IRF in accordance with § 412.23(b)(8) or § 412.30(b)(2) only has to self-attest that during its next full 12-month cost reporting period it will meet the 75 percent rule. Accordingly, a facility first seeking classification as an IRF in accordance with § 412.23(b)(8) or § 412.30(b)(2) has never had an FI verify that its patient population actually met the 75 percent rule. Until the medical conditions of this facility's patient population have been evaluated this facility has not proven that for at least one full 12-month cost reporting period it complied with the 75 percent rule and was appropriately classified as an IRF. Therefore, until a facility had proven that it qualified to be classified as an IRF because its patient population actually met the 75 percent rule it could not be eligible for suspension of enforcement of the 75 percent rule.

We will be instructing FIs to re-institute appropriate enforcement action if a FI determines that an IRF has not met the 75 percent rule. We realize that an IRF may need time to come into compliance with the 75 percent rule. An IRF's cost reporting period is the time period used to ascertain compliance with the 75 percent rule. Therefore, we will be instructing the FIs that the FI must use cost reporting periods that begin on or after October 1, 2003, as the time period to ascertain an IRF's compliance with the 75 percent rule.

While this proposed rule does not propose changes to the regulations related to the 75 percent rule, we expect that improved enforcement and compliance with the existing rule will have varying impacts on providers and beneficiaries.

Our analysis, detailed earlier in this section, indicates that approximately 50 percent of cases being cared for in IRFs fall outside of the ten conditions listed in the regulations. In addition, it estimates that potentially 86 percent of IRFs may currently be out of compliance. We again note that this analysis is based on Medicare administrative data (claims and patient assessments) rather than detailed medical record data and, thus, is limited in its ability to accurately classify all patients into one or more of the ten conditions cited in the regulations. Thus, we would expect our estimates of compliance to be higher if more detailed information from the medical records were available to perform the analysis.

We also know from the data that cases observed in IRFs that do not fall in one of the ten conditions have, on the average, lower lengths of stay than those cases that fall into one of the ten conditions. Specifically, the cases that do not fall into one of the ten conditions (approximately 50 percent) account for approximately 40 percent of the Medicare covered days. Conversely, 60 percent of the Medicare covered days fall into one of the ten conditions.

While it is difficult to predict the aggregate impact of improved compliance on provider revenues, we expect that IRFs and/or their parent hospitals (80 percent of IRFs are units of acute care hospitals) will change their behavior in a variety of ways. IRFs may change admission practices to alter their case mix, either Medicare or total patient population, by admitting patients with more intensive rehabilitative needs that fall into the ten conditions. This could have the effect of elevating the facility's revenues because cases requiring more intensive rehabilitation care generally receive higher Medicare payments than less complex cases.

For example, in each of the three years of data examined, lower extremity joint replacements contained by far the largest number of cases not in the ten conditions (44 percent in 2002). Other conditions included cardiac (10.3 percent), pulmonary (4.8 percent) and pain (4.1 percent). IRFs specializing in or treating a significant number of such cases may have to alter their admissions practice to achieve compliance. Treating fewer joint replacement cases (that result in relatively low payments under the IRF PPS) with cases requiring more intensive treatment could actually increase a facility's revenues.

Conversely, some IRFs may not be able to find such cases and may be required to reduce capacity and serve fewer patients in order to achieve compliance, an action that may have the effect of lowering a facility's revenues. Since compliance with the 75 percent rule could be achieved with changes in admission practices for Medicare as well as non-Medicare patients, the impact on Medicare revenues may vary.

The current regulation reflects the fact that a significant number (up to 25 percent) of medically necessary admissions may fall outside of the ten conditions. These cases can continue to be admitted and treated under the regulation. Other cases may appropriately receive rehabilitative care in alternative settings. For certain medically complex cases, it may be

appropriate to lengthen the patient's stay in an acute care setting in order to stabilize their condition to prepare the patient to participate in rehabilitation. Alternative settings for rehabilitative care could include the acute care hospital, skilled nursing facilities, long-term care hospitals, outpatient rehabilitation, and home health care. For this reason, we do not expect to see reduced access to care for Medicare beneficiaries as a result of improved compliance. In addition, because many hospitals having a Medicare certified IRF unit also have one or more other subunits that provide rehabilitation, revenues from these cases may be generated elsewhere within the same hospital.

We have developed a case study (below) to illustrate the differences in Medicare payment for cases that do not fall into one of the ten conditions included in the 75 percent rule. As discussed above, this type of case could be treated in an alternative setting. For this example, we detail Medicare payment amounts for rehabilitation care in four alternative settings (skilled nursing facility, home health, long term care hospital, and outpatient rehabilitation). As noted above, 80 percent of IRFs are units of hospitals. These hospitals may now choose to direct some patients to other settings. As explained above, it is difficult to predict the approach any individual or group of IRFs will follow in achieving compliance with this regulation, however, the case study illustrates some of the potential Medicare payment effects associated with providing similar levels of rehabilitation in different settings.

Case Example

The following case example has been developed to illustrate the payments under Medicare for levels of rehabilitative care received in the various settings that may be a part of a hospital complex for a patient that has a primary diagnosis of a lower extremity joint replacement. The following case example describes one of the most common patient conditions (not included in the 75 percent rule) but is not meant to describe all possible conditions and their related payment effects. The payments for each PPS described in the example are based on case weights and standardized payment rates for 2003.

The clinical description of the case example is as follows:

A 74-year-old woman status post a right total knee arthroplasty (TKA), with a wound infection, fever, and high white blood count are noted on her second postoperative day. A work-up indicates the existence of staphylococcus aureus septicemia. Patient lacks full extension and has only 65 degrees of flexion on her third post-operative day. The management options for this patient include: extension of acute care length of stay; transfer to a long term care hospital; admission to a skilled nursing facility; possibly home health services or outpatient services.

Under the IRF PPS, this patient would be classified into case-mix group 804 (lower extremity joint replacement with some functional capabilities) with an average length of stay of 14 days. Furthermore, the existence of staphylococcus aureus septicemia, a comorbid condition (ICD–9–CM code 038.11), would place this patient into the tier 2 payment category. The corresponding 2003 unadjusted payment amount for this patient would be $10,828.60.

Under the skilled nursing facility (SNF) PPS, this patient is classified into either the very high (RVB) or ultra high (RUB) rehabilitation group based on the hours of therapy she receives per week. We believe that this patient would have a length of stay in the SNF of either 14 days or 20 days. The corresponding 2003 unadjusted payment amount for this patient would be $4,446.82 for RVB and 14 days, $6,670.23 for RVB and 20 days, $6,352.60 for RUB and 14 days, or $7,672.40 for RUB and 20 days.

Under the long-term care hospital PPS, this patient would be classified into patient group 238 and would have a length of stay of either 14 days or 24 or more days. The corresponding 2003 unadjusted payment amount for this patient would be $17,671.22 for 14 days or $28,296.21 for 24 or more days.

Under the home health PPS, this patient would be placed into the High/High/Moderate group. The corresponding 2003 unadjusted payment amount for this patient would be $5,165.26 for home health services delivered for a 60-day period.

Under outpatient therapy, assuming 2 hours of physical therapy and 1 hour of occupational therapy given during 12 days, payment for this patient would be $4,108.16

If the patient remained in the original surgical acute care hospital stay, under the inpatient acute care hospital PPS this patient would be classified in to DRG 209 and payment at the 50th percentile would be $9,047.36. This illustrative example shows that this facility may have lower payments for the care of this patient relative to the IRF PPS payment if this patient is cared for in an SNF or receives home health or outpatient services. However, the facility may have higher payments relative to the IRF PPS payment if this patient is placed in a long-term care hospital unit. Overall, the example does show that this facility could continue to receive Medicare payments for this type of patient in a setting other than their IRF unit, and have the option of changing its IRF admitting practices without any potential negative effect on patient access to rehabilitative care. However, we invite public comment of this issue.

Section 412.29 Excluded Rehabilitation Units: Additional Requirements

Under § 412.29(a), an IRF unit must have met either the requirements for new units or converted units under § 412.30. Section 412.29(a)(2) contains an incorrect reference to the requirements for converted units as "§ 412.30(b)." The correct reference to the requirements for converted units is § 412.30(c). Accordingly, we are proposing to make a technical correction by changing the reference in paragraph (a)(2) to state "Converted units under § 412.30(c)."

Section 412.30 Exclusion of New Rehabilitation Units and Expansion of Units Already Excluded

Under § 412.30(b)(2), a hospital that seeks exclusion of a new IRF unit may provide written certification that the inpatient population the hospital intends the unit to serve meets the requirements of § 412.23(b)(2). Section 412.30(b)(3) contains an incorrect reference to the required written certification described in "(a)(2)" of this section. The correct reference to the written certification is described in paragraph (2) of § 412.30(b). Accordingly, we are proposing to make a technical correction by changing the current reference to § 412.23(a)(2) in § 412.23(b)(3) to state "The written certification described in paragraph (b)(2) * * *".

Section 412.30(d)(1) defines new bed capacity for the purposes of expanding an existing excluded IRF unit. Section 412.30(d)(2)(i) contains an incorrect reference to the definition of new bed capacity under paragraph "(c)(1)" of this section. The correct reference to the definition of new bed capacity is paragraph (d)(1). Accordingly, we are proposing a technical correction to change the current reference to paragraph (c)(1) in paragraph (d)(2)(i) to state "* * * under paragraph (d)(1) of this section."

III. Research To Support Case-Mix Refinements to the IRF PPS

A. Research on IRFs

As described in the August 7, 2001 final rule, we contracted with the RAND Corporation (RAND) to analyze IRF data to support our efforts in developing the CMG patient classification system and the IRF PPS. As discussed below, we are continuing our contract with RAND to support us in developing refinements to the classification and PPS, and in developing a system to monitor the effects of the IRF PPS. In addition, under a separate contract, we are developing and defining measures to monitor the quality of care and services provided to Medicare beneficiaries receiving care in an IRF.

B. RAND Research Background

In 1995, the RAND Corporation (RAND) began extensive CMS-sponsored research to assist us in developing a per-discharge based inpatient rehabilitation PPS model using patient classification system known as Functional Independence Measures-Functional Related Groups (FIM-FRGs) using 1994 data. Initial results of RAND's earliest research were revealed in September 1997 and are contained in two reports available through the National Technical Information Service (NTIS). The reports are entitled "Classification System for Inpatient Rehabilitation Patients—A Review and Proposed Revisions to the Functional Independence Measure-Function Related Groups," NTIS order number PB98–105992INZ; and "Prospective Payment System for Inpatient Rehabilitation," NTIS order number PB98–106024INZ.

In summarizing these reports, RAND found in the research based on 1994 data that, with limitations, the FIM-FRGs were effective predictors of resource use based on the proxy measurement: length of stay. FRGs based upon FIM motor score, cognitive scores, and age remained stable over time. Researchers at RAND developed, examined, and evaluated a model payment system based upon FIM-FRG classifications that explains approximately 50 percent of patient costs and approximately 60 percent to 65 percent of the costs at the facility level. Based on this earlier analysis, RAND concluded that an IRF PPS using this model is feasible.

In July 1999, we contracted with RAND to update the earlier study. The update used their earlier research and included an analysis of FIM data, the FRGs, and the model rehabilitation PPS using more recent data from a greater number of IRFs. The purpose of updating the earlier research was to develop the underlying data necessary to support the Medicare IRF PPS based on case-mix groups for the proposed rule. RAND expanded the scope of their earlier research to include the examination of several payment elements, such as comorbidities, facility-level adjustments, and implementation issues, including evaluation and monitoring. This research was used in our development of the IRF PPS. RAND issued a report on its research which can be found on our Web site at *http:cms.hhs.gov/providers/irfpps/research.asp.*

C. Continuing Research

RAND's data efforts over the past year were concentrated on archiving data from the first phase of the project, constructing the analytic files for monitoring special studies, and preparing for post-IRF data that will be used for monitoring and for refinement. RAND's monitoring effort seeks to measure changes in IRF, post-IRF, and post-acute care after implementation of the IRF PPS. The refinement effort necessitates that the methods used to create the initial set of CMGs weights, and facility adjustments be applied to more recent IRF data.

Section 125(b) of the BBRA provides that the Secretary shall conduct a study of the impact on utilization and beneficiary access to services of the implementation of the IRF prospective payment system. A report on the study must be submitted to the Congress not later than 3 years after the date the IRF prospective payment system is first implemented. Accordingly, to continue RAND's research, data from other health care settings are needed to assess the impact on utilization and beneficiary access to services because the IRF PPS can have an impact among other settings that deliver rehabilitative services. If we only analyzed data from IRFs, our assessment of utilization and access would not be complete. In addition to the data obtained from the IRF Medicare claims, functional measures from the IRF PAI, and cost reports, other data are required that shows the utilization and access of rehabilitative services delivered in other settings, such as skilled nursing facilities, long-term care facilities, home health agencies, and outpatient rehabilitation facilities. Analysis of these data may show changes in utilization of inpatient rehabilitation services and if the types or severity of patients treated in IRFs differs significantly from the data used to create the CMGs, case-mix refinements may be needed.

In the next phase of their research, RAND will be developing and testing possible improvements to the payment system using existing data. This analysis will focus on potential improvements to the methods used to establish the CMGs, facility adjustments (such as teaching, rural, and low-income adjustments), and comorbidities.

In constructing the CMGs for the IRF PPS, one of our primary goals was to create payments that would match payment to resource use as closely as possible. It is important to continue to examine the IRF PPS to ensure that the system remains a good predictor of resource use over time. Further, more complete data will be available in which we can assess the reliability and validity of the IRF PPS. We also expect improvements with certain data elements. For example, prior to implementation of the IRF PPS, IRFs were not required to code comorbidities. As a result of implementing the IRF PPS, we expect that IRFs will improve coding comorbidities because they may affect their payment amount. These improved data will allow us to determine the effects various conditions have on the cost of a case.

RAND will use post-IRF PPS data when it becomes available, as well as existing data to support their research. RAND research includes: analyses of methodological improvements in the creation of CMGs, methodological improvements to the statistical approaches used to derive payment adjustments and characterizing IRFs into groups based on their case mix. As mentioned in Section I of this proposed rule, currently, RAND does not have enough post-IRF PPS data to analyze potential modifications to the classification and payment systems. Further, we will need a sufficient amount of these data to be able to determine our future refinements, if any are needed. Because IRFs began to be paid under the IRF PPS based on their cost report start date that occurred on or after January 1, 2002, sufficient data will not be available for those facilities whose cost report start date occurs later in the calendar year. Therefore, in this proposed rule, we are not proposing to change the CMG classification system or the facility level and case level adjustments, other than the wage adjustment. The proposed changes for the wage adjustment are discussed in detail in Section VI of this proposed rule.

D. Staff Time Measurement Data

As described in the August 7, 2001 final rule, we contracted with Aspen Systems Corporation (ASPEN) to collect

actual resource use or staff time measurement (STM) data in a sample of IRFs. Data were collected using the MDS–PAC patient assessment instrument. FIM data were collected at the same time. We believe that these data that measure actual nursing and therapy time spent on patient care may be used to enhance our ability to refine the CMGs.

RAND received ASPEN's analytical database in early spring 2002. After a brief period of working with the data, RAND discovered that their study required details that were not in this summary database. Specifically, about half of the cases within the analytic database had data for only the first part of the patient's stay. RAND needed to have data on how staff time use changed during the stay and the analytic database contained only the averages of the observed portions of the patient's stay. RAND needed data on patients during the second part of their stay.

In late July 2002, RAND received the backup data, but did not assess it until late August 2002. Further technical questions about the data still exist and must be answered before the modeling of the data can occur.

E. Monitoring

A greater part of the ongoing work to be performed by RAND is an analysis to develop a potential system of indicators to monitor the impact and performance of the IRF PPS. As part of their analysis, RAND will case-mix adjust these measures and distinguish between those that will track the direct impact of PPS on IRFs and IRF patients, and those that will track changes in the pool of potential IRF patients. We anticipate that RAND will develop a set of possible indicators needed to monitor the IRF PPS, develop potential access to care models and measures, and define a possible measure of outcomes.

F. Need To Develop Quality Indicators for IRFs

The IRF–PAI is the data collection instrument for IRFs. It contains a blend of FIM items and proposed quality and medical needs questions. These quality and medical needs questions (which are currently collected on a voluntary basis) may need to be modified to encapsulate those data necessary for calculation of a quality indicator. One of the primary tasks of the RAND contract is to identify quality indicators pertinent to the inpatient rehabilitation setting and determine what information is necessary to calculate those quality indicators. These tasks include reviewing literature and other sources for existing rehabilitation quality indicators. It also involves identifying organizations involved in measuring or monitoring quality of care in the inpatient rehabilitation setting. RAND will convene a technical expert panel to identify a series of quality indicators that can be measured using the IRF–PAI. In addition, quality indicators and data elements must be developed for calculation as well as the independent testing of the developed indicators.

IV. The IRF PPS Patient Assessment Process

A. Background

On August 7, 2001, we published the IRF PPS final rule (66 FR 41316), which described how the IRF would use the IRF Patient Assessment Instrument (PAI) to assess an IRF patient. During the fall of 2001, we conducted training on the IRF–PAI assessment process. The training was held in the cities of Baltimore, Maryland, Chicago, Illinois, San Francisco, California, and Atlanta, Georgia. The training was videotaped. During the training sessions we stated that any IRF could obtain the videotapes free of charge. In addition, we stated on the CMS IRF PPS website that any IRF could obtain copies of the videotapes. The IRS–PAI manual, which contains detailed instructions regarding the completion of the IRS–PAI, is also available on the CMS IRF PPS website.

B. Patient Rights

Section 412.608 specifies that prior to performing the IRS–PAI assessment, the IRF must inform the patient of the rights contained in this section. The rights specified in § 412.608 are as follows:

(1) The right to be informed of the purpose of the collection of the patient assessment data;

(2) The right to have the patient assessment information collected be kept confidential and secure;

(3) The right to be informed that the patient assessment information will not be disclosed to others, except for legitimate purposes allowed by the Federal Privacy Act and Federal and State regulations;

(4) The right to refuse to answer patient assessment questions; and

(5) The right to see, review, and request changes on his or her patient assessment.

In addition to the rights specified in § 412.608, a patient has privacy rights under the Privacy Act of 1974 (5 U.S.C. § 552a(e)(3)), and 45 CFR 5b.4(a)(3). The Privacy Act and 45 CFR 5b.4(a)(3) require that an individual be informed under what authority, and for what purpose, individually identifiable information is being collected by a Federal agency and maintained in a system of records. In order to ensure compliance with the Privacy Act of 1974, and 45 CFR 5b.4(a)(3), we are proposing that prior to performing the IRS–PAI assessment an IRF clinician must give to each Medicare inpatient two forms. We have published these forms in Appendix B of this proposed rule. In addition, we are proposing that the form entitled "Privacy Act Statement—Health Care Records" is a detailed description of the patient's privacy rights under the Privacy Act of 1974. Also, we are proposing that the form entitled "Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities" is the simplified plain language description of the Privacy Act Statement—Health Care Records. Additionally, we are proposing that by giving both of these forms to the patient before beginning the IRS–PAI assessment, the IRF would fulfill the requirement that the patient be informed of the five rights specified in § 412.608. Accordingly we are proposing to amend § 412.608 to read as follows:

Patient's rights regarding the collection of patient assessment data.

(a) Before performing an assessment using the inpatient rehabilitation facility patient assessment instrument, a clinician of the inpatient rehabilitation facility must give a Medicare inpatient each of these forms—

(1) The form entitled "Privacy Act Statement—Health Care Records;" and

(2) The simplified plain language description of the Privacy Act Statement—Health Care Records which is a form entitled "Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities."

(b) The inpatient rehabilitation facility must document in the Medicare inpatient's clinical record that the Medicare inpatient has been given the documents specified in paragraph (a) of this section.

(c) The Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities is the simplified plain language description of the Privacy Act Statement—Health Care Records.

(d) By giving the Medicare inpatient the forms specified in paragraph (a) of this section the inpatient rehabilitation facility will inform the Medicare patient of—

(1) Their privacy rights under the Privacy Act of 1974 and 45 CFR 5b.4(a)(3); and

(2) The following rights:

(i) The right to be informed of the purpose of the collection of the patient assessment data;

(ii) The right to have the patient assessment information collected be kept confidential and secure;

(iii) The right to be informed that the patient assessment information will not be disclosed to others, except for legitimate purposes allowed by the Federal Privacy Act and Federal and State regulations;

(iv) The right to refuse to answer patient assessment questions; and

(v) The right to see, review, and request changes on his or her patient assessment.

(e) The patient rights specified in this section are in addition to the patient rights specified in § 482.13 of this chapter.

It should be noted that when the IRF clinician gives the patient the forms entitled "Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities" and the "Privacy Act Statement—Health Care Records" prior to performing an assessment, these forms do not satisfy the privacy provisions contained in the HIPAA Privacy Rule (65 FR 82462 as modified by 67 FR 53182). For example, these forms do not meet the privacy notice requirements of the HIPAA Privacy Rule (see 45 CFR § 164.520). Health plans and health care providers must meet the notice requirements of the HIPAA Privacy Rule by giving a Notice of Privacy Practices to their patients. The Notice of Privacy Practices describes a health plan or health care provider's uses and disclosures of protected health information and the individual rights that patients have with respect to their protected health information.

C. When the IRF–PAI Must Be Completed

According to § 412.606(b), an IRF must use the IRF–PAI to assess Medicare Part A fee-for-service inpatients. According to § 412.610(c)(1)(i)(A), the admission assessment covers the first 3 calendar days of the inpatient's current IRF Medicare Part A fee-for-service hospitalization. According to § 412.610(c)(1)(i)(B), the admission assessment reference date is the third day of the 3-day admission assessment time period. Section 412.610(c)(1)(i)(C) specifies that the IRF–PAI for the admission assessment "Must be completed on the calendar day that follows the admission assessment reference day."

We are concerned IRFs believe § 412.610(c)(1)(i)(C) means that they may not start to record data on the IRF–PAI before the calendar day that follows the admission assessment reference day, which is not our intent. The "completion requirement" of the IRF–PAI means when the IRF's staff must have finished recording on the IRF–PAI the assessment data that the IRF's clinical staff obtained during an assessment of the inpatient that was performed during the admission assessment time period. In other words, the date when the IRF–PAI must be completed is a deadline date when the process of recording data on the IRF–PAI must be finished. The IRF's staff is permitted to enter assessment data on the IRF–PAI prior to the deadline date.

How data are recorded on the IRF–PAI is specified in the IRF–PAI item-by-item guide, which is entitled the "IRF–PAI Training Manual Revised 01/16/02." The instructions contained in the IRF–PAI item-by-item guide are, when possible, very similar to the rules for coding the patient assessment instrument that we used as the model for the IRF–PAI. The model for the IRF–PAI was the patient assessment instrument published by Uniform Data System for Medical Rehabilitation (UDSmr). The UDSmr rules for coding their assessment instrument specified that an item's score should reflect the inpatient's lowest level of functioning. Consequently, in order to be consistent with how an inpatient's functional performance was scored on the UDSmr patient assessment instrument, the IRF–PAI item-by-item guide likewise specifies that a patient's assessment must indicate the patient's lowest level of functioning.

During the admission assessment, an IRF clinician records different types of data on the IRF–PAI. We believe that the sources of the data recorded in the categories of the IRF–PAI entitled "Identification Information," "Admission Information," and "Payer Information" makes these data easy and quick to obtain and record. For these categories of data the source of the data may be the patient, the patient's medical record, other patient documents, the patient's family, or a person that has personal knowledge of the patient. In contrast, in order to complete the data for the IRF–PAI categories entitled "Function Modifiers" and "FIM™ Instrument," the clinician observes the patient's functional performance over the admission assessment time period, and makes clinical judgments regarding the patient's performance. Consequently, due to how the data for the Function Modifiers and FIM™ categories are obtained, we believe it is the time span that it takes to assess the patient's functional performance that will usually determine how long it takes to complete the admission assessment.

Page III–3 of the IRF–PAI manual states that when determining the level of the patient's functional performance the clinician is to "record the lowest (most dependent) score." We believe that in the time span between the patient's admission to and discharge from the IRF, the patient's functional performance improves. We believe that on the patient's admission day and the next few days a patient's functional performance is poor in comparison to functional performance on subsequent days of the patient's current IRF hospitalization. Therefore, during the part of the admission assessment that is the first or second day of the patient's current IRF hospitalization, we believe that a patient's functional performance will usually be scored as indicating the most dependence.

As stated previously, the IRF's clinical staff is permitted to record assessment data on the IRF–PAI at any time during the admission assessment process. Also, as stated previously, we believe it is the scoring of the patient's functional performance that will determine how long it takes to complete the admission assessment. The combination of: (1) Being able to record assessment data at any time during the admission assessment, (2) the requirement that the lowest level of functional performance be recorded, and (3) that the lowest level of functional performance will usually occur on the first or second day of the admission assessment, makes it possible to finish obtaining and recording all the assessment data before the day that follows the admission assessment reference date. However, in accordance with § 412.610(c)(1)(i)(C), an IRF has until the day following the admission assessment reference day to complete the IRF–PAI.

In order to clarify that § 412.610(c)(1)(i)(C) does not prohibit the IRF from recording any or all of the data on the IRF–PAI before the day that follows the admission assessment reference day, we are proposing to amend § 412.610(c)(1)(i)(C) to read as follows: Must be completed by the calendar day that follows the admission assessment reference day.

D. Transmission of IRF–PAI Data

As specified in § 412.606(b), "Patient assessment instrument," an IRF must use the IRF–PAI to assess Medicare Part A fee-for-service inpatients. There are nine categories of IRF–PAI assessment data. The nine categories are entitled "identification information, admission

information, payer information, medical information, medical needs, function modifiers, the FIM™ instrument, discharge information, and quality indicators". The data from some of these categories are used to classify a patient into a CMG. It is the CMG classification code, not the IRF–PAI raw data itself, that is part of the claim data the IRF submits to its FI when the IRF submits data in order to be paid for the services it furnished to the inpatient. We believe that an IRF's clinical staff will initially use the paper version of the IRF–PAI to record its assessment data. Then, in accordance with § 412.610(d), the IRF would use the data that it recorded on the paper version of the IRF–PAI to enter the IRF–PAI data into an electronic version of the document. The electronic version of the IRF–PAI uses the patient assessment data to classify a patient into a CMG. Under the IRF PPS, it is the CMG payment code, along with other information that the IRF submits to the fiscal intermediary (FI), that will determine the payment the IRF receives for the services the IRF furnished to a Medicare Part A fee-for-service beneficiary.

Section 412.614, "Transmission of patient assessment data," specifies that an IRF must transmit to us the IRF–PAI assessment data for each Medicare Part A fee-for-service inpatient. It is the electronic version of the IRF–PAI that enables an IRF to transmit the IRF–PAI data to us. We require that IRFs transmit IRF–PAI data so that we have the IRF–PAI data that are associated with the CMG payment code that the IRF submitted to its FI.

In most cases an IRF will submit claims data, including the patient's CMG, to the FI in order to be paid for the services it furnished to a Medicare Part A fee-for-service inpatient. However, there are situations when the IRF would submit claim data to its FI, but the submission of the claim data is not for the purpose of being paid for any of the services the IRF furnished to a Medicare Part A fee-for-service inpatient.

In these situations, Medicare operational procedures that were in effect before implementation of the IRF PPS requires an IRF to send claim data to the FI. The purpose of the IRF sending claim data to the FI in these situations is to enable Medicare to monitor a beneficiary's period of entitlement. For instance, an IRF must still send the FI claim data even if the inpatient's non-Medicare primary payer paid for all of the IRF services the IRF furnished to the Medicare Part A fee-for-service inpatient. Another instance when the IRF must still send the FI claim data is when any of the services that an inpatient's non-Medicare primary payer did not pay for also do not qualify for payment under the IRF PPS.

We want to relieve the IRF of the burden of transmitting IRF–PAI data to us when the IRF is not requesting that Medicare pay for any of the services the IRF furnished to a Medicare Part A fee-for-service inpatient. Accordingly, we are proposing to amend § 412.614 by specifying that § 412.614(a) is a general rule that would read as follows:

(a) *Data format. General rule.* The inpatient rehabilitation facility must encode and transmit data for each Medicare Part A fee-for-service inpatient—

We are also proposing to further amend § 412.614 by adding a new § 412.614(a)(3), which would relieve the IRF of the burden of having to transmit the IRF–PAI data for a Medicare Part A fee-for-service inpatient when Medicare will not be paying the IRF for any of the services the IRF furnished to that inpatient. New § 412.614(a)(3) would read as follows:

Exception to the general rule. When the inpatient rehabilitation facility does not submit claim data to Medicare in order to be paid for any of the services it furnished to a Medicare Part A fee-for-service inpatient, the inpatient rehabilitation facility is not required to, but may, transmit to Medicare the inpatient rehabilitation facility patient assessment data associated with the services furnished to that same Medicare Part A fee-for-service inpatient.

E. Proposed Revision of the Definition of Discharge

According to § 412.602, a discharge has occurred when the patient has been formally released from the hospital, or has died in the hospital, or when the patient stops receiving Medicare-covered Part A inpatient rehabilitation services. Our intent in specifying this definition of when a discharge has occurred under the IRF PPS was to try to ensure that Medicare paid an IRF only for furnishing an IRF level of services to the Medicare Part A fee-for-service inpatient. However, in contrast to when a patient is formally released from the IRF or dies, the time when a patient stops receiving Medicare-covered Part A IRF services may be subject to different interpretations resulting in different determinations of when a discharge has occurred. The result of different determinations of when a discharge has occurred is inconsistency in determining the discharge date. This inconsistency could result in different IRFs furnishing the same services for the same period of time, but being paid differently, because the discharge date determines a patient's length-of-stay, and the patient's length-of-stay is one of the factors that determines the amount of the CMG payment. For example, according to § 412.624(f), a patient's length-of-stay as determined by the inpatient's discharge date may affect the amount of the IRF's CMG payment when a patient is transferred from an IRF to another site of care.

In addition, there may be cases when an IRF believes an inpatient no longer has a medical need for Medicare-covered Part A inpatient rehabilitation services, but the IRF believes that the inpatient has a medical need for a SNF level of services. However, due to circumstances beyond the IRF's control, the IRF is unable to formally release the patient, because the IRF cannot place the patient in a SNF setting. In that situation, according to section 1861(v)(1)(G)(i) of the Act and § 424.13(b), a physician may certify or recertify that the patient needs to continue to be hospitalized in the IRF. The effect of the physician's certification or recertification is that under Medicare the patient is not considered discharged until the patient is formally released from the IRF.

In consideration of what can occur when discharge is defined as being when the inpatient stops receiving Medicare-covered Part A inpatient rehabilitation services, we are proposing to amend § 412.602 by revising the definition of "discharge" by removing the phrase "(2) The patient stops receiving Medicare-covered Part A inpatient rehabilitation services, unless the patient qualifies for continued hospitalization under § 424.13(b) of this chapter; or". The proposed revised definition would read as follows:

Discharge. A Medicare patient in an inpatient rehabilitation facility is considered discharged when—

(1) The patient is formally released from the inpatient rehabilitation facility; or

(2) The patient dies in the inpatient rehabilitation facility.

F. Waiver of the Penalty for Transmitting the IRF–PAI Data Late

Section 412.614(c) "Transmission dates" states that the admission and discharge assessment data must be transmitted together. The discharge assessment is completed after the admission assessment has been completed. Therefore, the date when the IRF–PAI data must be transmitted is

determined by when the IRF–PAI discharge assessment is completed.

After the discharge assessment has been completed, § 412.610(d) "Encoding dates" specifies that the data must be entered into the electronic version of the IRF–PAI, a process which § 412.602 defines as encoding the data. As specified in § 412.610(d) the IRF has 7 calendar days to encode the discharge assessment. In order for the IRF–PAI data not to be considered as having been transmitted late, § 412.614(d)(2) specifies that the IRF–PAI data must be transmitted to us no later than 10 calendar days from the date specified in § 412.614(c). The date specified in § 412.614(c) is the 7th calendar day of the applicable encoding time period specified in § 412.610(d). The 7th calendar day of the applicable encoding date specified in § 412.610(d) is the end of the discharge assessment encoding time period because none of the data can be transmitted until the discharge assessment has been encoded. The following example, which is very similar to the Chart 3 on page 41332 of the August 7, 2001 final rule (66 FR 41316), is intended to clarify when CMS will determine that the IRF–PAI data was transmitted late.

CHART 2.— EXAMPLE OF APPLYING THE PATIENT ASSESSMENT INSTRUMENT DISCHARGE ASSESSMENT AND TRANSMISSION DATES

Assessment Type	Discharge date	Assessment reference date	IRF–PAI completed by	IRF–PAI encoded by	IRF–PAI data transmitted by	Date when IRF–PAI data transmission is late
Discharge Assessment	10/16/03	10/16/03	10/20/03	10/26/03	11/01/03	11/12/03*

*Or any day after 11/12/03.

If IRF–PAI data are transmitted later than 10 calendar days from the transmission date specified in § 412.614(c), § 412.614(d)(2) specifies that we will assess a penalty by deducting 25 percent from the CMG payment that is associated with the IRF–PAI data that were transmitted late. However, we believe that an IRF may encounter an extraordinary situation, which is beyond its control, and that extraordinary situation could render the IRF unable to comply with § 412.614(c). The IRF must fully describe in the appropriate inpatient's clinical record, or by use of another documentation method as selected by the IRF, the extraordinary situation which the IRF encountered that resulted in the IRF being unable to comply with § 412.614(c). Although an IRF may believe that the facility has encountered an extraordinary situation, the IRF's belief does not mean that CMS is obligated to also automatically determine that the situation was of an extraordinary nature. CMS has the discretion to determine whether the situation described by the IRF is extraordinary.

The extraordinary situation may be, but does not have to be, due to the occurrence of an unusual event. Examples of unusual events include, but are not limited to, fire, flood, earthquake, or other similar incidents that inflict extensive damage to an IRF. Another example of an extraordinary situation is the inability of an IRF to transmit any IRF–PAI data for an extended time period, because during that entire time period there was a problem with the data transmission system that was beyond the control of the IRF. An example of a data transmission system problem that is beyond the control of the IRF is the inability of an IRF to transmit its IRF–PAI data because the computer used by CMS to receive and process the data is malfunctioning. A further example of a data transmission system problem that is beyond the control of the IRF is the existence of a flaw in the software that was distributed by CMS to IRFs, or a flaw in the software specifications made available by CMS to vendors that prevent the IRF from transmitting its IRF–PAI data. In addition, an extraordinary situation may include a situation in which a facility has correctly followed CMS policies and procedures in order to be classified as an IRF and obtain an IRF provider number, but has experienced a delay in attaining an IRF provider number. In light of these possibilities, we are proposing a new § 412.614(e) to read as follows: "Exemption to being assessed a penalty for transmitting the IRF–PAI data late." CMS may waive the penalty specified in paragraph (d) of this section when, due to an extraordinary situation that is beyond the control of an inpatient rehabilitation facility, the inpatient rehabilitation facility is unable to transmit the patient assessment data in accordance with paragraph (c) of this section. Only CMS can determine if a situation encountered by an inpatient rehabilitation facility is extraordinary and qualifies as a situation for waiver of the penalty specified in paragraph (d)(2) of this section. An extraordinary situation may be due to, but is not limited to, fires, floods, earthquakes, or similar unusual events that inflict extensive damage to an inpatient rehabilitation facility. An extraordinary situation may be one that produces a data transmission problem that is beyond the control of the inpatient rehabilitation facility, as well as other situations determined by CMS to be beyond the control of the inpatient rehabilitation facility. An extraordinary situation must be fully documented by the inpatient rehabilitation facility."

G. General Information Regarding the IRF–PAI Assessment Process

We have received many questions regarding the IRF–PAI assessment process policies. We have posted the answers to most of these questions on the IRF PPS website.

1. The IRF PPS Website Address

The current internet address for the IRF PPS website is *http://www.cms.hhs.gov/providers/irfpps/*. Due to changes in CMS internet policies during 2002, the current website address is different from the one we published in the August 7, 2001 final rule.

2.►Exceptions to the IRF–PAI Admission and Discharge Assessment Time Period General Rules

Section 412.610(c)(1)(i) states the general rule that the time span covered during the admission assessment is calendar days 1 through 3 of the patient's current Medicare Part A fee-for-service IRF hospitalization. Section 412.610(c)(2)(i) states the general rule that the discharge assessment time period is a span of time that covers 3 calendar days, which includes the inpatient's discharge date, which is the same date as the discharge assessment reference date, and the 2 calendar days

before the discharge date. We want to remind IRFs that, as specified in § 412.610(c)(1)(ii) and § 412.610(c)(2)(iii), we may use the IRF–PAI item-by-item guide and other instructions to identify items that have a different admission or discharge assessment time period. We may specify different admission and discharge assessment time periods in order to capture patient information for payment and quality of care monitoring objectives appropriately.

V. Patient Classification System for the IRF PPS

As previously stated, in this proposed rule we are proposing to use the same case-mix classification system that was set forth in the August 7, 2001 final rule. It is our intention to pursue the development of possible refinements to the case-mix classification system that will continue to improve the ability of the PPS to accurately pay IRFs. We have awarded a contract to the RAND Corporation (RAND) to conduct additional research that will, in the initial stages, provide us with the data necessary to address the feasibility of developing and proposing refinements. When the study has been completed, we plan to review various approaches so that we can propose an appropriate methodology to develop and apply refinements. Any specific refinement proposal resulting from this research will be published in the **Federal Register**.

Table 1, *Proposed Relative Weights for Case-Mix Groups (CMGs),* presents the proposed CMGs, comorbidity tiers, and corresponding Federal relative weights. We also present the average length of stay for each CMG. As we discussed in the August 7, 2001 final rule (66 FR 41353), the average length of stay for each CMG, along with the discharge destination, is used to determine when an IRF discharge meets the definition of a transfer, which results in a per diem case level adjustment (66 FR 41354). Because these data elements are not changing as a result of this proposed rule, Table 1 is identical to Table 1 that was published in the August 7, 2001 final rule (66 FR 41394 through 41396). The proposed relative weights reflect the inclusion of cases with an interruption of stay (patient returns on day of discharge or either of the next 2 days). The methodology we used to construct the data elements in Table 1 is described in detail in the August 7, 2001 final rule (66 FR 41350 through 41353).

VI. Proposed Fiscal Year 2004 Federal Prospective Payment Rates

A. Expiration of the IRF PPS Transition Period

The transition period provision under section 1886(j)(1) of the Act and § 412.626 of the regulations expired for cost reporting periods beginning on or after October 1, 2002 (FY 2003 and beyond). Accordingly, the payment for discharges during FY 2004 will be based entirely on the proposed adjusted FY 2004 IRF Federal PPS rates.

B. Description of the IRF Standardized Payment Amount

In the August 7, 2001 final rule, we established a standard payment amount referred to as the budget neutral conversion factor under § 412.624(c). In accordance with the methodology described in § 412.624(c)(3)(i), the budget neutral conversion factor for FY 2002, as published in the August 7, 2001 final rule, was $11,838.00. Under § 412.624(c)(3)(i), this amount reflects, as appropriate, any adjustments for outlier payments, budget neutrality, and coding and classification changes as described in § 412.624(d).

The budget neutral conversion factor is a standardized payment amount and the amount reflects the budget neutrality adjustment for FY 2002, as described in § 412.624(d)(2). The statute requires a budget neutrality adjustment only for fiscal years 2001 and 2002. Accordingly, we believe it is more consistent with the statute to refer to the standardized payment as the standardized payment conversion factor, rather than refer to it as a budget neutral conversion factor. Thus, after careful consideration, we are proposing to change all references to the budget neutral conversion factor in §§ 412.624(c) and 412.624(d) to the "standard payment conversion factor." We believe that the standard payment conversion factor better describes the standardized payment amount especially in those fiscal years where a budget neutrality adjustment is not made.

Thus, under § 412.624(c)(3)(i), the standard payment conversion factor for FY 2002 of $11,838.00 reflected the budget neutrality adjustment described in § 412.624(d)(2). Under current revised § 412.624(c)(3)(ii), we updated the FY 2002 standard payment conversion factor ($11,838.00) to FY 2003 by applying an increase factor (the IRF market basket index) of 3.0 percent, as described in the August 1, 2002 update notice (67 FR 49931). This yielded the FY 2003 standard payment conversion factor of $12,193.00 that was published in the August 1, 2002 update notice (67 FR 49931). The FY 2003 standard payment conversion factor will be the basis of the updated FY 2004 standard payment conversion factor that will also reflect the adjustments described below.

C. Proposed Adjustments To Determine the Proposed FY 2004 Standard Payment Conversion Factor

1. IRF Market Basket Index

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in IRF services paid for under the IRF PPS, which is referred to as the IRF market basket index. Accordingly, in updating the FY 2004 payment rates set forth in this proposed rule, we propose to apply an appropriate increase factor, that is equal to the IRF market basket, to the FY 2003 IRF standardized payment amount.

Beginning with the implementation of the IRF PPS in FY 2002 and with the FY 2003 IRF PPS update, the 1992-based excluded hospital with capital market basket has been used to determine the IRF market basket factor for updating payments to rehabilitation facilities. The 1992-based market basket reflected the distribution of costs in 1992 for Medicare-participating freestanding rehabilitation, long-term care, psychiatric, cancer, and children's hospitals. This information was derived from the 1992 Medicare cost reports. A full discussion of the methodology and data sources used to construct the 1992-based excluded hospital with capital market basket is available in Appendix D of the IRF PPS August 7, 2001 final rule **Federal Register** (66 FR 41427).

In this proposed rule, we propose to revise and rebase the excluded hospital with capital market basket to a 1997 base year. We believe that proposing to use 1997 data, rather than 1992 data, to construct the IRF market basket will allow us to more appropriately estimate increases in the costs of IRF goods and services from year to year.

The operating portion of the 1997-based excluded hospital with capital market basket is derived from the 1997-based excluded hospital market basket. The methodology used to develop the excluded hospital market basket operating portion was described in the August 1, 2002 **Federal Register** (67 FR 50042–50044). In brief, the operating cost category weights in the 1997-based excluded market basket added to 100.0. These weights were determined from the Medicare cost reports, the 1997 Business Expenditure Survey from the

Bureau of the Census, and the 1997 Annual Input-Output data from the Bureau of Economic Analysis. In using the 1997 data, we made two methodological revisions to the 1997-based excluded hospital market basket: (1) Changing the wage and benefit price proxies to use the Employment Cost Index (ECI) wage and benefit data for hospital workers, and (2) adding a cost category for blood and blood products.

Previously we used a combination of several ECIs, a great part of which are listed in the 1992-based index such as the hospital, professional, and technical workers ECIs. However, the ECI for hospital workers better represents the movement of hospital wages, salaries, and benefits and it is more reflective of current labor market conditions. For the 1992-based market baskets we were unable to find an adequate data source for the blood cost category. For the 1997-based excluded hospital market basket, we were able to obtain this data from Medicare cost reports. As discussed in the IPPS August 1, 2002 final rule (67 FR 50035), BIPA required that we adequately reflect the price of blood and blood products in the hospital market basket when it was rebased and revised, which was done for the FY 2003 IPPS payment rates.

We believe this revision is also appropriate for the excluded hospital with capital market basket because it results in a more precise measure of the cost category for blood and blood products.

When we add the weight for capital costs to the excluded hospital market basket, the sum of the operating and capital weights must still equal 100.0. Because capital costs account for 8.968 percent of total costs for excluded hospitals in 1997, it holds that operating costs must account for 91.032 percent. Each operating cost category weight from the August 1, 2002 **Federal Register** (67 FR 50442–50444) was rebased to the 1997-based excluded hospital market basket by multiplying by 0.91032 to determine its weight in the 1997-based excluded hospital with capital market basket.

The aggregate capital component of the 1997-based excluded hospital market basket (8.968 percent) was determined from the same set of Medicare cost reports used to derive the operating component. The detailed capital cost categories of depreciation, interest, and other capital expenses were also determined using the Medicare cost reports. As explained below, two sets of weights for the capital portion of the revised and rebased market basket needed to be determined. The first set of weights identifies the proportion of capital expenditures attributable to each capital cost category, while the second set represents relative vintage weights for depreciation and interest. The vintage weights identify the proportion of capital expenditures that is attributable to each year over the useful life of capital assets within a cost category (*see* IPPS final rule published in the August 1, 2002 **Federal Register** (67 FR 50046–50047)) for a discussion of how vintage weights are determined).

The cost categories, price proxies, and base-year FY 1992 and proposed FY 1997 weights for the excluded hospital with capital market basket are presented in Chart 3 "Excluded Hospital With Capital Input Price Index (FY 1992 and Proposed FY 1997) Structure and Weights." Chart 4 "Proposed Excluded Hospital with Capital Input Price Index (FY 1997) Vintage Weights" presents the vintage weights for the proposed 1997-based excluded hospital with capital market basket.

CHART 3.—EXCLUDED HOSPITAL WITH CAPITAL INPUT PRICE INDEX [1] [2] (FY 1992 AND PROPOSED FY 1997) STRUCTURE AND WEIGHTS

Cost category	Price wage variable	Weights (%) base-year 1992	Proposed weights (%) base-year 1997
TOTAL		100.000	100.000
Compensation		57.935	57.579
Wages and Salaries	ECI—Wages and Salaries, Civilian Hospital Workers	47.417	47.335
Employee Benefits	ECI—Benefits, Civilian Hospital Workers to capture total costs (operating and capital), In order to capture total costs (operating and capital), HCFA Occupational Benefit Proxy.	10.519	10.244
Professional fees: Non-Medical	ECI—Compensation: Prof. & Technical Technical	1.908	4.423
Utilities		1.524	1.180
Electricity	WPI—Commercial Electric Power	0.916	0.726
Fuel Oil, Coal, etc.	WPI—Commercial Natural Gas	0.365	0.248
Water and Sewerage	CPI–U—Water & Sewage	0.243	0.206
Professional Liability	HCFA—Professional Liability Premiums	0.983	0.733
All Other Products and Services		28.571	27.117
All Other Products		22.027	17.914
Pharmaceuticals	WPI—Prescription Drugs	2.791	6.318
Food: Direct Purchase	WPI—Processed Foods	2.155	1.122
Food: Contract Service	CPI–U—Food Away from Home	0.998	1.043
Chemicals	WPI—Industrial Chemicals	3.413	2.133
Blood and Blood Products	WPI—Blood and Derivatives		0.748
Medical Instruments	WPI—Med. Inst. & Equipment	2.868	1.795
Photographic Supplies	WPI—Photo Supplies	0.364	0.167
Rubber and Plastics	WPI—Rubber & Plastic Products	4.423	1.366
Paper Products	WPI—Convert. Paper and Paperboard	1.984	1.110
Apparel	WPI—Apparel	0.809	0.478
Machinery and Equipment	WPI—Machinery & Equipment	0.193	0.852
Miscellaneous Products	WPI—Finished Goods excluding Food and Energy	2.029	0.783
All Other Services		6.544	9.203
Telephone	CPI–U—Telephone Services	0.574	0.348
Postage	CPI–U—Postage	0.268	0.702
All Other: Labor	ECI—Compensation: Service Workers	4.945	4.453
All Other: Non-Labor Intensive	CPI–U—All Items (Urban)	0.757	3.700

CHART 3.—EXCLUDED HOSPITAL WITH CAPITAL INPUT PRICE INDEX [1] [2] (FY 1992 AND PROPOSED FY 1997) STRUCTURE AND WEIGHTS—Continued

Cost category	Price wage variable	Weights (%) base-year 1992	Proposed weights (%) base-year 1997
Capital-Related Costs		9.080	8.968
Depreciation		5.611	5.586
Fixed Assets	Boeckh-Institutional Construction:	3.570	3.503
Movable Equipment	WPI—Machinery & Equipment: 11 Year Useful Life	2.041	2.083
Interest Costs		3.212	2.682
Non-profit	Avg. Yield Municipal Bonds: 23 Year Useful Life	2.730	2.280
For-profit	Avg. Yield AAA Bonds: 23 Year Useful Life	0.482	0.402
Other Capital-Related Costs	CPI-U—Residential Rent	0.257	0.699

[1] The operating cost category weights in the excluded hospital market basket described in the August 1, 2002 **Federal Register** (67 FR 50442 through 50444) add to 100.0.
[2] Due to rounding, weights sum to 1.000.

When we add an additional set of cost category weights (total capital weight = 8.968 percent) to this original group, the sum of the weights in the new index must still add to 100.0. Because capital costs account for 8.968 percent of the market basket, then operating costs account for 91.032 percent. Each weight in the 1997-based excluded hospital market basket from the IPPS final rule published in the August 1, 2002 **Federal Register** (67 FR 50442–50444) was multiplied by 0.91032 to determine its weight in the 1997-based excluded hospital with capital market basket.

CHART 4.—PROPOSED EXCLUDED HOSPITAL WITH CAPITAL INPUT PRICE INDEX (FY 1997) VINTAGE WEIGHTS

Year from farthest to most recent	Fixed assets (23-year weights)	Movable assets (11-year weights)	Interest: capital-related (23-year weights)
1	0.018	0.063	0.007
2	0.021	0.068	0.009
3	0.023	0.074	0.011
4	0.025	0.080	0.012
5	0.026	0.085	0.014
6	0.028	0.091	0.016
7	0.030	0.096	0.019
8	0.032	0.101	0.022
9	0.035	0.108	0.026
10	0.039	0.114	0.030
11	0.042	0.119	0.035
12	0.044		0.039
13	0.047		0.045
14	0.049		0.049
15	0.051		0.053
16	0.053		0.059
17	0.057		0.065
18	0.060		0.072
19	0.062		0.077
20	0.063		0.081
21	0.065		0.085
22	0.064		0.087
23	0.065		0.090
Total*	1.0000	1.0000	1.0000

* Due to rounding, weights sum to 1.000.

Chart 5 "Percent Changes in the 1992-based and proposed 1997-based Excluded Hospital with Capital Market Baskets, FY 1999–2004" compares the 1992-based excluded hospital with capital market basket to the proposed 1997-based excluded hospital with capital market basket. As is shown, the rebased and revised market basket grows slightly faster over the 1999–2001 period than the 1992-based market basket. The major reason for this was the switching of the wage and benefit proxy to the ECI for hospital workers from the previous occupational blend. We believe that the ECI is the most appropriate price proxy for measuring changes in wage data facing IRFs. This wage series reflects actual wage data reported by civilian hospitals to the Bureau of Labor Statistics. The ECIs are fixed-weight indexes and strictly measure the change in wage rates and employee benefits per hour. They are appropriately not affected by shifts in skill mix. This differs from the proxy used in the FY 1992-based index in which a blended occupational wage index was used. The blended occupational wage proxy used in the FY 1992-based index and the ECI for wages and salaries for hospitals both reflect a fixed distribution of occupations within

a hospital. The major difference between the two proxies is in the treatment of professional and technical wages (legal, accounting, management, and consulting services from outside the facility). In the blended occupational wage proxy, the professional and technical category was blended evenly between the ECI for wages and salaries for hospitals and the ECI for wages and salaries for professional and technical occupations in the overall economy. The ECI for hospitals reflects hospital-specific occupations. This revision had a similar impact on the hospital PPS and excluded market baskets, as described in the IPPS final rule published in the August 1, 2001 **Federal Register**. The proposed FY 2004 increase in the 1997-based excluded hospital with capital market basket is 3.3 percent.

CHART 5.—PERCENT CHANGES IN THE 1992-BASED AND PROPOSED 1997-BASED EXCLUDED HOSPITAL WITH CAPITAL MARKET BASKETS, FY 1999–2004

Fiscal Year	Percent Change, FY 1992-based Market Basket	Percent Change, Proposed FY 1997-based Market Basket
Actual Historical % Increase (FY 1999–2001)		
1999	2.3	2.7
2000	3.4	3.1
2001	3.9	4.0
Average historical	3.2	3.3
Forecasts (FY 2002–2004)		
2002	2.7	3.6
2003	3.0	3.5
2004	3.0	3.3
Average forecast	2.9	3.5

Section 1886(j)(3)(c) requires that the increase in the IRF PPS payment rate be based on an "appropriate percentage increase in a market basket of goods and services comprising services for which payment is made under this subsection, which may be the market basket percentage increase described in subsection (b)(3)(B)(iii)." To date, we have used a market basket based on the cost structure of all excluded hospitals to satisfy this requirement, and have discussed in prior rules why we feel this market basket provides a reasonable measure of the price changes facing exempt hospitals.

In its March 2002 Report, the Medicare Payment Advisory Commission (MedPAC) recommended the development of a market basket specific to IRF services. As we mentioned in last year's final rule, we have been researching the feasibility of developing such a market basket. This research included analyzing data sources for cost category weights, specifically the Medicare cost reports, and investigating other data sources on cost, expenditure, and price information specific to IRFs. As described in greater detail below, based on this research, we are not proposing at this time to develop a market basket specific to IRF services.

Our analysis of the Medicare cost reports indicates that the distribution of costs among major cost report categories (wages, pharmaceuticals, capital) for IRFs is not substantially different from the 1997-based excluded hospital with capital market basket we propose to use. In addition, the only data available to us was for these cost categories (wages, pharmaceuticals, and capital) presenting a potential problem since no other major cost category would be based on IRF data.

We conducted a sensitivity analysis of annual percent changes in the market basket when the IRF weights for wages, pharmaceuticals, and capital were substituted into the excluded hospital with capital market basket. Other cost categories were recalibrated using ratios available from the inpatient PPS hospital market basket. On average, between the years 1995 through 2002, the excluded hospital with capital market basket increased at essentially the same average annual rate (2.9 percent) as the market basket with IRF weights for wages, pharmaceuticals, and capital (2.8 percent). In addition, in almost any individual year the difference was 0.1 percentage point or less, which is less than the 0.25 percentage point criterion that is used under the IPPS update framework to determine whether a forecast error adjustment is warranted.

The 0.25 percentage point criterion that determines whether a forecast error adjustment is warranted has been used in the IPPS update framework since the implementation of the IPPS. It serves as a guideline for the level of forecast accuracy, since any forecast is likely to contain enough imprecision that differences of one tenth or two-tenths of a percentage point are not thought to be significant. Thus, in this case if the forecast error is not at least greater than two-tenths of a percentage point, it is thought to be similar enough to the actual data as not to warrant an adjustment.

Based on the above, we continue to believe that the excluded hospital with capital market basket is doing an adequate job of reflecting the price changes facing IRFs. We will continue to solicit comments about issues particular to IRFs that should be considered in our development of the proposed 1997-based excluded hospital with capital market basket, as well as encourage suggestions for additional data sources that may be available. Our hope is that the additional cost data being collected under the IRF PPS will eventually allow for the development of a market basket derived specifically from IRF data.

As shown in Chart 4, for the payment rates set forth in this proposed rule, the proposed FY 2004 IRF market basket increase factor using 1997 data is 3.3 percent. Thus, we propose to apply the 3.3 percent increase, in addition to the proposed budget neutral wage adjustment factor described below, to the FY 2003 standard payment

conversion factor ($12,193.00) to determine the proposed 2004 standard payment conversion factor.

2. Proposed Area Wage Adjustment

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs that are attributable to wages and wage-related costs for area differences in wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in a geographic area of a rehabilitation facility compared to the national average wage level for such facilities. The statute requires the Secretary to update this wage index adjustment at least every 36 months. The Secretary is required to update this adjustment on the basis of information available to the Secretary (and updated as appropriate) of the wages and wage-related costs incurred in furnishing rehabilitation services. Any adjustments or updates made under section 1886(j)(6) of the Act shall be made in a budget neutral manner.

3. Updated Wage Data

For the FY 2004 IRF PPS rates proposed in this proposed rule, we are updating the IRF wage index. In implementing the FY 2002 and FY 2003 IRF PPS, we used FY 1997 acute care hospital wage data to develop the IRF wage indices. We believe that the FY 1999 acute care hospital data are the best available because they are currently the most recent complete final data. Accordingly, we are proposing to update from the FY 1997 acute care hospital wage data to the FY 1999 acute care hospital wage data to develop the proposed wage indices contained in this proposed rule. Tables 3A and 3B contain the proposed FY 2004 wage indices for urban and rural areas respectively.

4. Proposed Updated Labor-Related Share

In implementing the FY 2002 and FY 2003 IRF PPS, we used the 1992 market basket data to determine the labor-related share (72.395 percent). As stated above, we are proposing to update the 1992 market basket data to 1997. Doing so allows us to propose to use the 1997-based excluded hospital market basket with capital costs to determine the FY 2004 labor-related share.

We propose to calculate the FY 2004 labor-related share as the sum of the weights for those cost categories contained in the proposed 1997-based excluded hospital with capital market basket that are influenced by local labor markets. These cost categories include wages and salaries, employee benefits, professional fees, labor-intensive services and a 46 percent share of capital-related expenses. The proposed labor-related share for FY 2004 is the sum of the FY 2004 relative importance of each labor-related cost category, and reflects the different rates of price change for these cost categories between the base year (FY 1997) and FY 2004. The proposed sum of the relative importance for FY 2004 for operating costs (wages and salaries, employee benefits, professional fees, and labor-intensive services) is 69.163 percent, as shown in Chart 6 "FY 2004 Labor-Related Share Relative Importance." The portion of capital that is influenced by local labor markets is estimated to be 46 percent. Because the relative importance of capital is 7.653 percent of the 1997-based excluded hospital with capital market basket in FY 2004, we take 46 percent of 7.653 percent to determine the labor-related share of capital for FY 2004. The result is 3.520 percent, which we then add to the 69.163 percent calculated for operating costs to determine the total labor-related relative importance for FY 2004. The resulting labor-related share that we propose to use for IRFs in FY 2004 is 72.683 percent.

CHART 6.—PROPOSED FY 2004 LABOR-RELATED SHARE RELATIVE IMPORTANCE

Cost category	Relative importance 1992-based market basket FY 2004	Relative importance proposed 1997-based market basket FY 2004
Wages and salaries	50.625	49.032
Employee benefits	11.903	11.050
Professional fees	2.055	4.523
Postage	0.252	
All other labor intensive services	5.242	4.558
Subtotal	70.077	69.163
Labor-related share of capital costs	3.394	3.520
Total	73.471	72.683

Chart 6 above shows that rebasing the excluded hospital with capital market basket lowers the increase in labor share that we are proposing to use in FY 2004 relative to what it would have been had we not rebased the excluded hospital with capital market basket. The proposed labor-related share for FY 2004 of 72.683 percent reflects an increase of 0.29 percent from the FY 2003 labor-related share of 72.395 percent. If we did not rebase the excluded hospital with capital market basket, the labor-related share would have increased from 72.395 percent for FY 2003 to 73.471 percent for FY 2004 by approximately 1.1 percent, rather than the proposed increase of 0.29 percent. As we previously stated, we are proposing a labor-related share of 72.683 percent for the FY 2004 IRF PPS payment rates set forth in the proposed rule.

5. Proposed Budget Neutral Wage Adjustment Update Methodology

As stated above, for FY 2004, we are proposing to update the FY 2003 IRF wage indices by using FY 1999 acute care hospital wage data and update the labor-related share by using the 1997 market basket data. Since any adjustment or updates to the IRF wage index made under section 1886(j)(6) of the Act shall be made in a budget neutral manner as required by statute, we are proposing to amend the regulation at § 412.624(e)(1) to reflect this requirement. We are also proposing to determine a budget neutral wage adjustment factor based on an adjustment or update to the wage data to apply to the standard payment conversion factor.

We propose to use the following steps to ensure that the FY 2004 IRF standard payment conversion factor reflects the update to the wage indices and to the labor-related share in a budget neutral manner:

Step 1. We determine the total amount of the FY 2003 IRF PPS rates using the FY 2003 standardized payment amount and the labor-related share and the wage indices from FY 2003 (as published in the August 1, 2002 notice).

Step 2. We then calculate the total amount of IRF PPS payments using the FY 2003 standardized payment amount and the proposed updated FY 2004 labor-related share and wage indices described above.

Step 3. We divide the amount calculated in step 1 by the amount calculated in step 2, which equals the proposed FY 2004 budget neutral wage adjustment factor of 0.9954.

Step 4. We then apply the FY 2004 budget neutral wage adjustment factor from step 3 to the FY 2003 IRF PPS standard payment conversion factor after the application of the market basket update, described above, to determine the proposed FY 2004 standardized payment amount.

D. Proposed Update of Payment Rates Under the IRF PPS for FY 2004

Once we calculate the proposed IRF market basket increase factor and determine the proposed budget neutral wage adjustment factor, we can determine the proposed updated Federal prospective payments for FY 2004. In accordance with proposed revised § 412.624(c)(3)(i), we apply the proposed IRF market basket increase factor of 3.3 percent to the proposed standard payment conversion factor for FY 2003 ($12,193) which equals $12,595. Then, we apply the proposed budget neutral wage adjustment of .9954 to $12,595, which results in an updated proposed standard payment conversion factor for FY 2004 of $12,537. The proposed FY 2004 standard payment conversion factor is applied to each proposed CMG weight shown in Table 1 to compute the proposed unadjusted IRF prospective payment rates for FY 2004 shown in Table 2.

Table 2, Proposed FY 2004 Federal Prospective Payments for Case-Mix Groups (CMGs) for FY 2004, displays the proposed CMGs, the proposed comorbidity tiers, and the corresponding proposed unadjusted IRF prospective payment rates for FY 2004.

E. Examples of Computing the Total Proposed Adjusted IRF Prospective Payments

In general, under § 412.624(e), we will adjust the Federal prospective payment amount associated with a CMG, shown in Table 2, to account an IRF's geographic wage variation, low-income patients and, if applicable, location in a rural area.

The adjustment for an IRF's geographic wage variation includes the proposed FY 2004 labor-related share adjustment of 72.683 percent and the proposed FY 2004 IRF urban or rural wage indices in Tables 3A and 3B, respectively.

The adjustment for low-income patients is based on the formula to account for the cost of furnishing care to low-income patients as discussed in the August 7, 2001 IRF PPS final rule (67 FR 41360). The formula to calculate the low-income patient or LIP adjustment is as follows:

(1 + DSH) raised to the power of (.4838)

Where:

$$DSH = \frac{\text{Medicare SSI Days}}{\text{Total Medicare Days}} + \frac{\text{Medicaid, Non-Medicare Days}}{\text{Total Days}}$$

The adjustment for IRFs located in rural areas is an increase to the Federal prospective payment amount of 19.14 percent. This percentage increase is the same as the one described in the August 7, 2002 IRF PPS final rule (67 FR 41359).

To illustrate the proposed methodology that we will use for adjusting the Federal prospective payments, we provide the following example in Chart 7 below. One beneficiary is in Facility A, an IRF located in rural Maryland, and another beneficiary is in Facility B, an IRF located in the New York City metropolitan statistical area (MSA).

Facility A's disproportionate share hospital (DSH) adjustment is 5 percent, with a low-income patient (LIP) adjustment of (1.0239) and a wage index of (0.8946), and the rural area adjustment (19.14 percent) applies. Facility B's DSH is 15 percent, with a LIP adjustment of (1.0700) and a wage index of (1.4414).

Both Medicare beneficiaries are classified to CMG 0112 (without comorbidities). To calculate each IRF's total proposed adjusted Federal prospective payment, we compute the wage-adjusted Federal prospective payment and multiply the result by the appropriate LIP adjustment and the rural adjustment (if applicable). The following chart illustrates the components of the proposed adjusted payment calculation.

CHART 7.—EXAMPLES OF COMPUTING AN IRF'S PROPOSED FEDERAL PROSPECTIVE PAYMENT

	Facility A	Facility B
Federal Prospective Payment	$25,092.93	$25,092.93
Labor Share	× 0.72683	× 0.72683
Labor Portion of Federal Payment	× 18,238.29	× 18,238.29
Wage Index—(shown in Tables 3A or 3B)	× 0.8946	× 1.4414
Wage-Adjusted Amount	= 16,315.98	= 26,288.67
Non-Labor Amount	+ 6,854.15	+ 6,854.15
Wage-Adjusted Federal Payment	23,170.13	33,142.82
Rural Adjustment	× 1.1914	× 1.0000
Subtotal	27,604.89	33,142.82
LIP Adjustment	× 1.0239	× 1.0700
Total FY'04 Adjusted Federal Prospective Payment	28,264.65	35,462.82

Thus, the proposed adjusted payment for facility A will be $28,264.65, and the proposed adjusted payment for facility B will be $35,462.82.

F. Computing Total Payments Under the IRF PPS for the Transition Period

Under section 1886(j)(1) of the Act and § 412.626, payment for all IRFs with cost reporting periods beginning on or after October 1, 2002 will consist of 100 percent of the proposed FY 2004 adjusted Federal prospective payment (plus any applicable outlier payments under § 412.624(e)(4)) and there will not be any blended payments. Accordingly, the proposed FY 2004 IRF PPS rates set forth in this proposed rule would apply to all discharges on or after October 1, 2003 and before October 1, 2004.

G. IRF-Specific Wage Data

On page 41358 of the August 7, 2001 IRF PPS final rule, we responded to comments regarding the development of a separate wage index for IRFs. Specifically, we responded to these comments as follows:

"At this time, we are unable to develop a separate wage index for rehabilitation facilities. There is a lack of specific IRF wage and staffing data necessary to develop a separate IRF wage index accurately. Further, in order to accumulate the data needed for such an effort, we would need to make modifications to the cost report. In the future, we will continue to research a wage index specific to IRF facilities. Because we do not have an IRF specific wage index that we can compare to the hospital wage index, we are unable to determine at this time the degree to which the acute care hospital data fully represent IRF wages. However, we believe that a wage index based on acute care hospital wage data is the best and most appropriate wage index to use in adjusting payments to IRFs, since both acute care hospitals and IRFs compete in the same labor markets."

We still do not have any IRF-specific wage data to determine the feasibility of developing an IRF-specific wage index or of developing an adjustment to refine the acute care hospital wage data to reflect inpatient rehabilitation services. We continue to look into alternative ways to collect, analyze, develop, and audit IRF-specific wage data that would reflect the wages and wage-related costs attributable to rehabilitation facilities. We believe that the best source to collect IRF-specific wage data is the Medicare cost report—the same source for the acute care hospital wage data. These data must be accurate and reliable, thus collecting these data would increase the recordkeeping and reporting burden on IRFs. Initially, this burden would be imposed to collect data just to determine the feasibility of developing an IRF-specific wage index or development of an adjustment to the current IRF wage index.

In addition, as stated earlier in this section of this proposed rule, any adjustment or update to the wage index must be made in a budget neutral manner in accordance with § 1886(j)(6) of the Act. Thus, the PPS rates for any one IRF could be affected in a positive or negative direction, due to the application of the proposed updates to the labor-related share and wage indices in a budget neutral manner. Accordingly, given the current trend of reducing the Medicare cost reporting burden of collecting data and given that any change to the wage index be budget neutral, we are soliciting comments on possible ways to adjust or refine the current IRF wage index, given those restraints.

Since IRFs and hospitals compete in the same labor markets, we propose to continue to use the acute care hospital wage data to develop the IRF wage index as described earlier in this section of this proposed rule.

H. Proposed Adjustment for High-Cost Outliers Under the IRF Prospective Payment System

In this proposed rule, we are proposing changes to the methodology for determining IRF payments for high-cost outliers. The intent of these proposed changes is to ensure outlier payments are paid only for truly high-cost cases. Further, these proposed changes will allow us to create policies that are consistent among the various Medicare prospective payment systems when appropriate.

We have become aware that under the existing acute care hospital inpatient prospective payment system (IPPS), that some hospitals have taken advantage of two system features in the IPPS outlier policy to maximize their outlier payments. The first is the time lag between the current charges on a submitted bill and the cost-to-charge ratio taken from the most recent settled cost report. Second, statewide average cost-to-charge ratios are used in those instances in which an acute care hospital's operating or capital cost-to-charge ratios fall outside reasonable parameters. We set forth these parameters and the statewide cost-to-charge ratios in the annual notices of prospective payment rates that are published by August 1 of each year in accordance with § 412.8(b). Currently, these parameters represent 3.0 standard deviations (plus or minus) from the geometric mean of cost-to-charge ratios for all hospitals. In some cases, hospitals may increase their charges so far above costs that their cost-to-charge ratios fall below 3 standard deviations from the geometric mean of the cost-to-charge ratio and a higher statewide average cost-to-charge ratio is applied to determine if the acute care hospital should receive an outlier payment. This disparity results in their cost-to-charge ratios being set too high, which in turn results in an overestimation of their current costs per case.

We believe the Congress intended that outlier payments under both the IPPS and the IRF PPS would be made only in situations where the cost of care is extraordinarily high in relation to the average cost of treating comparable conditions or illnesses. Under the existing IPPS outlier methodology, if hospitals' charges are not sufficiently comparable in magnitude to their costs, the legislative purpose underlying the outlier regulations is thwarted. Thus, on March 4, 2003, we published a proposed rule (68 FR 10420–10429) "Proposed Changes in Methodology for Determining Payment for Extraordinarily High-Cost Cases (Cost Outliers) Under the Acute Care Hospital Inpatient Prospective Payment System," with an extensive discussion proposing new regulations to ensure outlier payments are paid for truly high-cost cases under the IPPS.

We believe the use of parameters is appropriate for determining cost-to-charge ratios to ensure these values are reasonable and outlier payments can be made in the most equitable manner possible. Further, we believe the methodology of computing IRF outlier payments is susceptible to the same payment enhancement practices identified under the IPPS and, therefore, merit similar proposed revisions. Accordingly, as discussed below, we are proposing in this proposed rule to make revisions to the IRF outlier payment methodology.

1. Current Outlier Payment Provision Under the IRF PPS

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. In the August 7, 2001 IRF PPS final rule, we codified at § 412.624(e)(4) of the regulations the provision to make an adjustment for additional payments for outlier cases that have extraordinarily high costs relative to the costs of most discharges. Providing additional payments for outliers strongly improves the accuracy of the IRF PPS in

determining resource costs at the patient and facility level. These additional payments reduce the financial losses that would otherwise be caused by treating patients who require more costly care and, therefore, reduce the incentives to underserve these patients.

Under § 412.624(e)(4), we make outlier payments for any discharges if the estimated cost of a case exceeds the adjusted IRF PPS payment for the CMG plus the adjusted threshold amount ($11,211 which is then adjusted for each IRF by the facilities wage adjustment, its LIP adjustment, and its rural adjustment, if applicable). We calculate the estimated cost of a case by multiplying the IRF's overall cost-to-charge ratio by the Medicare allowable covered charge. In accordance with § 412.624(e)(4), we pay outlier cases 80 percent of the difference between the estimated cost of the case and the outlier threshold (the sum of the adjusted IRF PPS payment for the CMG and the adjusted threshold amount).

On November 1, 2001, we published a Program Memorandum (Transmittal A–01–131) with detailed intermediary instructions for calculating the cost-to-charge ratios for the purposes of determining outlier payments under the IRF PPS. We stated the following:

"Intermediaries will use the latest available settled cost report and associated data in determining a facility's overall Medicare cost-to-charge ratio specific to freestanding IRFs and for IRFs that are distinct part units of acute care hospitals. Intermediaries will calculate updated ratios each time a subsequent cost report settlement is made. Further, retrospective adjustments to the data used in determining outlier payments will not be made. If the overall Medicare cost-to-charge ratio appears to be substantially out-of-line with similar facilities, the intermediary should ensure that the underlying costs and charges are properly reported. We are evaluating the use of upper and lower cost-to-charge ratio thresholds (similar with the outlier policy for acute care hospitals) in the future to ensure that the distribution of outlier payments remains equitable."

For this proposed rule, we are proposing to continue to use the $11,211 threshold amount. This threshold amount was used in the FY 2003 IRF PPS payment rates and we believe it remains appropriate because the data should not contain any of the inappropriate payment enhancement practices that would result with the implementation of an outlier policy. The data used to construct the existing IRF-PPS outlier threshold consists of cost and charge data that was not influenced by the incentives the current IRF PPS outlier policy may create. Specifically, we used the IRF cost and charge data from the previous cost-based reimbursement system to establish the outlier threshold. These data were not inappropriately influenced by incentives to inflate charges that are created with the existence of an outlier policy; there is not a need for an outlier policy cost-based reimbursement because IRFs, with some limits, would be paid their costs. This is unlike the outlier situation in IPPS, which used post-PPS data to update its annual threshold amount. The IPPS data reflected the practices that we believe erroneously created inappropriate outlier payments.

We propose to continue to make outlier payments for any discharges if the estimated cost of a case exceeds the adjusted IRF PPS payment for the CMG plus the adjusted threshold amount ($11,211 which is then adjusted for each IRF by the facility's wage adjustment, its LIP adjustment, and its rural adjustment, if applicable). We propose to continue to calculate the estimated cost of a case by multiplying an IRF's overall cost-to-charge ratio by the Medicare allowable covered charge. However, we are proposing to apply a ceiling to an IRF's cost-to-charge ratios which is discussed below. In accordance with § 412.624(e)(4), we will continue to pay outlier cases 80 percent of the difference between the estimated cost of the case and the outlier threshold (the sum of the adjusted IRF PPS payment for the CMG and the adjusted threshold amount). In addition, under the existing methodology described in the preamble to the August 7, 2001 IRF PPS final rule (66 FR 41363), we will continue to assign the applicable national average for new IRFs.

2. Proposed Changes to the IRF Outlier Payment Methodology

Statistical Accuracy of Cost-to-Charge ratios

We believe that there is a need to ensure that the cost-to-charge ratio used to compute an IRF's estimated costs should be subject to a statistical measure of accuracy. Removing aberrant data from the calculation of outlier payments will allow us to enhance the extent to which outlier payments are equitably distributed and continue to reduce incentives for IRFs to underserve patients who require more costly care. Further, using a statistical measure of accuracy to address aberrant cost-to-charge ratios will also allow us to be consistent with the proposed outlier policy changes for the acute care hospital IPPS discussed in the March 4, 2003 Cost Outlier proposed rule, (68 FR 10420). Therefore in this proposed rule, we are proposing the following:

(1) To apply a ceiling to IRF's cost-to-charge ratio if a facility's cost-to-charge ratio is above a ceiling. We will calculate two national ceilings, one for IRFs located in rural areas and one for facilities located in urban areas. We propose to compute this ceiling by first calculating the national average and the standard deviation of the cost-to-charge ratio for both urban and rural IRFs. (Because of the small number of IRF's compared to the number of acute care hospitals, we believe that statewide averages for IRFs, as proposed under the IPPS, would not be statistically valid. Thus, we propose to use national average cost-to-charge ratios in place of statewide averages.) To determine the rural and urban ceiling, we propose to multiply each of the standard deviations by 3 and add the result to the appropriate national cost-to-charge ratio average (rural and urban). We believe this method results in statistically valid ceilings. If an IRF's cost-to-charge ratio is above the applicable ceiling it is considered to be statistically inaccurate and we propose to assign the national (either rural or urban) average cost-to-charge ratio to the IRF. Cost-to-charge ratios above this ceiling are probably due to faulty data reporting or entry, and, therefore, should not be used to identify and make payments for outlier cases because such data are most likely erroneous and therefore should not be relied upon. We propose to update the ceiling and averages using this methodology every year and we will publish these amounts in future program memoranda;

(2) Not assign the applicable national average cost-to-charge ratio when an IRF's cost-to-charge ratio falls below a floor. We are proposing this policy because, as is the case for acute care hospitals, we believe IRFs could arbitrarily increase their charges in order to maximize outlier payments. Even though this arbitrary increase in charges should result in a lower cost-to-charge ratio in the future (due to the lag time in cost report settlement), if we propose the use of a floor, the IRF's cost-to-charge ratio would be raised to the applicable national average. This application of the national average could result in inappropriately higher outlier payments. Accordingly, we are proposing to apply the IRF's actual cost-to-charge ratio to determine the cost of the case rather than creating and applying a floor. Applying an IRF's actual cost-to-charge ratio to charges in the future to determine the cost of a case

will result in more appropriate outlier payments because it does not overstate the actual cost-to-charge ratio. Therefore, consistent with the proposed policy change for acute care hospitals under the IPPS, we are proposing that to use an IRF's actual cost-to-charge ratio no matter how low their ratio fall.

3. Proposed Adjustment of IRF Outlier Payments

Under the existing methodology for computing IRF outlier payments as described in the preamble of the August 7, 2001 IRF PPS final rule (66 FR 41363) and in the November 1, 2001 Program Memorandum discussed above, we specify that the cost-to-charge ratio used to compute estimated costs are obtained from the most recent settled Medicare cost report. Further, we provided for no retroactive adjustment to the outlier payments to account for differences between the cost-to-charge ratio from the latest settled cost report and the actual cost-to-charge ratio for the cost reporting period in which the outlier payment is made. This policy is consistent with the existing outlier payment policy for acute care hospitals under the IPPS. However, as discussed in the IPPS March 4, 2003 Cost Outlier proposed rule (68 FR 10423), we proposed to revise the methodology for determining cost-to-charge ratios for acute care hospitals under the IPPS because we became aware that payment vulnerabilities exist in the current IPPS outlier policy. Because we believe the IRF outlier payment methodology is likewise susceptible to the same payment vulnerabilities, we are proposing the following:

(1) As proposed for acute care hospitals under the IPPS at proposed § 412.84(i) in the March 4, 2003 proposed rule (68 FR 10420), we are proposing under § 412.624(e)(4), by cross-referencing proposed § 412.84(i), that fiscal intermediaries would use more recent data when determining an IRF's cost-to-charge ratio. Specifically, under proposed § 412.84(i), we are proposing that fiscal intermediaries would use either the most recent settled IRF cost report or the most recent tentative settled IRF cost report, whichever is later to obtain the applicable IRF cost-to-charge ratio. In addition, as proposed under § 412.84(i), any reconciliation of outlier payments will be based on a ratio of costs to charges computed from the relevant cost report and charge data determined at the time the cost report coinciding with the discharge is settled. As is the case with the proposed changes to the outlier policy for acute care hospitals under the IPPS, we are still assessing the procedural changes that would be necessary to implement this change.

(2) As proposed for acute care hospitals under the IPPS at proposed § 412.84(m) in the March 4, 2003 proposed rule (68 FR 10420), we are proposing under § 412.624(e)(4), by cross-referencing proposed § 412.84(m), that IRF outlier payments may be adjusted to account for the time value of money which is the value of money during the time period it was inappropriately held by the IRF as an "overpayment." We also may adjust outlier payments for the time value of money for cases that are "underpaid" to the IRF. In these cases, the adjustment will result in additional payments to the IRF. We are proposing that any adjustment will be based upon a widely available index to be established in advance by the Secretary, and will be applied from the midpoint of the cost reporting period to the date of reconciliation.

4. Proposed Change to the Methodology for Calculating the Federal Prospective Payment Rates

Section 412.624(e)(4) Adjustment for high-cost outliers

We provide for an additional payment to a facility if its estimated costs for a patient exceeds a fixed dollar amount (adjusted for area wage levels and factors to account for treating low-income patients and for rural locations) as specified by CMS. The additional payment equals 80 percent of the difference between the estimated cost of the patient and the sum of the adjusted Federal prospective payment computed under this section and the adjusted fixed dollar amount. Additional payments made under this section will be subject to the adjustments at § 412.84(i) except that national averages will be used instead of statewide averages. Additional payments made under this section will also be subject to adjustments at § 412.84(m).

VII. Provisions of the Proposed Rule

Overall, in this proposed rule, we are proposing to update the IRF Federal prospective payment rates from FY 2003 to FY 2004 using the methodology described in § 412.624 of the regulations. Our proposed FY 2004 Federal prospective payment rates would be effective for discharges on or after October 1, 2003 and before October 1, 2004.

We are proposing to update the IRF wage indices for FY 2004 by using FY 1999 acute care hospital data. However, any adjustments or updates made under section 1886(j)(6) of the Act must be made in a budget neutral manner. Therefore, we are proposing a methodology to update the wage indices for FY 2004 using 1999 acute care hospital data in a budget neutral manner.

We are also proposing to modify certain criteria for a hospital or a hospital unit to be classified as an IRF.

Section 412.20 Hospital services subject to the prospective payment systems

We are proposing to redesignate current § 412.20(b) and add a new paragraph (b)(2) that states inpatient hospital services will not be paid for under the IRF PPS if the services are paid by a health maintenance organization (HMO) or competitive medical plan (CMP) that elects not to have CMS make payments to an IRF for services, which are inpatient hospital services, furnished to the HMO's or CMP's Medicare enrollees under part 417.

Section 412.22 Excluded hospitals and hospital units: General rules

We are proposing to eliminate application of the bed-number criteria in § 412.22(h)(2)(i) for freestanding satellite IRFs by revising § 412.22(h)(2) and by adding § 412.22(h)(7).

Section 412.25 Excluded hospital units: Common requirements

We are also proposing to eliminate application of the bed-number criteria for IRF satellite units of a hospital in § 412.25(e)(2)(i) by revising § 412.25(e)(2) and by adding § 412.25(e)(5) to conform with the proposed change in § 412.22(h)(2)(i).

Section 412.29 Excluded rehabilitation units: Additional requirements

Under § 412.29(a), an IRF unit must have met either the requirements for new units or converted units under § 412.30 in order to be excluded from the inpatient acute care PPS. Section 412.29(a)(2) contains an incorrect reference to the requirements for converted units under "§ 412.30(b)." The correct reference to the requirements for converted units is § 412.30(c). Accordingly, we are proposing to make a technical correction by changing the reference in § 412.29(a)(2) to state "Converted units under § 412.30(c)."

Section 412.30 Exclusion of new rehabilitation units and expansion of units already excluded

Section 412.30(b)(3) contains an incorrect reference to the required written certification described in

paragraph "(a)(2)" of this section. The correct reference to the written certification is described in paragraph (2) of § 412.30(b). Accordingly, we are proposing to make a technical correction by changing the current reference to paragraph (a)(2) in paragraph (b)(3) to state "The written certification described in paragraph (b)(2) * * *".

Section 412.30(d)(2)(i) contains an incorrect reference to the definition of new bed capacity under paragraph "(c)(1)" of this section. The correct reference to the definition of new bed capacity is paragraph (d)(1). Accordingly, we are proposing a technical correction to change the current reference to paragraph (c)(1) in paragraph (d)(2)(i) to state "* * * under paragraph (d)(1) of this section."

Revision of the Definition of Discharge in § 412.602

According to § 412.602, a discharge has occurred when the patient has been formally released from the hospital, or has died in the hospital, or when the patient stops receiving Medicare—covered Part A inpatient rehabilitation services. We are proposing to amend § 412.602 by revising the definition of "Discharge." Accordingly, the revised definition would read as follows:

Discharge. A Medicare patient in an inpatient rehabilitation facility is considered discharged when—

(1) The patient is formally released from the inpatient rehabilitation facility; or

(2) The patient dies in the inpatient rehabilitation facility.

General Requirements for Payment Under the Prospective Payment System for Inpatient Rehabilitation Facilities in § 412.604

In § 412.604, "General requirements," in paragraph (a)(2) introductory text, we are proposing to change the word "we" to "CMS or its Medicare fiscal intermediary" to read as follows:

"If an inpatient rehabilitation facility fails to comply fully with these conditions with respect to inpatient hospital services furnished to one or more Medicare Part A fee-for-service beneficiaries, CMS or its Medicare fiscal intermediary may, as appropriate—"

Addition of Requirement To Give Patient the Privacy Act Statement in § 412.608

Section 412.608 specifies that before performing the IRF–PAI assessment, the IRF must inform the patient of the rights contained in this section. The rights specified in § 412.608 are—

(1) The right to be informed of the purpose of the collection of the patient assessment data;

(2) The right to have the patient assessment information collected be kept confidential and secure;

(3) The right to be informed that the patient assessment information will not be disclosed to others, except for legitimate purposes allowed by the Federal Privacy Act and Federal and State regulations;

(4) The right to refuse to answer patient assessment questions; and

(5) The right to see, review, and request changes on his or her patient assessment.

In addition to the rights specified in § 412.608, a patient has privacy rights under the Privacy Act of 1974 (5 U.S.C. § 552a(e)(3)), and 45 CFR 5b.4(a)(3). The Privacy Act and 45 CFR 5b.4(a)(3) require that an individual be informed under what authority, and for what purpose, individually identifiable information is being collected by a Federal agency and maintained in a system of records. In order to ensure that an IRF complies with the Privacy Act of 1974, and 45 CFR 5b.4(a)(3), we are proposing that before performing the IRF–PAI assessment, an IRF clinician must give each Medicare inpatient two forms. We have published these forms in Appendix B "Inpatient Rehabilitation Facility Patient Privacy Forms" of this proposed rule. In addition, we are proposing that the form entitled "Privacy Act Statement—Health Care Records" is a detailed description of patient privacy rights under the Privacy Act of 1974. Also, we are proposing that the form entitled "Inpatient Rehabilitation Facility Patient Assessment Instrument (IRF–PAI) Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities" is the plain language equivalent of the Privacy Act Statement—Health Care Records. Additionally, we are proposing that by giving both of these forms to a patient before starting the IRF–PAI assessment, the IRF would fulfill the requirement that the patient be informed of the five rights specified in § 412.608. Accordingly, we are proposing to amend § 412.608 to read as follows:

Section 412.608 Patients Rights Regarding the Collection of Patient Assessment Data

(a) Before performing an assessment using the patient assessment instrument, a clinician of the inpatient rehabilitation facility must give a Medicare inpatient each of these forms—

(1) The Privacy Act Statement—Health Care Records; and

(2) The Inpatient Rehabilitation Facility Patient Assessment Instrument (IRF–PAI) Privacy Act Statement—Health Care Records.

(b) The Inpatient Rehabilitation Facility Patient Assessment Instrument (IRF–PAI) Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities is the plain language equivalent of the Privacy Act Statement—Health Care Records.

(c) By giving the Medicare inpatient the forms specified in paragraph (a) of this section the inpatient rehabilitation facility has informed the Medicare patient of—

(1) His or her privacy rights under the Privacy Act of 1974 and 45 CFR 5b.4(a)(3); and

(2) The following rights:

(i) The right to be informed of the purpose of the collection of the patient assessment data.

(ii) The right to have the patient assessment information collected be kept confidential and secure.

(iii) The right to be informed that the patient assessment information will not be disclosed to others, except for legitimate purposes allowed by the Federal Privacy Act and Federal and State regulations.

(iv) The right to refuse to answer patient assessment questions.

(v) The right to see, review, and request changes on his or her patient assessment.

(d) The patient rights specified in this section are in addition to the patient rights specified in § 482.13 of this chapter.

By complying with the requirements specified in revised § 412.608 the IRF has not met the separate requirement in 45 CFR 164.520 entitled "Notice of privacy practices for protected health information." Section 164.520 requires that a health plan or health care provider give patients a Notice of Privacy Practices that must describe the health plan's or health care provider's own uses and disclosures of protected health information, and the individual rights that patients have with respect to their protected health information.

When the IRF–PAI Must Be Completed (§ 412.610)

According to § 412.606(b), an IRF must use the IRF–PAI to assess Medicare Part A fee-for-service inpatients. Section 412.610(c)(1)(i)(C) specifies that the IRF–PAI for the admission assessment "Must be completed on the calendar day that follows the admission assessment reference day." In order to clarify that

§ 412.610(c)(1)(i)(C) does not prohibit the IRF from recording any or all of the data on the IRF–PAI before the day that follows the admission assessment reference day, we are proposing to amend § 412.610(c)(1)(i)(C) to read as follows: Must be completed by the calendar day that follows the admission assessment reference day.

Transmission of IRF–PAI Data (§ 412.614)

As specified in § 412.606(b), "Patient assessment instrument," an IRF must use the IRF–PAI to assess Medicare Part A fee-for-service inpatients.

Section 412.614, "Transmission of patient assessment data," specifies that an IRF must transmit to us the IRF–PAI assessment data for each Medicare Part A fee-for-service inpatient. It is the electronic version of the IRF–PAI that enables an IRF to transmit the IRF–PAI data to us. We require that IRFs transmit IRF–PAI data so that we have the IRF–PAI data that are associated with the CMG payment code that the IRF submitted to its FI. We are proposing to amend § 412.614 by specifying that § 412.614(a) is a general rule that would read as follows:

(a) Data format. *General rule.* The IRF must encode and transmit data for each Medicare Part A fee-for-service inpatient—

We are proposing to amend § 412.614 by adding a new § 412.614(a)(3), which would relieve the IRF of having to transmit the IRF–PAI data for a Medicare Part A fee-for-service inpatient when Medicare will not be paying the IRF for any of the services the IRF furnished to that inpatient. New § 412.614(a)(3) would read as follows:

Exception to the general rule. When the inpatient rehabilitation facility does not submit claims data to Medicare in order to be paid for any of the services it furnished to a Medicare Part A fee-for-service inpatient, the inpatient rehabilitation facility is not required, but may, transmit to Medicare the inpatient rehabilitation facility patient assessment data associated with the services furnished to that same Medicare Part A fee-for-service inpatient.

We are proposing a new § 412.614(e) to read as follows: "Exemption to being assessed a penalty for transmitting the IRF-PAI data late. CMS may waive the penalty specified in paragraph (d) of this section when, due to an extraordinary situation that is beyond the control of an inpatient rehabilitation facility, the inpatient rehabilitation facility is unable to transmit the patient assessment data in accordance with paragraph (c) of this section. Only CMS can determine if a situation encountered by an inpatient rehabilitation facility is extraordinary and qualifies as a situation for waiver of the penalty specified in paragraph (d)(2) of this section. An extraordinary situation may be, but is not limited to, fires, floods, earthquakes, or similar unusual events that inflict extensive damage to an inpatient rehabilitation facility. An extraordinary situation may be one that produces a data transmission problem that is beyond the control of the inpatient rehabilitation facility, as well as other situations determined by CMS to be beyond the control of the inpatient rehabilitation facility. An extraordinary situation must be fully documented by the inpatient rehabilitation facility."

Proposed Update of Area Wage Data

In § 412.624(e), "Calculation of the adjusted Federal prospective payment," in paragraph (1), "Adjustment for area wage levels," we are proposing that adjustments or updates to the wage data used to adjust a facility's Federal prospective payment rate under paragraph (e)(1) of this section will be made in a budget neutral manner. We are also proposing to determine a budget neutral wage adjustment factor, based on any adjustment or update to the wage data, to apply to the standard payment conversion factor.

Proposed Adjustment for High-Cost Outliers Under the IRF Prospective Payment System (§ 412.624)

As proposed for acute care hospitals under the IPPS at proposed § 412.84(i) in the March 4, 2003 proposed rule (68 FR 10420), we are proposing under § 412.624(e)(4), by cross-referencing proposed § 412.84(i), that fiscal intermediaries would use more recent data when determining an IRF's cost-to-charge ratio. Specifically, under proposed § 412.84(i), we are proposing that fiscal intermediaries would use either the most recent settled IRF cost report or the most recent tentative settled IRF cost report, whichever is later, to obtain the applicable IRF cost-to-charge ratio. In addition, as proposed under § 412.84(i), any reconciliation of outlier payments will be based on a ratio of costs to charges computed from the relevant cost report and charge data determined at the time the cost report coinciding with the discharge is settled. (Because of the small number of IRFs compared to the number of acute care hospitals, we believe that statewide averages for IRFs, as proposed under the IPPS, would not be statistically valid. Thus, we are proposing to use national average cost-to-charge ratios in place of statewide averages.) As is the case with the proposed changes to the outlier policy for acute care hospitals under the IPPS, we are still assessing the procedural changes that would be necessary to implement this change.

As proposed for acute care hospitals under the IPPS at proposed § 412.84(m) in the March 4, 2003 proposed rule (68 FR 10420), we are proposing under § 412.624(e)(4), by cross-referencing proposed § 412.84(m), that IRF outlier payments may be adjusted to account for the time value of money which is the value of money during the time period it was inappropriately held by the IRF as an "overpayment." We also may adjust outlier payments for the time value of money for cases that "underpaid" to the IRF. In these cases, the adjustment will result in additional payments to the IRF. We are proposing that any adjustment will be based upon a widely available index to be established in advance by the Secretary, and will be applied from the midpoint of the cost reporting period to the date of reconciliation.

VIII. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to provide a 60-day notice in the **Federal Register** and solicit public comment when a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comments on the following issues:

- Whether the information collection is necessary and useful to carry out the proper functions of the agency;
- The accuracy of the agency's estimate of the information collection burden;
- The quality, utility, and clarity of the information to be collected; and
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are therefore soliciting public comment on each of these issues for the proposed information collection requirements discussed below.

Section 412.608 Patients' rights regarding the collection of patient assessment data.

Under this section, before performing an assessment using the inpatient rehabilitation facility patient assessment instrument, a clinician of the inpatient rehabilitation facility must give a Medicare inpatient the form entitled

"Privacy Act Statement—Health Care Records" and the simplified plain language description of the Privacy Act Statement—Health Care Records, which is a form entitled "Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities;" the inpatient rehabilitation facility must document in the Medicare inpatient's clinical record that the Medicare inpatient has been given the documents specified in the section.

The burden associated with this section is the time it will take to document that the patient has been given the requisite forms. We estimate that it will take no more than a minute per patient. There will be an estimated 390,000 admissions per year, for a total of 6,500 hours per year.

Section 412.614 Transmission of Patient Assessment Data

1. The inpatient rehabilitation facility must encode and transmit data for each Medicare Part A fee-for-service inpatient.

These information collection requirements associated with the IRF PPS are currently approved by OMB through July 31, 2005 under OMB number 0938–0842.

2. Under paragraph (e), *Exemption to being assessed a penalty for transmitting the IRF-PAI data late,* CMS may waive the penalty specified in paragraph (d) of this section. To assist CMS in determining if a waiver is appropriate the inpatient rehabilitation facility must fully document the circumstances surrounding the occurrence.

Given that it is estimated that fewer than 10 instances will occur on an annual basis to necessitate a waiver, this requirement is not subject to the PRA as stipulated under 5 CFR 1320.3(c).

We have submitted a copy of this proposed rule to OMB for its review of the information collection requirements in § 412.604, § 412.608 and § 412.614. These requirements are not effective until they have been approved by OMB.

If you have any comments on any of these information collection and record keeping requirements, please mail the original and 3 copies to CMS within 60 days of this publication date directly to the following: Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Office of Regulations Development and Issuances, Reports Clearance Officer, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Attn: Julie Brown, CMS–1474–P; and Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS Desk Officer.

Comments submitted to OMB may also be emailed to the following address: e-mail: *baguilar@omb.eop.gov;* or faxed to OMB at (202) 395–6974.

IX. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

X. Regulatory Impact Analysis

A. Introduction

The August 7, 2001 IRS PPS final rule (66 FR 41316) established the IRF PPS for the payment of inpatient hospital services furnished by a rehabilitation hospital or rehabilitation unit of a hospital with cost reporting periods beginning on or after January 1, 2002. We incorporated a number of elements into the IRF PPS, such as case-level adjustments, a wage adjustment, an adjustment for the percentage of low-income patients, a rural adjustment, and outlier payments. The August 1, 2002 IRF PPS notice (67 FR 49928) set forth updates of the IRF PPS rates contained in the August 7, 2001 IRF PPS final rule. The purpose of the updates set forth in the August 1, 2002 IRF PPS notice was to provide an update to the IRF payment rates for discharges during FY 2003. This proposed rule proposes updated IRF PPS rates for discharges that occur during FY 2004.

In constructing these impacts, we do not attempt to predict behavioral responses, and we do not make adjustments for future changes in such variables as discharges or case-mix. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors due to other changes in the forecasted impact time period. Some examples of such possible events are newly legislated general Medicare program funding changes by the Congress, or changes specifically related to IRFs. In addition, changes to the Medicare program may continue to be made as a result of the BBA, the BBRA, the BIPA, or new statutory provisions. Although these changes may not be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 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.

1. Executive Order 12866

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 this proposed rule, we are proposing to use an updated FY 2004 IRF market basket index and an updated FY 2004 IRF labor-related share and wage indices to update the IRF PPS rates to FY 2004, as described in section VI of this proposed rule. By updating the IRF PPS rates to FY 2004, as proposed in this proposed rule, we estimate that the overall cost to the Medicare program for IRF services in FY 2004 will increase by $204.2 million over FY 2003 levels. The updates to the IRF labor-related share and wage indices are made in a budget neutral manner. Thus, updating the IRF labor-related share and the wage indices to FY 2004 have no overall effect on estimated costs to the Medicare program. Therefore, this estimated cost to the Medicare program is due to the application of the proposed updated IRF market basket of 3.3 percent. Because the cost to the Medicare program is greater than $100 million, this proposed rule is considered a major rule as defined above.

2. Regulatory Flexibility Act (RFA) and Impact on Small Hospitals

The RFA requires agencies to analyze the economic impact of our regulations on small entities. If we determine that the regulation will impose a significant burden on a substantial number of small entities, we must examine options for reducing the burden. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and governmental agencies. Most hospitals

are considered small entities, either by nonprofit status or by having receipts of $6 million to $29 million in any 1 year. (For details, see the Small Business Administration's regulation that set forth size standards for health care industries at 65 FR 69432.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs. Therefore, we assume that all IRFs are considered small entities for the purpose of the analysis that follows. Medicare fiscal intermediaries and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

This proposed rule proposes a 3.3 percent increase to the Federal PPS rates. We do not expect an incremental increase of 3.3 percent to the Medicare Federal rates to have a significant effect on the overall revenues of IRFs. Most IRFs are units of hospitals that provide many different types of services (for example, acute care, outpatient services) and the rehabilitation component of their business is relatively minor in comparison. In addition, IRFs provide services to (and generate revenues from) patients other than Medicare beneficiaries. Accordingly, we certify that this proposed rule will not have a significant impact on small entities.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any proposed rule that will have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 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 (MSA) and has fewer than 100 beds.

This proposed rule will not have a significant impact on the operations of small rural hospitals. As indicated above, this proposed rule proposes a 3.3 percent increase to the Federal PPS rates. In addition, we do not expect an incremental increase of 3.3 percent to the Federal rates to have a significant effect on overall revenues or operations since most rural hospitals provide many different types of services (for example, acute care, outpatient services) and the rehabilitation component of their business is relatively minor in comparison. Accordingly, we certify that this proposed rule will not have a significant impact on the operations of small rural hospitals.

3. Unfunded Mandates Reform Act

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 an expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of at least $110 million. This proposed rule will not have a substantial effect on the governments mentioned nor will it affect private sector costs.

4. Executive Order 13132

We examined this proposed rule in accordance with Executive Order 13132 and determined that it will not have a substantial impact on the rights, roles, or responsibilities of State, local, or tribal governments.

5. Overall Impact

For the reasons stated above, we have not prepared an analysis under the RFA and section 1102(b) of the Act because we have determined that this proposed rule will not have a significant impact on small entities or the operations of small rural hospitals.

B. Anticipated Effects of the Proposed Rule

We discuss below the impacts of this proposed rule on the Federal budget and on IRFs.

1. Budgetary Impact

Section 1886(j)(3)(C) of the Act requires annual updates to the IRF PPS payment rates. Section 1886 (j)(6) of the Act requires the Secretary to adjust or update the labor-related share and the wage indices or the labor-related share and the wage indices the applicable to IRFs not later than October 1, 2001 and at least every 36 months thereafter. We project that updating the IRF PPS for discharges occurring on or after October 1, 2003 and before October 1, 2004 will cost the Medicare program $204.2 million. The proposed update to the IRF labor-related share and wage indices if finalized will be made in a budget neutral manner. Thus, updating the IRF labor-related share and the wage indices to FY 2004 would have no overall effect on estimated costs to the Medicare program. Therefore, this estimated cost to the Medicare program is due to the application of the proposed updated IRF market basket of 3.3 percent.

2. Impact on Providers

For the impact analyses shown in the August 7, 2001 IRF PPS final rule, we simulated payments for 1,024 facilities. To construct the impact analyses set forth in this proposed rule, we use the latest available data. These data include the same facilities that were used in constructing the impact analyses displayed in the August 7, 2001 IRF PPS final rule (66 FR 41364–41365, and 41372). We do not have enough post-IRF PPS data to develop the overall budgetary impact and the impact on providers. Further, we will need a sufficient amount of these data to be able to rely on them as the basis for the impact analysis. Because IRFs began to be paid under the IRF PPS based on their cost report start date that occurred on or after January 1, 2002, sufficient Medicare claims data will not be available for those facilities whose cost report start date occurs later in the calendar year. We do not have enough post-IRF PPS data to develop the overall budgetary impact and the impact on providers. Further, we will need a sufficient amount of these data to be able to rely on them as the basis for the impact analysis. Because IRFs began to be paid under the IRF PPS based on their cost report start date that occurred on or after January 1, 2002, sufficient Medicare claims data will not be available for those facilities whose cost report start date occurs later in the calendar year. The estimated monetary changes among the various classifications of IRFs for discharges occurring on or after October 1, 2003 and before October 1, 2004 is reflected in Chart 8 "Projected Impact of Proposed FY 2004 Update" of this proposed rule.

3. Calculation of the Estimated FY 2003 IRF Prospective Payments

To estimate payments under the IRF PPS for FY 2003, we multiplied each facility's case-mix index by the facility's number of Medicare discharges, the FY 2003 standardized payment amount, the applicable FY 2003 labor-related share and wage indices, a low-income patient adjustment, and a rural adjustment (if applicable). The adjustments include the following:

The wage adjustment, calculated as follows: (.27605 + (.72395 × FY 2003 Wage Index)).

The disproportionate share adjustment, calculated as follows: (1 + Disproportionate Share Percentage) raised to the power of .4838).

The rural adjustment, if applicable, calculated by multiplying payments by 1.1914.

4. Calculation of the Proposed Estimated FY 2004 IRF Prospective Payments

To calculate proposed FY 2004 payments, we use the payment rates described in this proposed rule that reflect the proposed 3.3 percent market basket increase factor using the proposed FY 2004 labor-related share

and wage indices, a low-income patient adjustment, and a rural adjustment (if applicable). The proposed adjustments include the following:

The proposed wage adjustment, calculated as follows: (.27605 + (.72683 × FY 2004 Wage Index)).

The proposed disproportionate share adjustment, calculated as follows: (1 + Disproportionate Share Percentage) raised to the power of .4838).

The proposed rural adjustment, if applicable, calculated by multiplying payments by 1.1914.

Chart 8 "Projected Impact of Proposed FY 2004 Update" illustrates the aggregate impact of the proposed estimated FY 2004 updated payments among the various classifications of facilities compared to the estimated IRF PPS payment rates applicable for FY 2003.

The first column, Facility Classification, identifies the type of facility. The second column identifies the number of facilities for each classification type, and the third column lists the number of cases. The fourth column indicates the impact of the proposed budget neutral wage adjustment. The last column reflects the combined changes including the proposed update to the FY 2003 payment rates by proposed 3.3 percent and the proposed budget neutral wage adjustment (including the proposed FY 2004 labor-related share and the proposed FY 2004 wage indices).

CHART 8.—PROJECTED IMPACT OF PROPOSED FY 2004 UPDATE

Facility classification	Number of facilities	Number of cases	Proposed budget neutral wage adjustment	Proposed total change
Total	1,024	347,809	0.0%	3.3%
Urban unit	725	206,926	−0.5	2.8
Rural unit	131	26,507	0.2	3.5
Urban hospital	156	109,691	0.9	4.3
Rural hospital	12	4,685	−1.3	1.9
Total urban	881	316,617	0.0	3.3
Total rural	143	31,192	0.0	3.2
Urban by Region				
New England	32	15,039	0.1	3.5
Middle Atlantic	133	64,042	−1.5	1.8
South Atlantic	112	52,980	0.5	3.8
East North Central	171	55,071	−0.5	2.7
East South Central	41	23,434	0.9	4.2
West North Central	70	18,087	0.6	3.9
West South Central	154	52,346	1.5	4.8
Mountain	56	14,655	1.1	4.4
Pacific	112	20,963	−0.7	2.6
Rural by Region				
New England	4	829	−0.2	3.1
Middle Atlantic	10	2,424	−1.3	1.9
South Atlantic	20	6,192	−0.8	2.5
East North Central	29	5,152	−0.5	2.8
East South Central	10	3,590	0.2	3.5
West North Central	22	3,820	1.7	4.9
West South Central	32	7,317	0.6	3.9
Mountain	9	1,042	−0.3	3.0
Pacific	7	826	−1.2	2.1

As Chart 8 illustrates, all IRFs are expected to benefit from the proposed 3.3 percent market basket increase that would be applied to FY 2003 IRF PPS payment rates to develop the proposed FY 2004 rates. However, there may be distributional impacts among various IRFs due to the application of the proposed updates to the labor-related share and proposed wage indices in a budget neutral manner.

To summarize, we have proposed that all facilities would receive a 3.3 percent increase in their unadjusted IRF PPS payments. The estimated positive impact among all IRFs reflected in Chart 8 are due to the effect of the proposed update to the IRF market basket index. We also note that, while no changes in the regulations are being proposed, we discuss the potential effects of improved compliance with the 75 percent rule in section II of this proposed rule.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget (OMB).

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV, part 412, as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

1. The authority citation for part 412 continues to read as follows:

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

Subpart B—Hospital Services Subject to and Excluded From the Prospective Payment Systems for Inpatient Operating Costs and Inpatient Capital-Related Costs

2. In § 412.20, the following changes are made:

A. Redesignate paragraph (b) as paragraph (b)(1).

B. Add paragraph (b)(2) to read as follows:

§ 412.20 Hospital services subject to the prospective payment systems.

* * * * *

(b) * * *

(2) CMS will not pay for services under Subpart P of this part if the services are paid for by a health maintenance organization (HMO) or competitive medical plan (CMP) that elects not to have CMS make payments to an inpatient rehabilitation facility for services, which are inpatient hospital services, furnished to the HMO's or CMP's Medicare enrollees, as provided under part 417 of this chapter.

* * * * *

3. In § 412.22, the following changes are made:

A. Revise paragraph (h)(2) introductory text.

B. Add and reserve paragraph (h)(6).

C. Add paragraph (h)(7).

The revisions and addition read as follows:

§ 412.22 Excluded hospitals and hospital units: General rules.

* * * * *

(h) * * *

(2) Except as provided in paragraphs (h)(3) and (h)(7) of this section, effective for cost reporting periods beginning on or after October 1, 1999, a hospital that has a satellite facility must meet the following criteria in order to be excluded from the acute care hospital inpatient prospective payment systems for any period:

* * * * *

(6) [Reserved]

(7) The provisions of paragraph (h)(2)(i) of this section do not apply to any inpatient rehabilitation facility that is subject to the inpatient rehabilitation facility prospective payment system under subpart P of this part, effective for cost reporting periods beginning on or after October 1, 2003.

4. In § 412.25, the following changes are made:

A. Revise paragraph (e)(2) introductory text.

B. Add paragraph (e)(5).

The revision and addition read as follows:

§ 412.25 Excluded hospital units: Common requirements.

* * * * *

(e) * * *

(2) Except as provided in paragraphs (e)(3) and (e)(5) of this section, effective for cost reporting periods beginning on or after October 1, 1999, a hospital that has a satellite facility must meet the following criteria in order to be excluded from the acute care hospital inpatient prospective payment systems for any period:

* * * * *

(5) The provisions of paragraph (e)(2)(i) of this section do not apply to any inpatient rehabilitation facility that is subject to the inpatient rehabilitation facility prospective payment system under subpart P of this part, effective for cost reporting periods beginning on or after October 1, 2003.

* * * * *

5. In § 412.29, revise paragraph (a)(2) to read as follows:

§ 412.29 Excluded rehabilitation units: Additional requirements.

(a) * * *

(2) Converted units under § 412.30(c).

* * * * *

6. In § 412.30, the following changes are made:

A. Revise paragraph (b)(3).

B. Revise paragraph (d)(2)(i).

§ 412.30 Exclusion of new rehabilitation units and expansion of units already excluded.

(b) * * *

(3) The written certification described in paragraph (b)(2) of this section is effective for the first full cost reporting period during which the unit is used to provide hospital inpatient care.

* * * * *

(d) * * *

(2) *Conversion of existing bed capacity.* (i) Bed capacity is considered to be existing bed capacity if it does not meet the definition of new bed capacity under paragraph (d)(1) of this section.

* * * * *

Subpart P—Prospective Payment for Inpatient Rehabilitation Hospitals and Rehabilitation Units

7. In § 412.602, republish the introductory text and revise the definition of "Discharge" to read as follows:

§ 412.602 Definitions.

As used in this subpart—

* * * * *

Discharge. A Medicare patient in an inpatient rehabilitation facility is considered discharged when—

(1) The patient is formally released from the inpatient rehabilitation facility; or

(2) The patient dies in the inpatient rehabilitation facility.

* * * * *

8. In § 412.604, revise paragraph (a)(2) introductory text to read as follows:

§ 412.604 Conditions for payment under the prospective payment system for inpatient rehabilitation facilities.

(a) * * *

(2) If an inpatient rehabilitation facility fails to comply fully with these conditions with respect to inpatient hospital services furnished to one or more Medicare Part A fee-for-service beneficiaries, CMS or its Medicare fiscal intermediary may, as appropriate—

* * * * *

9. Section 412.608 is revised to read as follows:

§ 412.608 Patients' rights regarding the collection of patient assessment data

(a) Before performing an assessment using the inpatient rehabilitation facility patient assessment instrument, a clinician of the inpatient rehabilitation facility must give a Medicare inpatient each of these forms—

(1) The form entitled "Privacy Act Statement—Health Care Records;" and

(2) The simplified plain language description of the Privacy Act Statement—Health Care Records which is a form entitled "Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities."

(b) The inpatient rehabilitation facility must document in the Medicare inpatient's clinical record that the Medicare inpatient has been given the documents specified in paragraph (a) of this section.

(c) The Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities is the simplified plain language description of the Privacy Act Statement—Health Care Records.

(d) By giving the Medicare inpatient the forms specified in paragraph (a) of this section the inpatient rehabilitation facility will inform the Medicare patient of—

(1) Their privacy rights under the Privacy Act of 1974 and 45 CFR 5b.4(a)(3); and

(2) The following rights:

(i) The right to be informed of the purpose of the collection of the patient assessment data;

(ii) The right to have the patient assessment information collected be kept confidential and secure;

(iii) The right to be informed that the patient assessment information will not be disclosed to others, except for legitimate purposes allowed by the Federal Privacy Act and Federal and State regulations;

(iv) The right to refuse to answer patient assessment questions; and

(v) The right to see, review, and request changes on his or her patient assessment.

(e) The patient rights specified in this section are in addition to the patient rights specified in § 482.13 of this chapter.

10. In § 412.610, revise paragraph (c)(1)(i)(C) to read as follows:

§ 412.610 Assessment schedule.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(C) Must be completed by the calendar day that follows the admission assessment reference day.

* * * * *

11. In § 412.614, the following changes are made:

A. Redesignate paragraphs (a)(1) and (a)(2) as (a)(1)(i) and (a)(1)(ii), respectively.

B. Redesignate the introductory text to paragraph (a) as (a)(1) and add a heading to newly designated paragraph (a)(1).

C. Add a new paragraph (a)(2).

D. Add a new paragraph (e).

The revision and additions read as follows:

§ 412.614 Transmission of patient assessment data.

(a) *Data format.* (1) *General rule.* The inpatient rehabilitation facility must encode and transmit data for each Medicare Part A fee-for-service inpatient—

* * * * *

(2) *Exception to the general rule.* When the inpatient rehabilitation facility does not submit claim data to Medicare in order to be paid for any of the services it furnished to a Medicare Part A fee-for-service inpatient, the inpatient rehabilitation facility is not required to, but may, transmit to Medicare the inpatient rehabilitation facility patient assessment data associated with the services furnished to that same Medicare Part A fee-for-service inpatient.

* * * * *

(e) *Exemption to being assessed a penalty for transmitting the IRF-PAI data late.* CMS may waive the penalty specified in paragraph (d) of this section when, due to an extraordinary situation that is beyond the control of an inpatient rehabilitation facility, the inpatient rehabilitation facility is unable to transmit the patient assessment data in accordance with paragraph (c) of this section. Only CMS can determine if a situation encountered by an inpatient rehabilitation facility is extraordinary and qualifies as a situation for waiver of the penalty specified in paragraph (d)(2) of this section. An extraordinary situation may be due to, but is not limited to, fires, floods, earthquakes, or similar unusual events that inflict extensive damage to an inpatient rehabilitation facility. An extraordinary situation may be one that produces a data transmission problem that is beyond the control of the inpatient rehabilitation facility, as well as other situations determined by CMS to be beyond the control of the inpatient rehabilitation facility. An extraordinary situation must be fully documented by the inpatient rehabilitation facility.

12. In § 412.624, the following changes are made:

A. Revise paragraph (c).

B. Revise paragraph (d).

C. Revise paragraph (e)(1).

D. Revise paragraph (e)(4).

The revisions read as follows:

§ 412.624 Methodology for calculating the Federal prospective payment rates.

* * * * *

(c) *Determining the Federal prospective payment rates.* (1) *General.* The Federal prospective payment rates will be established using a standard payment amount referred to as the standard payment conversion factor. The standard payment conversion factor is a standardized payment amount based on average costs from a base year that reflects the combined aggregate effects of the weighting factors, various facility and case level adjustments, and other adjustments.

(2) *Update the cost per discharge.* CMS applies the increase factor described in paragraph (a)(3) of this section to the facility's cost per discharge determined under paragraph (b) of this section to compute the cost per discharge for fiscal year 2002. Based on the updated cost per discharge, CMS estimates the payments that would have been made to the facility for fiscal year 2002 under part 413 of this chapter without regard to the prospective payment system implemented under this subpart.

(3) *Computation of the standard payment conversion factor.* The standard payment conversion factor is computed as follows:

(i) *For fiscal year 2002.* Based on the updated costs per discharge and estimated payments for fiscal year 2002 determined in paragraph (c)(2) of this section, CMS computes a standard payment conversion factor for fiscal year 2002, as specified by CMS, that reflects, as appropriate, the adjustments described in paragraph (d) of this section.

(ii) *For fiscal years after 2002.* The standard payment conversion factor for fiscal years after 2002 will be the standardized payments for the previous fiscal year updated by the increase factor described in paragraph (a)(3) of this section, including adjustments described in paragraph (d) of this section as appropriate.

(4) *Determining the Federal prospective payment rate for each case-mix group.* The Federal prospective payment rates for each case-mix group is the product of the weighting factors described in § 412.620(b) and the standard payment conversion factor described in paragraph (c)(3) of this section.

(d) *Adjustments to the standard payment conversion factor.* The standard payment conversion factor described in paragraph (c)(3) of this section will be adjusted for the following:

(1) *Outlier payments.* CMS determines a reduction factor equal to the estimated proportion of additional outlier payments described in paragraph (e)(4) of this section.

(2) *Budget neutrality.* CMS adjusts the Federal prospective payment rates for fiscal year 2002 so that aggregate payments under the prospective payment system, excluding any additional payments associated with elections not to be paid under the transition period methodology under § 412.626(b), are estimated to equal the amount that would have been made to inpatient rehabilitation facilities under part 413 of this chapter without regard to the prospective payment system implemented under this subpart.

(3) *Coding and classification changes.* CMS adjusts the standard payment conversion factor for a given year if CMS determines that revisions in case-mix classifications or weighting factors for a previous fiscal year (or estimates that those revisions for a future fiscal year) did result in (or would otherwise result in) a change in aggregate payments that are a result of changes in the coding or classification of patients that do not reflect real changes in case-mix.

(e) * * *

(1) *Adjustment for area wage levels.* The labor portion of a facility's Federal prospective payment is adjusted to account for geographical differences in the area wage levels using an appropriate wage index. The application of the wage index is made on the basis of the location of the facility in an urban or rural area as defined in § 412.602. Adjustments or updates to the wage data used to adjust a facility's Federal prospective payment rate under this paragraph will be made in a budget neutral manner. CMS determines a budget neutral wage adjustment factor, based on any adjustment or update to the wage data, to apply to the standard payment conversion factor.

* * * * *

(4) *Adjustment for high-cost outliers.* CMS provides for an additional payment to an inpatient rehabilitation

facility if its estimated costs for a patient exceeds a fixed dollar amount (adjusted for area wage levels and factors to account for treating low-income patients and for rural locations) as specified by CMS. The additional payment equals 80 percent of the difference between the estimated cost of the patient and the sum of the adjusted Federal prospective payment computed under this section and the adjusted fixed dollar amount. Additional payments made under this section will be subject to the adjustments at § 412.84(i) and at § 412.84(m), except that national averages will be used instead of statewide averages. Additional payments made under this section will also be subject to adjustments at § 412.84(m).

* * * * *

Dated: March 18, 2003.

Thomas A Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: May 6, 2003.

Tommy G. Thompson,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations:

Appendix A—Methodology to Determine Compliance with the 75 Percent Rule

Section 412.23(b)(2) specifies that during the most recent cost reporting period 75 percent of an IRF's inpatient population must have had a medical condition that can be matched to one of ten medical conditions specified in this section. This requirement is commonly termed the "75 percent rule."

CMS used the IRF–PAI database to estimate the percentage of IRFs that submitted IRF–PAI data during the first eight months of calendar year 2002 that met the 75 percent rule. Under the existing IRF PPS regulations, an IRF must send CMS an IRF–PAI data record that contains data about each Medicare Part A fee-for-service inpatient admitted to the IRF. The IRF–PAI is submitted by the IRF after the inpatient has been discharged.

Section II of the preamble contains Chart 1 "Estimates of Compliance with the 75 Percent Rule." Chart 1 illustrates the estimated percentage of IRFs whose Medicare inpatient populations had medical conditions considered to be consistent with one or more of the medical conditions in § 412.23(b)(2). In addition, Chart 1 also shows the estimated percentage of IRFs that met lower thresholds.

For example, in the "65% rule" column of Chart 1 shows the percentage of IRFs that submitted IRF–PAI data during the first eight months of calendar year 2002 that had 65 percent of their Medicare inpatient population included in at least one of the ten medical conditions specified in § 412.23(b)(2).

An IRF–PAI data record was counted as meeting one of the ten medical conditions specified in § 412.23(b)(2) if its impairment group code given in IRF–PAI item 21 is listed in one of the codes listed in Table 4 "Acceptable Impairment Group Codes" below, or if any of its diagnoses (IRF–PAI items 22 and 24a through 24j) are listed in Table 5 "Acceptable ICD–9–CM Codes" below. (This list may not be all inclusive, but represents a conservative list of diagnoses more likely to be consistent with the ten diagnoses.)

Table 4 illustrates that the pairing of some impairment group codes with specific etiologic diagnosis ICD–9–CM codes within the same IRF–PAI data record resulted in that data record not being counted as meeting one of the ten medical conditions specified in § 412.23(b)(2). For example, if an IRF–PAI data record specified both the impairment group code 02.1 (non-traumatic brain injury) and the etiologic diagnosis ICD–9–CM code 215.0 (other benign neoplasms of connective and other soft tissue of head and neck) then that admission was not counted as meeting one of the medical conditions specified in § 412.23(b)(2). However, regardless of the impairment group code specified in an IRF–PAI data record the data record for the admission was counted as meeting one of the ten medical conditions specified in § 412.23(b)(2) if IRF–PAI items 22 and 24a through 24j contained an ICD–9–CM code as specified in Table 5 "Acceptable ICD–9–CM Codes" below. The data analyzed represents 8 months of IRF–PAI data records.

Appendix B—Inpatient Rehabilitation Facility Patient Privacy Forms

BILLING CODE 4120–01–P

PRIVACY ACT STATEMENT - HEALTH CARE RECORDS

THIS STATEMENT GIVES YOU NOTICE REQUIRED BY LAW (the Privacy Act of 1974).

THIS STATEMENT IS NOT A CONSENT FORM. IT WILL NOT BE USED TO RELEASE OR TO USE YOUR HEALTH CARE INFORMATION.

I. AUTHORITY FOR COLLECTION OF YOUR INFORMATION, INCLUDING YOUR SOCIAL SECURITY NUMBER, AND WHETHER OR NOT YOU ARE REQUIRED TO PROVIDE INFORMATION FOR THIS ASSESSMENT. Sections 1102(a), 1154,), 1861(z), 1864, 1865, 1866, 1871, 1886(j) of the Social Security Act.

Medicare participating inpatient rehabilitation facilities must do a complete assessment that accurately reflects your current clinical status and includes information that can be used to show your progress toward your rehabilitation goals. The inpatient rehabilitation facility must use the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IFR-PAI) as part of that assessment, when evaluating your clinical status. The IRF-PAI must be used to assess every Medicare Part A fee-for-service inpatient, and it may be used to assess other types of inpatients. This information will be used by the Centers for Medicare & Medicaid Services (CMS) to be sure that the inpatient rehabilitation facility is paid appropriately for the services that they furnish you, and to help evaluate that the inpatient rehabilitation facility meets quality standards and gives appropriate health care to its patients. You have the right to refuse to provide information to the inpatient rehabilitation facility for the assessment. Information provided to the federal government for this assessment is protected under the Federal Privacy Act of 1974 and the IRF-PAI System of Records. You have the right to see, copy, review, and request correction of inaccurate or missing personal health information in the IRF-PAI System of Records.

II. PRINCIPAL PURPOSES FOR WHICH YOUR INFORMATION IS INTENDED TO BE USED

The information collected will be entered into the IRF-PAI System No. 09-70-1518. Your health care information in the IRF-PAI System of Records will be used for the following purposes:

- support the IRF prospective payment system (PPS) for payment of the IRF Medicare Part A fee-for services furnished by the IRF to Medicare beneficiaries;
- help validate and refine the Medicare IRF-PPS
- study and help ensure the quality of care provided by IRFs;
- enable CMS and its agents to provide IRFs with data for their quality assurance and ultimately quality improvement activities;
- support agencies of the State government , deeming organizations or accrediting agencies to determine, evaluate and assess overall effectiveness and quality of IRF services provided in the State;
- provide information to consumers to allow them to make better informed selections of providers;
- support regulatory and policy functions performed within the IRF or by a contractor or consultant;
- support constituent requests made to a Congressional representative;
- support litigation involving the facility;
- support research on the utilization and quality of Inpatient rehabilitation services; as well as, evaluation, or epidemiological projects related to the prevention of disease or disability, or the restoration or maintenance of health for understanding and improving payment systems.

III. ROUTINE USES

These "routine uses" specify the circumstances when the Centers for Medicare & Medicaid Services may release your information from the IRF-PAI System of Records without your consent. Each prospective recipient must agree in writing to ensure the continuing confidentiality and security of your information. Disclosures of protected health information authorized by these routine uses may be made only if, and as, permitted or required by the 'Standards for Privacy of Individually Identifiable Health Information.' Disclosures of the information may be to:

1. To agency contractors or consultants who have been contracted by the agency to assist in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity;
2. To a Peer Review Organization (PRO) in order to assist the PRO to perform Title XI and Title XVIII functions relating to assessing and improving IRF quality of care. PROs will work with IRFs to implement quality improvement programs, provide consultation to CMS, its contractors, and to State agencies;
3. To another Federal or State agency:
    a. To contribute to the accuracy of CMS's proper payment of Medicare benefits,
    b. To enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds, or
    c. To improve the state survey process for investigation of complains related to health and safety or quality of care and to implement a more outcome oriented survey and certification program.

4. To an individual or organization for a research, evaluation, or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health epidemiological or for understanding and improving payment projects.
5. To a member of Congress or to a congressional staff member in response to a inquiry of the Congressional Office made at the written request of the constituent about whom the record is maintained.
6. To the Department of Justice (DOJ), court or adjudicatory body when:
    a. The agency or any component thereof; or
    b. Any employee of the agency in his or her official capacity; or
    c. Any employee of the agency in his or her individual capacity where the employee; or
    d. The United States Government; is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation and the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.
7. To a CMS contractor (including, but not necessarily limited to fiscal intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.
8. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in whole or part by Federal funds, when disclosure is deemed reasonable necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat frauds or abuse in such programs;
9. To a national accrediting organization that has been approved for deeming authority for Medicare requirements for inpatient rehabilitation services (I.e., the Joint Commission for the Accreditation of Healthcare Organizations, the American Osteopathic Association and the Commission of Accreditation of Rehabilitation Facilities). Data will be released to these organizations only for those facilities that participate in Medicare by virtue of their accreditation status.
10. To insurance companies, third party administrators (TPA), employers, self-insurers, manage care organizations, other supplemental insurers, non-coordinating insurers, multiple employer trusts, group health plans (i.e., health maintenance organizations (HMO) or a competitive medical plan (CMP)) with a Medicare contract, or a Medicare-approved health care prepayment plan (HCPP), directly or through a contractor, and other groups providing protection for their enrollees. Information to be disclosed shall be limited to Medicare entitlement data. In order to receive the information, they must agree to:
    a. Certify that the individual about whom the information is being provided is one of its insured or employees, or is insured and/or employed by another entity for whom they serve as a third party administrator;
    b. Utilize the information solely for the purpose of processing the individual's insurance claims; and
    c. Safeguard the confidentiality of the data and prevent unauthorized access.

IV. EFFECT ON YOU IF YOU DO NOT PROVIDE INFORMATION

The inpatient rehabilitation facility needs the information contained in the IRF-PAI in order to comply with the Medicare regulations. Your inpatient rehabilitation facility will also use the IRF-PAI to assist in providing you with quality care. It is important that the information be correct. Incorrect information could result in payment errors. Incorrect information also could make it difficult to evaluate if the facility is giving you quality services. If you choose not to provide information, there is no federal requirement for the inpatient rehabilitation facility to refuse you services.

CONTACT INFORMATION

If you want to ask the Centers for Medicare & Medicaid Services to see, review, copy or request correction of inaccurate or missing personal health information which that Federal agency maintains in its IRF-PAI System of Records:

Call 1-800-MEDICARE, toll free, for assistance in contacting the IRF-PAI System of Records Manager.

TTY for the hearing and speech impaired: 1-800-820-1202

Data Collection Information Summary for Patients in Inpatient Rehabilitation Facilities

This notice is a summary of the information contained in the attached "Privacy Act Statement-Health Care Records"

As a hospital rehabilitation inpatient, you have the privacy rights listed below.

- **You have the right to know why we need to ask you questions.**

  We are required by federal law to collect health information to make sure:
  1) you get quality health care, and
  2) payment for Medicare patients is correct.

- **You have the right to have your personal health care information kept confidential and secure.**

  - You will be asked to tell us information about yourself so that we can provide the most appropriate, comprehensive services for you.
  - We keep anything we learn about you confidential and secure. This means only those who are legally permitted to use or obtain the information collected during this assessment will see it.

- **You have the right to refuse to answer questions.**

  You do not have to answer any questions to get services.

- **You have the right to look at your personal health information.**

  - We know how important it is that the information we collect about you is correct.
  - You may ask to review the information you provided. If you think we made a mistake, you can ask us to correct it.

In addition, you may ask the Centers for Medicare & Medicaid Services to see, review, copy or request correction of inaccurate or missing personal identifying health information which this Federal agency maintains in its IRF-PAI System of Records. For CONTACT INFORMATION or a detailed description of your privacy rights, refer to the attached PRIVACY ACT STATEMENT – HEALTH CARE RECORDS.
Note: The rights listed above are in concert with the rights listed in the hospital conditions of participation and the rights established under the Federal Privacy Rule.

This is a Medicare & Medicaid Approved Notice.

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

TABLES

Table 1. – Proposed Relative Weights for Case-Mix Groups (CMGs)

CMG	CMG Description (M = motor, C = cognitive, A = age)	Proposed Relative Weights				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0101	Stroke M=69-84 and C=23-35	0.4778	0.4279	0.4078	0.3859	10	9	6	8
0102	Stroke M=59-68 and C=23-35	0.6506	0.5827	0.5553	0.5255	11	12	10	10
0103	Stroke M=59-84 and C=5-22	0.8296	0.7430	0.7080	0.6700	14	12	12	12
0104	Stroke M=53-58	0.9007	0.8067	0.7687	0.7275	17	13	12	13
0105	Stroke M=47-52	1.1339	1.0155	0.9677	0.9158	16	17	15	15
0106	Stroke M=42-46	1.3951	1.2494	1.1905	1.1267	18	18	18	18
0107	Stroke M=39-41	1.6159	1.4472	1.3790	1.3050	17	20	21	21
0108	Stroke M=34-38 and A>=83	1.7477	1.5653	1.4915	1.4115	25	27	22	23
0109	Stroke M=34-38 and A<=82	1.8901	1.6928	1.6130	1.5265	24	24	22	24
0110	Stroke M=12-33 and A>=89	2.0275	1.8159	1.7303	1.6375	29	25	27	26
0111	Stroke M=27-33 and A=82-88	2.0889	1.8709	1.7827	1.6871	29	26	24	27
0112	Stroke M=12-26 and A=82-88	2.4782	2.2195	2.1149	2.0015	40	33	30	31
0113	Stroke M=27-33 and A<=81	2.2375	2.0040	1.9095	1.8071	30	27	27	28
0114	Stroke M=12-26 and A<=81	2.7302	2.4452	2.3300	2.2050	37	34	32	33
0201	Traumatic brain injury M=52-84 and C=24-35	0.7689	0.7276	0.6724	0.6170	13	14	14	11
0202	Traumatic brain injury M=40-51 and C=24-35	1.1181	1.0581	0.9778	0.8973	18	16	17	16
0203	Traumatic brain injury M=40-84 and C=5-23	1.3077	1.2375	1.1436	1.0495	19	20	19	18
0204	Traumatic brain injury M=30-39	1.6534	1.5646	1.4459	1.3269	24	23	22	22
0205	Traumatic brain injury M=12-29	2.5100	2.3752	2.1949	2.0143	44	36	35	31
0301	Non-traumatic brain injury M=51-84	0.9655	0.8239	0.7895	0.7195	14	14	12	13
0302	Non-traumatic brain injury M=41-50	1.3678	1.1672	1.1184	1.0194	19	17	17	16
0303	Non-traumatic brain injury M=25-40	1.8752	1.6002	1.5334	1.3976	23	23	22	22
0304	Non-traumatic brain injury M=12-24	2.7911	2.3817	2.2824	2.0801	44	32	34	31
0401	Traumatic spinal cord injury M=50-84	0.9282	0.8716	0.8222	0.6908	15	15	16	14
0402	Traumatic spinal cord injury M=36-49	1.4211	1.3344	1.2588	1.0576	21	18	22	19

CMG	CMG Description	Proposed Relative Weights				Average Length of Stay			
	M = motor, C = cognitive, A = age)	Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0403	Traumatic spinal cord injury M=19-35	2.3485	2.2052	2.0802	1.7478	32	32	31	30
0404	Traumatic spinal cord injury M=12-18	3.5227	3.3078	3.1203	2.6216	46	43	62	40
0501	Non-traumatic spinal cord injury M=51-84 and C=30-35	0.7590	0.6975	0.6230	0.5363	12	13	10	10
0502	Non-traumatic spinal cord injury M=51-84 and C=5-29	0.9458	0.8691	0.7763	0.6683	15	17	10	12
0503	Non-traumatic spinal cord injury M=41-50	1.1613	1.0672	0.9533	0.8206	17	17	15	14
0504	Non-traumatic spinal cord injury M=34-40	1.6759	1.5400	1.3757	1.1842	23	21	21	19
0505	Non-traumatic spinal cord injury M=12-33	2.5314	2.3261	2.0778	1.7887	31	31	29	28
0601	Neurological M=56-84	0.8794	0.6750	0.6609	0.5949	14	13	12	12
0602	Neurological M=47-55	1.1979	0.9195	0.9003	0.8105	15	15	14	15
0603	Neurological M=36-46	1.5368	1.1796	1.1550	1.0397	21	18	18	18
0604	Neurological M=12-35	2.0045	1.5386	1.5065	1.3561	31	24	25	23
0701	Fracture of lower extremity M=52-84	0.7015	0.7006	0.6710	0.5960	13	13	12	11
0702	Fracture of lower extremity M=46-51	0.9264	0.9251	0.8861	0.7870	15	15	16	14
0703	Fracture of lower extremity M=42-45	1.0977	1.0962	1.0500	0.9326	18	17	17	16
0704	Fracture of lower extremity M=38-41	1.2488	1.2471	1.1945	1.0609	14	20	19	18
0705	Fracture of lower extremity M=12-37	1.4760	1.4740	1.4119	1.2540	20	22	22	21
0801	Replacement of lower extremity joint M=58-84	0.4909	0.4696	0.4518	0.3890	9	9	8	8
0802	Replacement of lower extremity joint M=55-57	0.5667	0.5421	0.5216	0.4490	10	10	9	9
0803	Replacement of lower extremity joint M=47-54	0.6956	0.6654	0.6402	0.5511	9	11	11	10
0804	Replacement of lower extremity joint M=12-46 and C=32-35	0.9284	0.8881	0.8545	0.7356	15	14	14	12
0805	Replacement of lower extremity joint M=40-46 and C=5-31	1.0027	0.9593	0.9229	0.7945	16	16	14	14
0806	Replacement of lower extremity joint M=12-39 and C=5-31	1.3681	1.3088	1.2592	1.0840	21	20	19	18

CMG	CMG Description (M = motor, C = cognitive, A = age)	Proposed Relative Weights				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0901	Other orthopedic M=54-84	0.6988	0.6390	0.6025	0.5213	12	11	11	11
0902	Other orthopedic M=47-53	0.9496	0.8684	0.8187	0.7084	15	15	14	13
0903	Other orthopedic M=38-46	1.1987	1.0961	1.0334	0.8942	18	18	17	16
0904	Other orthopedic M=12-37	1.6272	1.4880	1.4029	1.2138	23	23	23	21
1001	Amputation, lower extremity M=61-84	0.7821	0.7821	0.7153	0.6523	13	13	12	13
1002	Amputation, lower extremity M=52-60	0.9998	0.9998	0.9144	0.8339	15	15	14	15
1003	Amputation, lower extremity M=46-51	1.2229	1.2229	1.1185	1.0200	18	17	17	18
1004	Amputation, lower extremity M=39-45	1.4264	1.4264	1.3046	1.1897	20	20	19	19
1005	Amputation, lower extremity M=12-38	1.7588	1.7588	1.6086	1.4670	21	25	23	23
1101	Amputation, non-lower extremity M=52-84	1.2621	0.7683	0.7149	0.6631	18	11	13	12
1102	Amputation, non-lower extremity M=38-51	1.9534	1.1892	1.1064	1.0263	25	18	17	18
1103	Amputation, non-lower extremity M=12-37	2.6543	1.6159	1.5034	1.3945	33	23	22	25
1201	Osteoarthritis M=55-84 and C=34-35	0.7219	0.5429	0.5103	0.4596	13	10	11	9
1202	Osteoarthritis M=55-84 and C=5-33	0.9284	0.6983	0.6563	0.5911	16	11	13	13
1203	Osteoarthritis M=48-54	1.0771	0.8101	0.7614	0.6858	18	15	14	13
1204	Osteoarthritis M=39-47	1.3950	1.0492	0.9861	0.8882	22	19	16	17
1205	Osteoarthritis M=12-38	1.7874	1.3443	1.2634	1.1380	27	21	21	20
1301	Rheumatoid, other arthritis M=54-84	0.7719	0.6522	0.6434	0.5566	13	14	13	11
1302	Rheumatoid, other arthritis M=47-53	0.9882	0.8349	0.8237	0.7126	16	14	14	14
1303	Rheumatoid, other arthritis M=36-46	1.3132	1.1095	1.0945	0.9469	20	18	16	17
1304	Rheumatoid, other arthritis M=12-35	1.8662	1.5768	1.5555	1.3457	25	25	29	22
1401	Cardiac M=56-84	0.7190	0.6433	0.5722	0.5156	15	12	11	11
1402	Cardiac M=48-55	0.9902	0.8858	0.7880	0.7101	13	15	13	13
1403	Cardiac M=38-47	1.2975	1.1608	1.0325	0.9305	21	19	16	15
1404	Cardiac M=12-37	1.8013	1.6115	1.4335	1.2918	30	24	21	20
1501	Pulmonary M=61-84	0.8032	0.7633	0.6926	0.6615	15	13	13	13

CMG	CMG Description (M = motor, C = cognitive, A = age)	Proposed Relative Weights				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
1502	Pulmonary M=48-60	1.0268	0.9758	0.8855	0.8457	17	17	14	15
1503	Pulmonary M=36-47	1.3242	1.2584	1.1419	1.0906	21	20	18	18
1504	Pulmonary M=12-35	2.0598	1.9575	1.7763	1.6965	30	28	30	26
1601	Pain syndrome M=45-84	0.8707	0.8327	0.7886	0.6603	15	14	13	13
1602	Pain syndrome M=12-44	1.3320	1.2739	1.2066	1.0103	21	20	20	18
1701	Major multiple trauma without brain or spinal cord injury M=46-84	0.9996	0.9022	0.8138	0.7205	16	14	11	13
1702	Major multiple trauma without brain or spinal cord injury M=33-45	1.4755	1.3317	1.2011	1.0634	21	21	20	18
1703	Major multiple trauma without brain or spinal cord injury M=12-32	2.1370	1.9288	1.7396	1.5402	33	28	27	24
1801	Major multiple trauma with brain or spinal cord injury M=45-84 and C=33-35	0.7445	0.7445	0.6862	0.6282	12	12	12	10
1802	Major multiple trauma with brain or spinal cord injury M=45-84 and C=5-32	1.0674	1.0674	0.9838	0.9007	16	16	16	16
1803	Major multiple trauma with brain or spinal cord injury M=26-44	1.6350	1.6350	1.5069	1.3797	22	25	20	22
1804	Major multiple trauma with brain or spinal cord injury M=12-25	2.9140	2.9140	2.6858	2.4589	41	29	40	40
1901	Guillian Barre M=47-84	1.1585	1.0002	0.9781	0.8876	15	15	16	15
1902	Guillian Barre M=31-46	2.1542	1.8598	1.8188	1.6505	27	27	27	24
1903	Guillian Barre M=12-30	3.1339	2.7056	2.6459	2.4011	41	35	30	40
2001	Miscellaneous M=54-84	0.8371	0.7195	0.6705	0.6029	12	13	11	12
2002	Miscellaneous M=45-53	1.1056	0.9502	0.8855	0.7962	15	15	14	14
2003	Miscellaneous M=33-44	1.4639	1.2581	1.1725	1.0543	20	18	18	18
2004	Miscellaneous M=12-32 and A>=82	1.7472	1.5017	1.3994	1.2583	30	22	21	22
2005	Miscellaneous M=12-32 and A<=81	2.0799	1.7876	1.6659	1.4979	33	25	24	24
2101	Burns M=46-84	1.0357	0.9425	0.8387	0.8387	18	18	15	16
2102	Burns M=12-45	2.2508	2.0482	1.8226	1.8226	31	26	26	29
5001	Short-stay cases, length of stay is 3 days or fewer				0.1651				3
5101	Expired, orthopedic, length of stay is 13 days or fewer				0.4279				8

CMG	CMG Description (M = motor, C = cognitive, A = age)	Proposed Relative Weights				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
5102	Expired, orthopedic, length of stay is 14 days or more				1.2390				23
5103	Expired, not orthopedic, length of stay is 15 days or fewer				0.5436				9
5104	Expired, not orthopedic, length of stay is 16 days or more				1.7100				28

TABLE 2.—PROPOSED FISCAL YEAR 2004 FEDERAL PROSPECTIVE PAYMENTS FOR CASE-MIX GROUPS (CMGS)

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidities
0101	$5,990.21	$5,364.61	$5,112.61	$4,838.05
0102	8,156.61	7,305.34	6,961.83	6,588.23
0103	10,400.74	9,315.04	8,876.24	8,399.83
0104	11,292.13	10,113.65	9,637.24	9,120.71
0105	14,215.77	12,731.38	12,132.11	11,481.44
0106	17,490.45	15,663.80	14,925.37	14,125.51
0107	20,258.64	18,143.63	17,288.61	16,360.86
0108	21,911.02	19,624.26	18,699.02	17,696.06
0109	23,696.30	21,222.74	20,222.28	19,137.82
0110	25,418.89	22,766.05	21,692.87	20,529.44
0111	26,188.66	23,455.59	22,349.82	21,151.27
0112	31,069.34	27,826.00	26,514.63	25,092.93
0113	28,051.67	25,124.27	23,939.52	22,655.72
0114	34,228.68	30,655.62	29,211.35	27,644.22
0201	9,639.75	9,121.96	8,429.92	7,735.37
0202	14,017.69	13,265.46	12,258.74	11,249.50
0203	16,394.71	15,514.61	14,337.38	13,157.64
0204	20,728.78	19,615.48	18,127.34	16,635.42
0205	31,468.02	29,778.02	27,517.59	25,253.40
0301	12,104.53	10,329.28	9,898.01	9,020.41
0302	17,148.19	14,633.26	14,021.45	12,780.28
0303	23,509.49	20,061.80	19,224.33	17,521.80
0304	34,992.19	29,859.52	28,614.59	26,078.34
0401	11,636.90	10,927.30	10,307.97	8,660.60
0402	17,816.42	16,729.45	15,781.65	13,259.19
0403	29,443.29	27,646.72	26,079.59	21,912.27
0404	44,164.30	41,470.09	39,119.39	32,867.16
0501	9,515.63	8,744.60	7,810.59	6,723.63
0502	11,857.55	10,895.96	9,732.52	8,378.52
0503	14,559.29	13,379.55	11,951.58	10,287.91
0504	21,010.86	19,307.07	17,247.23	14,846.39
0505	31,736.31	29,162.46	26,049.50	22,425.04
0601	11,025.09	8,462.52	8,285.74	7,458.30
0602	15,018.14	11,527.83	11,287.12	10,161.29
0603	19,266.95	14,788.72	14,480.30	13,034.78
0604	25,130.54	19,289.52	18,887.08	17,001.51
0701	8,794.75	8,783.46	8,412.37	7,472.09
0702	11,614.33	11,598.03	11,109.09	9,866.67
0703	13,761.93	13,743.13	13,163.91	11,692.06
0704	15,656.28	15,634.97	14,975.52	13,300.57
0705	18,504.70	18,479.63	17,701.08	15,721.47
0801	6,154.44	5,887.40	5,664.24	4,876.92
0802	7,104.75	6,796.34	6,539.33	5,629.14
0803	8,720.78	8,342.16	8,026.23	6,909.17
0804	11,639.41	11,134.16	10,712.92	9,222.26
0805	12,570.91	12,026.80	11,570.45	9,960.69
0806	17,151.95	16,408.50	15,786.67	13,590.17
0901	8,760.90	8,011.18	7,553.58	6,535.57
0902	11,905.19	10,887.18	10,264.09	8,881.25
0903	15,028.17	13,741.87	12,955.80	11,210.64
0904	20,400.30	18,655.15	17,588.24	15,217.48
1001	9,805.23	9,805.23	8,967.76	8,177.92
1002	12,534.55	12,534.55	11,463.89	10,454.65
1003	15,331.57	15,331.57	14,022.70	12,787.80
1004	17,882.86	17,882.86	16,355.85	14,915.34
1005	22,050.18	22,050.18	20,167.11	18,391.87
1101	15,823.02	9,632.22	8,962.74	8,313.32

TABLE 2.—PROPOSED FISCAL YEAR 2004 FEDERAL PROSPECTIVE PAYMENTS FOR CASE-MIX GROUPS (CMGS)—Continued

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidities
1102	24,489.89	14,909.07	13,871.00	12,866.78
1103	33,277.12	20,258.64	18,848.22	17,482.93
1201	9,050.50	6,806.37	6,397.66	5,762.03
1202	11,639.41	8,754.63	8,228.07	7,410.66
1203	13,503.67	10,156.27	9,545.72	8,597.92
1204	17,489.20	13,153.88	12,362.79	11,135.42
1205	22,408.74	16,853.57	15,839.32	14,267.17
1301	9,677.36	8,176.67	8,066.34	6,978.13
1302	12,389.12	10,467.19	10,326.78	8,933.91
1303	16,463.67	13,909.87	13,721.81	11,871.34
1304	23,396.66	19,768.44	19,501.40	16,871.12
1401	9,014.15	8,065.09	7,173.71	6,464.11
1402	12,414.20	11,105.33	9,879.20	8,902.57
1403	16,266.84	14,553.02	12,944.51	11,665.73
1404	22,583.01	20,203.47	17,971.88	16,195.37
1501	10,069.77	9,569.54	8,683.17	8,293.27
1502	12,873.05	12,233.66	11,101.57	10,602.59
1503	16,601.57	15,776.64	14,316.07	13,672.92
1504	25,823.84	24,541.29	22,269.58	21,269.12
1601	10,916.02	10,439.61	9,886.73	8,278.22
1602	16,699.36	15,970.96	15,127.22	12,666.19
1701	12,532.05	11,310.94	10,202.66	9,032.95
1702	18,498.43	16,695.60	15,058.26	13,331.91
1703	26,791.70	24,181.48	21,809.47	19,309.58
1801	9,333.84	9,333.84	8,602.93	7,875.78
1802	13,382.06	13,382.06	12,333.96	11,292.13
1803	20,498.09	20,498.09	18,892.10	17,297.38
1804	36,532.99	36,532.99	33,672.04	30,827.38
1901	14,524.18	12,539.57	12,262.50	11,127.89
1902	27,007.33	23,316.42	22,802.40	20,692.42
1903	39,289.89	33,920.27	33,171.81	30,102.73
2001	10,494.77	9,020.41	8,406.10	7,558.59
2002	13,860.97	11,912.71	11,101.57	9,982.01
2003	18,353.00	15,772.88	14,699.70	13,217.82
2004	21,904.75	18,826.90	17,544.36	15,775.38
2005	26,075.83	22,411.25	20,885.49	18,779.26
2101	12,984.63	11,816.18	10,514.83	10,514.83
2102	28,218.41	25,678.41	22,850.05	22,850.05
5001				2,069.87
5101				5,364.61
5102				15,533.42
5103				6,815.15
5104				21,438.37

TABLE 3A.—PROPOSED URBAN WAGE INDEX

MSA	Urban area (constituent counties or county equivalents)	Wage index
0040	Abilene, TX	0.7792
	Taylor, TX	
0060	Aguadilla, PR	0.4587
	Aguada, PR	
	Aguadilla, PR	
	Moca, PR	
0080	Akron, OH	0.9600
	Portage, OH	
	Summit, OH	
0120	Albany, GA	1.0594
	Dougherty, GA	
	Lee, GA	
0160	Albany-Schenectady-Troy, NY.	0.8384
	Albany, NY	
	Montgomery, NY	
	Rensselaer, NY	
	Saratoga, NY	
	Schenectady, NY	
	Schoharie, NY	
0200	Albuquerque, NM	0.9315
	Bernalillo, NM	
	Sandoval, NM	
	Valencia, NM	
0220	Alexandria, LA	0.7859
	Rapides, LA	
0240	Allentown-Bethlehem-Easton, PA.	0.9735
	Carbon, PA	
	Lehigh, PA	
	Northampton, PA	
0280	Altoona, PA	0.9225
	Blair, PA	
0320	Amarillo, TX	0.9034
	Potter, TX	
	Randall, TX	
0380	Anchorage, AK	1.2358
	Anchorage, AK	
0440	Ann Arbor, MI	1.1103
	Lenawee, MI	
	Livingston, MI	
	Washtenaw, MI	
0450	Anniston,AL	0.8044
	Calhoun, AL	
0460	Appleton-Oshkosh-Neenah, WI.	0.8997
	Calumet, WI	
	Outagamie, WI	
	Winnebago, WI	
0470	Arecibo, PR	0.4337

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Arecibo, PR	
	Camuy, PR	
	Hatillo, PR	
0480	Asheville, NC	0.9876
	Buncombe, NC	
	Madison, NC	
0500	Athens, GA	1.0211
	Clarke, GA	
	Madison, GA	
	Oconee, GA	
0520	Atlanta, GA	0.9991
	Barrow, GA	
	Bartow, GA	
	Carroll, GA	
	Cherokee, GA	
	Clayton, GA	
	Cobb, GA	
	Coweta, GA	
	De Kalb, GA	
	Douglas, GA	
	Fayette, GA	
	Forsyth, GA	
	Fulton, GA	
	Gwinnett, GA	
	Henry, GA	
	Newton, GA	
	Paulding, GA	
	Pickens, GA	
	Rockdale, GA	
	Spalding, GA	
	Walton, GA	
0560	Atlantic City-Cape May, NJ.	1.1017
	Atlantic City, NJ	
	Cape May, NJ	
0580	Auburn-Opelika, AL.	0.8325
	Lee, AL	
0600	Augusta-Aiken, GA–SC.	1.0264
	Columbia, GA	
	McDuffie, GA	
	Richmond, GA	
	Aiken, SC	
	Edgefield, SC	
0640	Austin-San Marcos, TX.	0.9637
	Bastrop, TX	
	Caldwell, TX	
	Hays, TX	
	Travis, TX	
	Williamson, TX	
0680	Bakersfield, CA	0.9899
	Kern, CA	
0720	Baltimore, MD	0.9929
	Anne Arundel, MD	
	Baltimore, MD	
	Baltimore City, MD	
	Carroll, MD	
	Harford, MD	
	Howard, MD	
	Queen Annes, MD	
0733	Bangor, ME	0.9664
	Penobscot, ME	
0743	Barnstable-Yarmouth, MA.	1.3202
	Barnstable, MA	
0760	Baton Rouge, LA	0.8294
	Ascension, LA	
	East Baton Rouge	
	Livingston, LA	
	West Baton Rouge, LA	
0840	Beaumont-Port Arthur, TX.	0.8324
	Hardin, TX	
	Jefferson, TX	
	Orange, TX	
0860	Bellingham, WA	1.2282
	Whatcom, WA	
0870	Benton Harbor, MI	0.9042
	Berrien, MI	
0875	Bergen-Passaic, NJ.	1.2150
	Bergen, NJ	
	Passaic, NJ	
0880	Billings, MT	0.9022
	Yellowstone, MT	
0920	Biloxi-Gulfport-Pascagoula, MS.	0.8757
	Hancock, MS	
	Harrison, MS	
	Jackson, MS	
0960	Binghamton, NY	0.8341
	Broome, NY	
	Tioga, NY	
1000	Birmingham, AL	0.9222
	Blount, AL	
	Jefferson, AL	
	St. Clair, AL	
	Shelby, AL	
1010	Bismarck, ND	0.7972
	Burleigh, ND	
	Morton, ND	
1020	Bloomington, IN	0.8907
	Monroe, IN	
1040	Bloomington-Normal, IL.	0.9109
	McLean, IL	
1080	Boise City, ID	0.9310
	Ada, ID	
	Canyon, ID	
1123	Boston-Worcester-Lawrence-Lowell-Brockton, MA–NH.	1.1235
	Bristol, MA	
	Essex, MA	
	Middlesex, MA	
	Norfolk, MA	
	Plymouth, MA	
	Suffolk, MA	
	Worcester, MA	
	Hillsborough, NH	
	Merrimack, NH	
	Rockingham, NH	
	Strafford, NH	
1125	Boulder-Longmont, CO.	0.9689
	Boulder, CO	
1145	Brazoria, TX	0.8535
	Brazoria, TX	
1150	Bremerton, WA	1.0944
	Kitsap, WA	
1240	Brownsville-Harlingen-San Benito, TX.	0.8880
	Cameron, TX	
1260	Bryan-College Station, TX.	0.8821
	Brazos, TX	
1280	Buffalo-Niagara Falls, NY.	0.9365
	Erie, NY	
	Niagara, NY	
1303	Burlington, VT	1.0052
	Chittenden, VT	
	Franklin, VT	
	Grand Isle, VT	
1310	Caguas, PR	0.4371
	Caguas, PR	
	Cayey, PR	
	Cidra, PR	
	Gurabo, PR	
	San Lorenzo, PR	
1320	Canton-Massillon, OH.	0.8932
	Carroll, OH	
	Stark, OH	
1350	Casper, WY	0.9690
	Natrona, WY	
1360	Cedar Rapids, IA	0.9056
	Linn, IA	
1400	Champaign-Urbana, IL.	1.0635
	Champaign, IL	
1440	Charleston-North Charleston, SC.	0.9235
	Berkeley, SC	
	Charleston, SC	
	Dorchester, SC	
1480	Charleston, WV	0.8898
	Kanawha, WV	
	Putnam, WV	
1520	Charlotte-Gastonia-Rock Hill, NC–SC.	0.9850
	Cabarrus, NC	
	Gaston, NC	
	Lincoln, NC	
	Mecklenburg, NC	
	Rowan, NC	
	Stanly, NC	
	Union, NC	
	York, SC	
1540	Charlottesville, VA	1.0438
	Albemarle, VA	
	Charlottesville City, VA	
	Fluvanna, VA	
	Greene, VA	
1560	Chattanooga, TN–GA.	0.8976
	Catoosa, GA	
	Dade, GA	
	Walker, GA	
	Hamilton, TN	
	Marion, TN	
1580	Cheyenne, WY	0.8628
	Laramie, WY	
1600	Chicago, IL	1.1044
	Cook, IL	

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	De Kalb, IL	
	Du Page, IL	
	Grundy, IL	
	Kane, IL	
	Kendall, IL	
	Lake, IL	
	McHenry, IL	
	Will, IL	
1620	Chico-Paradise, CA.	0.9745
	Butte, CA	
1640	Cincinnati, OH–KY–IN.	0.9381
	Dearborn, IN	
	Ohio, IN	
	Boone, KY	
	Campbell, KY	
	Gallatin, KY	
	Grant, KY	
	Kenton, KY	
	Pendleton, KY	
	Brown, OH	
	Clermont, OH	
	Hamilton, OH	
	Warren, OH	
1660	Clarksville-Hopkinsville, TN–KY.	0.8406
	Christian, KY	
	Montgomery, TN	
1680	Cleveland-Lorain-Elyria, OH.	0.9670
	Ashtabula, OH	
	Geauga, OH	
	Cuyahoga, OH	
	Lake, OH	
	Lorain, OH	
	Medina, OH	
1720	Colorado Springs, CO.	0.9916
	El Paso, CO	
1740	Columbia, MO	0.8496
	Boone, MO	
1760	Columbia, SC	0.9307
	Lexington, SC	
	Richland, SC	
1800	Columbus, GA–AL	0.8374
	Russell, AL	
	Chattanoochee, GA	
	Harris, GA	
	Muscogee, GA	
1840	Columbus, OH	0.9751
	Delaware, OH	
	Fairfield, OH	
	Franklin, OH	
	Licking, OH	
	Madison, OH	
	Pickaway, OH	
1880	Corpus Christi, TX	0.8729
	Nueces, TX	
	San Patricio, TX	
1890	Corvallis, OR	1.1453
	Benton, OR	
1900	Cumberland, MD–WV.	0.7847
	Allegany, MD	
	Mineral, WV	
1920	Dallas, TX	0.9998

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Collin, TX	
	Dallas, TX	
	Denton, TX	
	Ellis, TX	
	Henderson, TX	
	Hunt, TX	
	Kaufman, TX	
	Rockwall, TX	
1950	Danville, VA	0.8859
	Danville City, VA	
	Pittsylvania, VA	
1960	Davenport-Moline-Rock Island, IA–IL.	0.8835
	Scott, IA	
	Henry, IL	
	Rock Island, IL	
2000	Dayton-Springfield, OH.	0.9282
	Clark, OH	
	Greene, OH	
	Miami, OH	
	Montgomery, OH	
2020	Daytona Beach, FL.	0.9062
	Flagler, FL	
	Volusia, FL	
2030	Decatur, AL	0.8973
	Lawrence, AL	
	Morgan, AL	
2040	Decatur, IL	0.8055
	Macon, IL	
2080	Denver, CO	1.0601
	Adams, CO	
	Arapahoe, CO	
	Broomfield, CO	
	Denver, CO	
	Douglas, CO	
	Jefferson, CO	
2120	Des Moines, IA	0.8791
	Dallas, IA	
	Polk, IA	
	Warren, IA	
2160	Detroit, MI	1.0448
	Lapeer, MI	
	Macomb, MI	
	Monroe, MI	
	Oakland, MI	
	St. Clair, MI	
	Wayne, MI	
2180	Dothan, AL	0.8137
	Dale, AL	
	Houston, AL	
2190	Dover, DE	0.9356
	Kent, DE	
2200	Dubuque, IA	0.8795
	Dubuque, IA	
2240	Duluth-Superior, MN–WI.	1.0368
	St. Louis, MN	
	Douglas, WI	
2281	Dutchess County, NY.	1.0684
	Dutchess, NY	
2290	Eau Claire, WI	0.8952
	Chippewa, WI	
	Eau Claire, WI	
2320	El Paso, TX	0.9265

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	El Paso, TX	
2330	Elkhart-Goshen, IN	0.9722
	Elkhart, IN	
2335	Elmira, NY	0.8416
	Chemung, NY	
2340	Enid, OK	0.8376
	Garfield, OK	
2360	Erie, PA	0.8925
	Erie, PA	
2400	Eugene-Springfield, OR.	1.0944
	Lane, OR	
2440	Evansville-Henderson, IN–KY.	0.8177
	Posey, IN	
	Vanderburgh, IN	
	Warrick, IN	
	Henderson, KY	
2520	Fargo-Moorhead, ND–MN.	0.9684
	Clay, MN	
	Cass, ND	
2560	Fayetteville, NC	0.8889
	Cumberland, NC	
2580	Fayetteville-Springdale-Rogers, AR.	0.8100
	Benton, AR	
	Washington, AR	
2620	Flagstaff, AZ–UT	1.0682
	Coconino, AZ	
	Kane, UT	
2640	Flint, MI	1.1135
	Genesee, MI	
2650	Florence, AL	0.7792
	Colbert, AL	
	Lauderdale, AL	
2655	Florence, SC	0.8780
	Florence, SC	
2670	Fort Collins-Loveland, CO.	1.0066
	Larimer, CO	
2680	Ft. Lauderdale, FL	1.0297
	Broward, FL	
2700	Fort Myers-Cape Coral, FL.	0.9680
	Lee, FL	
2710	Fort Pierce-Port St. Lucie, FL.	0.9823
	Martin, FL	
	St. Lucie, FL	
2720	Fort Smith, AR–OK.	0.7895
	Crawford, AR	
	Sebastian, AR	
	Sequoyah, OK	
2750	Fort Walton Beach, FL.	0.9693
	Okaloosa, FL	
2760	Fort Wayne, IN	0.9457
	Adams, IN	
	Allen, IN	
	De Kalb, IN	
	Huntington, IN	
	Wells, IN	
	Whitley, IN	
2800	Forth Worth-Arlington, TX.	0.9446

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Hood, TX	
	Johnson, TX	
	Parker, TX	
	Tarrant, TX	
2840	Fresno, CA	1.0216
	Fresno, CA	
	Madera, CA	
2880	Gadsden, AL	0.8505
	Etowah, AL	
2900	Gainesville, FL	0.9871
	Alachua, FL	
2920	Galveston-Texas City, TX.	0.9465
	Galveston, TX	
2960	Gary, IN	0.9584
	Lake, IN	
	Porter, IN	
2975	Glens Falls, NY	0.8281
	Warren, NY	
	Washington, NY	
2980	Goldsboro, NC	0.8892
	Wayne, NC	
2985	Grand Forks, ND–MN.	0.8897
	Polk, MN	
	Grand Forks, ND	
2995	Grand Junction, CO.	0.9456
	Mesa, CO	
3000	Grand Rapids-Muskegon-Holland, MI.	0.9525
	Allegan, MI	
	Kent, MI	
	Muskegon, MI	
	Ottawa, MI	
3040	Great Falls, MT	0.8950
	Cascade, MT	
3060	Greeley, CO	0.9237
	Weld, CO	
3080	Green Bay, WI	0.9502
	Brown, WI	
3120	Greensboro-Winston-Salem-High Point, NC.	0.9282
	Alamance, NC	
	Davidson, NC	
	Davie, NC	
	Forsyth, NC	
	Guilford, NC	
	Randolph, NC	
	Stokes, NC	
	Yadkin, NC	
3150	Greenville, NC	0.9100
	Pitt, NC	
3160	Greenville-Spartanburg-Anderson, SC.	0.9122
	Anderson, SC	
	Cherokee, SC	
	Greenville, SC	
	Pickens, SC	
	Spartanburg, SC	
3180	Hagerstown, MD	0.9268
	Washington, MD	
3200	Hamilton-Middletown, OH.	0.9418
	Butler, OH	

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
3240	Harrisburg-Lebanon-Carlisle, PA.	0.9223
	Cumberland, PA	
	Dauphin, PA	
	Lebanon, PA	
	Perry, PA	
3283	Hartford, CT	1.1549
	Hartford, CT	
	Litchfield, CT	
	Middlesex, CT	
	Tolland, CT	
3285	Hattiesburg, MS	0.7659
	Forrest, MS	
	Lamar, MS	
3290	Hickory-Morganton-Lenoir, NC.	0.9028
	Alexander, NC	
	Burke, NC	
	Caldwell, NC	
	Catawba, NC	
3320	Honolulu, HI	1.1457
	Honolulu, HI	
3350	Houma, LA	0.8385
	Lafourche, LA	
	Terrebonne, LA	
3360	Houston, TX	0.9892
	Chambers, TX	
	Fort Bend, TX	
	Harris, TX	
	Liberty, TX	
	Montgomery, TX	
	Waller, TX	
3400	Huntington-Ashland, WV–KY–OH.	0.9636
	Boyd, KY	
	Carter, KY	
	Greenup, KY	
	Lawrence, OH	
	Cabell, WV	
	Wayne, WV	
3440	Huntsville, AL	0.8903
	Limestone, AL	
	Madison, AL	
3480	Indianapolis, IN	0.9717
	Boone, IN	
	Hamilton, IN	
	Hancock, IN	
	Hendricks, IN	
	Johnson, IN	
	Madison, IN	
	Marion, IN	
	Morgan, IN	
	Shelby, IN	
3500	Iowa City, IA	0.9587
	Johnson, IA	
3520	Jackson, MI	0.9532
	Jackson, MI	
3560	Jackson, MS	0.8607
	Hinds, MS	
	Madison, MS	
	Rankin, MS	
3580	Jackson, TN	0.9275
	Chester, TN	
	Madison, TN	
3600	Jacksonville, FL	0.9381

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Clay, FL	
	Duval, FL	
	Nassau, FL	
	St. Johns, FL	
3605	Jacksonville, NC	0.8239
	Onslow, NC	
3610	Jamestown, NY	0.7976
	Chautaqua, NY	
3620	Janesville-Beloit, WI.	0.9849
	Rock, WI	
3640	Jersey City, NJ	1.1190
	Hudson, NJ	
3660	Johnson City-Kingsport-Bristol, TN–VA.	0.8268
	Carter, TN	
	Hawkins, TN	
	Sullivan, TN	
	Unicoi, TN	
	Washington, TN	
	Bristol City, VA	
	Scott, VA	
	Washington, VA	
3680	Johnstown, PA	0.8329
	Cambria, PA	
	Somerset, PA	
3700	Jonesboro, AR	0.7749
	Craighead, AR	
3710	Joplin, MO	0.8613
	Jasper, MO	
	Newton, MO	
3720	Kalamazoo-Battlecreek, MI.	1.0595
	Calhoun, MI	
	Kalamazoo, MI	
	Van Buren, MI	
3740	Kankakee, IL	1.0790
	Kankakee, IL	
3760	Kansas City, KS–MO.	0.9736
	Johnson, KS	
	Leavenworth, KS	
	Miami, KS	
	Wyandotte, KS	
	Cass, MO	
	Clay, MO	
	Clinton, MO	
	Jackson, MO	
	Lafayette, MO	
	Platte, MO	
	Ray, MO	
3800	Kenosha, WI	0.9686
	Kenosha, WI	
3810	Killeen-Temple, TX	1.0399
	Bell, TX	
	Coryell, TX	
3840	Knoxville, TN	0.8970
	Anderson, TN	
	Blount, TN	
	Knox, TN	
	Loudon, TN	
	Sevier, TN	
	Union, TN	
3850	Kokomo, IN	0.8971
	Howard, IN	
	Tipton, IN	
3870	La Crosse, WI–MN	0.9400

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Houston, MN	
	La Crosse, WI	
3880	Lafayette, LA	0.8475
	Acadia, LA	
	Lafayette, LA	
	St. Landry, LA	
	St. Martin, LA	
3920	Lafayette, IN	0.9278
	Clinton, IN	
	Tippecanoe, IN	
3960	Lake Charles, LA	0.7965
	Calcasieu, LA	
3980	Lakeland-Winter Haven, FL.	0.9357
	Polk, FL	
4000	Lancaster, PA	0.9078
	Lancaster, PA	
4040	Lansing-East Lansing, MI.	0.9726
	Clinton, MI	
	Eaton, MI	
	Ingham, MI	
4080	Laredo, TX	0.8472
	Webb, TX	
4100	Las Cruces, NM	0.8745
	Dona Ana, NM	
4120	Las Vegas, NV–AZ.	1.1521
	Mohave, AZ	
	Clark, NV	
	Nye, NV	
4150	Lawrence, KS	0.7923
	Douglas, KS	
4200	Lawton, OK	0.8315
	Comanche, OK	
4243	Lewiston-Auburn, ME.	0.9179
	Androscoggin, ME	
4280	Lexington, KY	0.8581
	Bourbon, KY	
	Clark, KY	
	Fayette, KY	
	Jessamine, KY	
	Madison, KY	
	Scott, KY	
	Woodford, KY	
4320	Lima, OH	0.9483
	Allen, OH	
	Auglaize, OH	
4360	Lincoln, NE	0.9892
	Lancaster, NE	
4400	Little Rock-North Little, AR.	0.9097
	Faulkner, AR	
	Lonoke, AR	
	Pulaski, AR	
	Saline, AR	
4420	Longview-Marshall, TX.	0.8629
	Gregg, TX	
	Harrison, TX	
	Upshur, TX	
4480	Los Angeles-Long Beach, CA.	1.2001
	Los Angeles, CA	
4520	Louisville, KY–IN	0.9276
	Clark, IN	
	Floyd, IN	
	Harrison, IN	
	Scott, IN	
	Bullitt, KY	
	Jefferson, KY	
	Oldham, KY	
4600	Lubbock, TX	0.9646
	Lubbock, TX	
4640	Lynchburg, VA	0.9219
	Amherst, VA	
	Bedford City, VA	
	Bedford, VA	
	Campbell, VA	
	Lynchburg City, VA	
4680	Macon, GA	0.9204
	Bibb, GA	
	Houston, GA	
	Jones, GA	
	Peach, GA	
	Twiggs, GA	
4720	Madison, WI	1.0467
	Dane, WI	
4800	Mansfield, OH	0.8900
	Crawford, OH	
	Richland, OH	
4840	Mayaguez, PR	0.4914
	Anasco, PR	
	Cabo Rojo, PR	
	Hormigueros, PR	
	Mayaguez, PR	
	Sabana Grande, PR	
	San German, PR	
4880	McAllen-Edinburg-Mission, TX.	0.8428
	Hidalgo, TX	
4890	Medford-Ashland, OR.	1.0498
	Jackson, OR	
4900	Melbourne-Titusville-Palm Bay, FL.	1.0253
	Brevard, FL	
4920	Memphis, TN–AR–MS.	0.8920
	Crittenden, AR	
	De Soto, MS	
	Fayette, TN	
	Shelby, TN	
	Tipton, TN	
4940	Merced, CA	0.9837
	Merced, CA	
5000	Miami, FL	0.9802
	Dade, FL	
5015	Middlesex-Somerset-Hunterdon, NJ.	1.1213
	Hunterdon, NJ	
	Middlesex, NJ	
	Somerset, NJ	
5080	Milwaukee-Waukesha, WI.	0.9893
	Milwaukee, WI	
	Ozaukee, WI	
	Washington, WI	
	Waukesha, WI	
5120	Minneapolis-St. Paul, MN–WI.	1.0903
	Anoka, MN	
	Carver, MN	
	Chisago, MN	
	Dakota, MN	
	Hennepin, MN	
	Isanti, MN	
	Ramsey, MN	
	Scott, MN	
	Sherburne, MN	
	Washington, MN	
	Wright, MN	
	Pierce, WI	
	St. Croix, WI	
5140	Missoula, MT	0.9157
	Missoula, MT	
5160	Mobile, AL	0.8108
	Baldwin, AL	
	Mobile, AL	
5170	Modesto, CA	1.0498
	Stanislaus, CA	
5190	Monmouth-Ocean, NJ.	1.0674
	Monmouth, NJ	
	Ocean, NJ	
5200	Monroe, LA	0.8137
	Ouachita, LA	
5240	Montgomery, AL	0.7734
	Autauga, AL	
	Elmore, AL	
	Montgomery, AL	
5280	Muncie, IN	0.9284
	Delaware, IN	
5330	Myrtle Beach, SC	0.8976
	Horry, SC	
5345	Naples, FL	0.9754
	Collier, FL	
5360	Nashville, TN	0.9578
	Cheatham, TN	
	Davidson, TN	
	Dickson, TN	
	Robertson, TN	
	Rutherford, TN	
	Sumner, TN	
	Williamson, TN	
	Wilson, TN	
5380	Nassau-Suffolk, NY.	1.3357
	Nassau, NY	
	Suffolk, NY	
5483	New Haven-Bridgeport-Stamford-Waterbury-Danbury, CT.	1.2408
	Fairfield, CT	
	New Haven, CT	
5523	New London-Norwich, CT.	1.1767
	New London, CT	
5560	New Orleans, LA	0.9046
	Jefferson, LA	
	Orleans, LA	
	Plaquemines, LA	
	St. Bernard, LA	
	St. Charles, LA	
	St. James, LA	
	St. John The Baptist, LA	

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	St. Tammany, LA	
5600	New York, NY Bronx, NY Kings, NY New York, NY Putnam, NY Queens, NY Richmond, NY Rockland, NY Westchester, NY	1.4414
5640	Newark, NJ Essex, NJ Morris, NJ Sussex, NJ Union, NJ Warren, NJ	1.1381
5660	Newburgh, NY–PA Orange, NY Pike, PA	1.1387
5720	Norfolk-Virginia Beach-Newport News, VA–NC. Currituck, NC Chesapeake City, VA Gloucester, VA Hampton City, VA Isle of Wight, VA James City, VA Mathews, VA Newport News City, VA Norfolk City, VA Poquoson City,VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA York, VA	0.8574
5775	Oakland, CA Alameda, CA Contra Costa, CA	1.5072
5790	Ocala, FL Marion, FL	0.9402
5800	Odessa-Midland, TX. Ector, TX Midland, TX	0.9397
5880	Oklahoma City, OK. Canadian, OK Cleveland, OK Logan, OK McClain, OK Oklahoma, OK Pottawatomie, OK	0.8900
5910	Olympia, WA Thurston, WA	1.0960
5920	Omaha, NE–IA Pottawattamie, IA Cass, NE Douglas, NE Sarpy, NE Washington, NE	0.9978
5945	Orange County, CA. Orange, CA	1.1474
5960	Orlando, FL Lake, FL Orange, FL Osceola, FL Seminole, FL	0.9640
5990	Owensboro, KY Daviess, KY	0.8344
6015	Panama City, FL Bay, FL	0.8865
6020	Parkersburg-Marietta, WV–OH. Washington, OH Wood, WV	0.8127
6080	Pensacola, FL Escambia, FL Santa Rosa, FL	0.8645
6120	Peoria-Pekin, IL Peoria, IL Tazewell, IL Woodford, IL	0.8739
6160	Philadelphia, PA–NJ. Burlington, NJ Camden, NJ Gloucester, NJ Salem, NJ Bucks, PA Chester, PA Delaware, PA Montgomery, PA Philadelphia, PA	1.0713
6200	Phoenix-Mesa, AZ Maricopa, AZ Pinal, AZ	0.9820
6240	Pine Bluff, AR Jefferson, AR	0.7962
6280	Pittsburgh, PA Allegheny, PA Beaver, PA Butler, PA Fayette, PA Washington, PA Westmoreland, PA	0.9365
6323	Pittsfield, MA Berkshire, MA	1.0235
6340	Pocatello, ID Bannock, ID	0.9372
6360	Ponce, PR Guayanilla, PR Juana Diaz, PR Penuelas, PR Ponce, PR Villalba, PR Yauco, PR	0.5169
6403	Portland, ME Cumberland, ME Sagadahoc, ME York, ME	0.9794
6440	Portland-Vancouver, OR–WA. Clackamas, OR Columbia, OR Multnomah, OR Washington, OR Yamhill, OR	1.0667
6483	Providence-Warwick-Pawtucket, RI. Bristol, RI Kent, RI Newport, RI Providence, RI Washington, RI	1.0854
6520	Provo-Orem, UT Utah, UT	0.9984
6560	Pueblo, CO	0.8820
6580	Punta Gorda, FL Charlotte, FL	0.9218
6600	Racine, WI Racine, WI	0.9334
6640	Raleigh-Durham-Chapel Hill, NC. Chatham, NC Durham, NC Franklin, NC Johnston, NC Orange, NC Wake, NC	0.9990
6660	Rapid City, SD Pennington, SD	0.8846
6680	Reading, PA Berks, PA	0.9295
6690	Redding, CA Shasta, CA	1.1135
6720	Reno, NV Washoe, NV	1.0648
6740	Richland-Kennewick-Pasco, WA. Benton, WA Franklin, WA	1.1491
6760	Richmond-Petersburg, VA. Charles City County, VA Chesterfield, VA Colonial Heights City, VA Dinwiddie, VA Goochland, VA Hanover, VA Henrico, VA Hopewell City, VA New Kent, VA Petersburg City, VA Powhatan, VA Prince George, VA Richmond City, VA	0.9477
6780	Riverside-San Bernardino, CA. Riverside, CA San Bernardino, CA	1.1365
6800	Roanoke, VA Botetourt, VA Roanoke, VA Roanoke City, VA Salem City, VA	0.8614
6820	Rochester, MN Olmsted, MN	1.2139

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
6840	Rochester, NY	0.9194
	Genesee, NY	
	Livingston, NY	
	Monroe, NY	
	Ontario, NY	
	Orleans, NY	
	Wayne, NY	
6880	Rockford, IL	0.9625
	Boone, IL	
	Ogle, IL	
	Winnebago, IL	
6895	Rocky Mount, NC	0.9228
	Edgecombe, NC	
	Nash, NC	
6920	Sacramento, CA	1.1500
	El Dorado, CA	
	Placer, CA	
	Sacramento, CA	
6960	Saginaw-Bay City-Midland, MI.	0.9650
	Bay, MI	
	Midland, MI	
	Saginaw, MI	
6980	St. Cloud, MN	0 9700
	Benton, MN	
	Stearns, MN	
7000	St. Joseph, MO	0.8021
	Andrews, MO	
	Buchanan, MO	
7040	St. Louis, MO–IL	0.8855
	Clinton, IL	
	Jersey, IL	
	Madison, IL	
	Monroe, IL	
	St. Clair, IL	
	Franklin, MO	
	Jefferson, MO	
	Lincoln, MO	
	St. Charles, MO	
	St. Louis, MO	
	St. Louis City, MO	
	Warren, MO	
	Sullivan City, MO	
7080	Salem, OR	1.0367
	Marion, OR	
	Polk, OR	
7120	Salinas, CA	1.4623
	Monterey, CA	
7160	Salt Lake City-Ogden, UT.	0.9945
	Davis, UT	
	Salt Lake, UT	
	Weber, UT	
7200	San Angelo, TX	0.8374
	Tom Green. TX	
7240	San Antonio, TX	0.8753
	Bexar, TX	
	Comal, TX	
	Guadalupe, TX	
	Wilson, TX	
7320	San Diego, CA	1.1131
	San Diego, CA	
7360	San Francisco, CA	1.4142
	Marin, CA	
	San Francisco, CA	
	San Mateo, CA	
7400	San Jose, CA	1.4145
	Santa Clara, CA	
7440	San Juan-Bayamon, PR.	0.4741
	Aguas Buenas, PR	
	Barceloneta, PR	
	Bayamon, PR	
	Canovanas, PR	
	Carolina, PR	
	Catano, PR	
	Ceiba, PR	
	Comerio, PR	
	Corozal, PR	
	Dorado, PR	
	Fajardo, PR	
	Florida, PR	
	Guaynabo, PR	
	Humacao, PR	
	Juncos, PR	
	Los Piedras, PR	
	Loiza, PR	
	Luguillo, PR	
	Manati, PR	
	Morovis, PR	
	Naguabo, PR	
	Naranjito, PR	
	Rio Grande, PR	
	San Juan, PR	
	Toa Alta, PR	
	Toa Baja, PR	
	Trujillo Alto, PR	
	Vega Alta, PR	
	Vega Baja, PR	
	Yabucoa, PR	
7460	San Luis Obispo-Atascadero-Paso Robles, CA.	1.1271
	San Luis Obispo, CA	
7480	Santa Barbara-Santa Maria-Lompoc, CA.	1.0481
	Santa Barbara, CA	
7485	Santa Cruz-Watsonville, CA.	1.3646
	Santa Cruz, CA	
7490	Santa Fe, NM	1.0712
	Los Alamos, NM	
	Santa Fe, NM	
7500	Santa Rosa, CA	1.3046
	Sonoma, CA	
7510	Sarasota-Bradenton, FL.	0.9425
	Manatee, FL	
	Sarasota, FL	
7520	Savannah, GA	0.9376
	Bryan, GA	
	Chatham, GA	
	Effingham, GA	
7560	Scranton-Wilkes-Barre-Hazleton, PA.	0.8599
	Columbia, PA	
	Lackawanna, PA	
	Luzerne, PA	
	Wyoming, PA	
7600	Seattle-Bellevue-Everett, WA.	1.1474
	Island, WA	
	King, WA	
	Snohomish, WA	
7610	Sharon, PA	0.7869
	Mercer, PA	
7620	Sheboygan, WI	0.8697
	Sheboygan, WI	
7640	Sherman-Denison, TX.	0.9255
	Grayson, TX	
7680	Shreveport-Bossier City, LA.	0.8987
	Bossier, LA	
	Caddo, LA	
	Webster, LA	
7720	Sioux City, IA–NE	0.9046
	Woodbury, IA	
	Dakota, NE	
7760	Sioux Falls, SD	0.9257
	Lincoln, SD	
	Minnehaha, SD	
7800	South Bend, IN	0.9802
	St. Joseph, IN	
7840	Spokane, WA	1.0852
	Spokane, WA	
7880	Springfield, IL	0.8659
	Menard, IL	
	Sangamon, IL	
7920	Springfield, MO	0.8424
	Christian, MO	
	Greene, MO	
	Webster, MO	
8003	Springfield, MA	1.0927
	Hampden, MA	
	Hampshire, MA	
8050	State College, PA	0.8941
	Centre, PA	
8080	Steubenville-Weirton, OH–WV.	0.8804
	Jefferson, OH	
	Brooke, WV	
	Hancock, WV	
8120	Stockton-Lodi, CA	1.0506
	San Joaquin, CA	
8140	Sumter, SC	0.8273
	Sumter, SC	
8160	Syracuse, NY	0.9714
	Cayuga, NY	
	Madison, NY	
	Onondaga, NY	
	Oswego, NY	
8200	Tacoma, WA	1.0940
	Pierce, WA	
8240	Tallahassee, FL	0.8504
	Gadsden, FL	
	Leon, FL	
8280	Tampa-St. Petersburg-Clearwater, FL.	0.9065
	Hernando, FL	
	Hillsborough, FL	
	Pasco, FL	
	Pinellas, FL	
8320	Terre Haute, IN	0.8599
	Clay, IN	
	Vermillion, IN	
	Vigo, IN	

TABLE 3A.—PROPOSED URBAN WAGE INDEX—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
8360	Texarkana, AR-Texarkana, TX.	0.8088
	Miller, AR	
	Bowie, TX	
8400	Toledo, OH	0.9810
	Fulton, OH	
	Lucas, OH	
	Wood, OH	
8440	Topeka, KS	0.9199
	Shawnee, KS	
8480	Trenton, NJ	1.0432
	Mercer, NJ	
8520	Tucson, AZ	0.8911
	Pima, AZ	
8560	Tulsa, OK	0.8332
	Creek, OK	
	Osage, OK	
	Rogers, OK	
	Tulsa, OK	
	Wagoner, OK	
8600	Tuscaloosa, AL	0.8130
	Tuscaloosa, AL	
8640	Tyler, TX	0.9521
	Smith, TX	
8680	Utica-Rome, NY	0.8465
	Herkimer, NY	
	Oneida, NY	
8720	Vallejo-Fairfield-Napa, CA.	1.3354
	Napa, CA	
	Solano, CA	
8735	Ventura, CA	1.1096
	Ventura, CA	
8750	Victoria, TX	0.8756
	Victoria, TX	
8760	Vineland-Millville-Bridgeton, NJ.	1.0031
	Cumberland, NJ	
8780	Visalia-Tulare-Porterville, CA.	0.9429
	Tulare, CA	
8800	Waco, TX	0.8073
	McLennan, TX	
8840	Washington, DC–MD–VA–WV.	1.0851
	District of Columbia, DC	
	Calvert, MD	
	Charles, MD	
	Frederick, MD	
	Montgomery, MD	
	Prince Georges, MD	
	Alexandria City, VA	
	Arlington, VA	
	Clarke, VA	
	Culpepper, VA	
	Fairfax, VA	
	Fairfax City, VA	
	Falls Church City, VA	
	Fauquier, VA	
	Fredericksburg City, VA	
	King George, VA	
	Loudoun, VA	
	Manassas City, VA	
	Manassas Park City, VA	
	Prince William, VA	
	Spotsylvania, VA	
	Stafford, VA	
	Warren, VA	
	Berkeley, WV	
	Jefferson, WV	
8920	Waterloo-Cedar Falls, IA.	0.8069
	Black Hawk, IA	
8940	Wausau, WI	0.9782
	Marathon, WI	
8960	West Palm Beach-Boca Raton, FL.	0.9939
	Palm Beach, FL	
9000	Wheeling, OH–WV	0.7670
	Belmont, OH	
	Marshall, WV	
	Ohio, WV	
9040	Wichita, KS	0.9520
	Butler, KS	
	Harvey, KS	
	Sedgwick, KS	
9080	Wichita Falls, TX	0.8498
	Archer, TX	
	Wichita, TX	
9140	Williamsport, PA	0.8544
	Lycoming, PA	
9160	Wilmington-Newark, DE–MD.	1.1173
	New Castle, DE	
	Cecil, MD	
9200	Wilmington, NC	0.9640
	New Hanover, NC	
	Brunswick, NC	
9260	Yakima, WA	1.0569
	Yakima, WA	
9270	Yolo, CA	0.9434
	Yolo, CA	
9280	York, PA	0.9026
	York, PA	
9320	Youngstown-Warren, OH.	0.9358
	Columbiana, OH	
	Mahoning, OH	
	Trumbull, OH	
9340	Yuba City, CA	1.0276
	Sutter, CA	
	Yuba, CA	
9360	Yuma, AZ	0.8589
	Yuma, AZ	

TABLE 3B.—PROPOSED RURAL WAGE INDEX

Nonurban area	Wage index
Alabama	0.7660
Alaska	1.2293
Arizona	0.8493
Arkansas	0.7666
California	0.9840
Colorado	0.9015
Connecticut	1.2394
Delaware	0.9128
Florida	0.8814
Georgia	0.8230
Guam	0.9611
Hawaii	1.0255
Idaho	0.8747
Illinois	0.8204
Indiana	0.8755
Iowa	0.8315
Kansas	0.7923
Kentucky	0.8079
Louisiana	0.7567
Maine	0.8874
Maryland	0.8946
Massachusetts	1.1288
Michigan	0.9000
Minnesota	0.9151
Mississippi	0.7680
Missouri	0.8021
Montana	0.8481
Nebraska	0.8204
Nevada	0.9577
New Hampshire	0.9796
New Jersey [1]	
New Mexico	0.8872
New York	0.8542
North Carolina	0.8666
North Dakota	0.7788
Ohio	0.8613
Oklahoma	0.7590
Oregon	1.0303
Pennsylvania	0.8462
Puerto Rico	0.4356
Rhode Island [1]	
South Carolina	0.8607
South Dakota	0.7815
Tennessee	0.7877
Texas	0.7821
Utah	0.9312
Vermont	0.9345
Virginia	0.8504
Virgin Islands	0.7845
Washington	1.0179
West Virginia	0.7975
Wisconsin	0.9162
Wyoming	0.9007

[1] All counties within the State are classified urban.

TABLE 4.—ACCEPTABLE IMPAIRMENT GROUP CODES

Impairment group codes	Excluded etiological diagnoses	Associated rehabilitation impairment category
01.1 Left body involvement (right brain)	None	01 Stroke.

TABLE 4.—ACCEPTABLE IMPAIRMENT GROUP CODES—Continued

Impairment group codes	Excluded etiological diagnoses	Associated rehabilitation impairment category
01.2 Right body involvement (left brain)	None	
01.3 Bilateral Involvement	None	
01.4 No Paresis	None	
01.9 Other Stroke	None	
02.21 Open Injury	None	02 Traumatic brain injury.
02.22 Closed Injury	None	
02.1 Non-traumatic	331.0	03 Nontraumatic brain injury.
	331.2	
	215.0	
02.9 Other Brain	None	
04.210 Paraplegia, Unspecified	None	04 Traumatic spinal cord injury.
04.211 Paraplegia, Incomplete	None	
04.212 Paraplegia, Complete	None	
04.220 Quadriplegia, Unspecified	None	
04.2211 Quadriplegia, Incomplete C1–4	None	
04.2212 Quadriplegia, Incomplete C5–8	None	
04.2221 Quadriplegia, Complete C1–4	None	
04.2222 Quadriplegia, Complete C5–8	None	
04.230 Other traumatic spinal cord dysfunction	None	
04.110 Paraplegia, unspecified	None	05 Nontraumatic spinal cord injury.
04.111 Paraplegia, incomplete	None	
04.112 Paraplegia, complete	None	
04.120 Quadriplegia, unspecified	None	
04.1211 Quadriplegia, Incomplete C1–4	None	
04.1212 Quadriplegia, Incomplete C5–8	None	
04.1221 Quadriplegia, Complete C1–4	None	
04.1222 Quadriplegia, Complete C5–8	None	
04.130 Other non-traumatic spinal cord dysfunction	None	
03.1 Multiple Sclerosis	None	06 Neurological.
03.2 Parkinsonism	None	
03.3 Polyneuropathy	None	
03.5 Cerebral Palsy	None	
03.8 Neuromuscular Disorders	None	
03.9 Other Neurologic	None	
08.11 Status post unilateral hip fracture	None	07 Fracture of lower extremity.
08.12 Status post bilateral hip fractures	None	
08.3 Status post pelvic fracture	None	
05.3 Unilateral lower extremity above the knee (AK)	None	10 Amputation, lower extremity.
05.4 Unilateral lower extremity below the knee (BK)	None	
05.5 Bilateral lower extremity above the knee (AK/AK)	None	
05.6 Bilateral lower extremity above/below the knee (AK/BK)	None	
05.7 Bilateral lower extremity below the knee (BK/BK)	None	
05.1 Unilateral upper extremity above the elbow (AE)	None	11 Amputation, other.
05.2 Unilateral upper extremity below the elbow (BE)	None	
05.9 Other amputation	None	
06.1 Rheumatoid Arthritis	701.1	13 Rheumatoid, other arthritis.
	710.1	
06.9 Other arthritis	701.1	
	710.1	
08.4 Status post major multiple fractures	None	17 Major multiple trauma, no brain injury or spinal cord injury.
14.9 Other multiple trauma	None	
14.1 Brain and spinal cord injury	None	18 Major multiple trauma, with brain or spinal cord injury.
14.2 Brain and multiple fractures/amputation	None	
14.3 Spinal cord and multiple fractures/amputation	None	
13.4 Guillian Barre	None	19 Guillian Barre.
12.1 Spina Bifida	None	20 Miscellaneous.
12.9 Other congenital	None	
11 Burns	None	21 Burns.

TABLE 5.—ACCEPTABLE ICD–9–CM CODES

Code	Label
036.0	MENINGOCOCCALMENINGITIS
047.8	VIRAL MENINGITIS NEC
047.9	VIRAL MENINGITIS NOS

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
049.0	LYMPHOCYTICCHORIOMENINGG
049.9	VIRAL ENCEPHALITIS NOS

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
052.0	POSTVARICELLAENCEPHALIT
053.0	HERPES ZOSTER MENINGITIS
054.3	HERPETICENCEPHALITIS

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
054.5	HERPETICSEPTICEMIA
054.72	H SIMPLEX MENINGITIS
055.0	POSTMEASLESENCEPHALITIS
072.1	MUMPSMENINGITIS
072.2	MUMPSENCEPHALITIS
094.2	SYPHILITICMENINGITIS
112.83	CANDIDALMENINGITIS
114.2	COCCIDIOIDALMENINGITIS
115.01	HISTOPLASM CAPSUL MENING
115.11	HISTOPLASM DUBOIS MENING
115.91	HISTOPLASMOSISMENINGIT
130.0	TOXOPLASMMENINGOENCEPH
139.0	LATE EFF VIRAL ENCEPHAL
320.0	HEMOPHILUSMENINGITIS
320.1	PNEUMOCOCCALMENINGITIS
320.2	STREPTOCOCCALMENINGITIS
320.3	STAPHYLOCOCCMENINGITIS
320.7	MENING IN OTH BACT DIS
320.81	ANAEROBICMENINGITIS
320.82	MNINGTS GRAM–NEG BCT NEC
320.89	MENINGITIS OTH SPCF BACT
320.9	BACTERIAL MENINGITIS NOS
321.0	CRYPTOCOCCALMENINGITIS
321.1	MENING IN OTH FUNGAL DIS
321.2	MENING IN OTH VIRAL DIS
321.3	TRYPANOSOMIASISMENINGIT
321.4	MENINGIT D/T SARCOIDOSIS
321.8	MENING IN OTH NONBAC DIS
322.0	NONPYOGENICMENINGITIS
322.2	CHRONICMENINGITIS
322.9	MENINGITISNOS
323.0	ENCEPHALIT IN VIRAL DIS
323.6	POSTINFECTENCEPHALITIS
323.8	ENCEPHALITISNEC
323.9	ENCEPHALITISNOS
324.0	INTRACRANIALABSCESS
324.1	INTRASPINALABSCESS
324.9	CNS ABSCESS NOS
334.0	FRIEDREICHSATAXIA
334.1	HERED SPASTIC PARAPLEGIA
334.2	PRIMARY CEREBELLAR DEGEN
334.3	CEREBELLAR ATAXIA NEC
334.4	CEREBEL ATAX IN OTH DIS
334.8	SPINOCEREBELLAR DIS NEC
334.9	SPINOCEREBELLAR DIS NOS
335.0	WERDNIG–HOFFMANNDISEASE
335.10	SPINAL MUSCL ATROPHY NOS
335.11	KUGELBERG–WELANDERDIS
335.19	SPINAL MUSCL ATROPHY NEC
335.20	AMYOTROPHICSCLEROSIS
335.21	PROG MUSCULAR ATROPHY
335.22	PROGRESSIVE BULBAR PALSY
335.23	PSEUDOBULBARPALSY
335.24	PRIM LATERAL SCLEROSIS
335.29	MOTOR NEURON DISEASE NEC
335.8	ANT HORN CELL DIS NEC
335.9	ANT HORN CELL DIS NOS
336.0	SYRINGOMYELIA
336.1	VASCULARMYELOPATHIES
336.2	COMB DEG CORD IN OTH DIS
336.3	MYELOPATHY IN OTH DIS

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
336.8	MYELOPATHYNEC
336.9	SPINAL CORD DISEASE NOS
342.01	FLCCD HMIPLGA DOMNT SIDE
342.02	FLCCD HMIPLG NONDMNT SDE
342.10	SPSTC HMIPLGA UNSPF SIDE
342.11	SPSTC HMIPLGA DOMNT SIDE
342.12	SPSTC HMIPLG NONDMNT SDE
342.80	OT SP HMIPLGA UNSPF SIDE
342.81	OT SP HMIPLGA DOMNT SIDE
342.82	OT SP HMIPLG NONDMNT SDE
342.90	UNSP HEMIPLGA UNSPF SIDE
342.91	UNSP HEMIPLGA DOMNT SIDE
342.92	UNSP HMIPLGA NONDMNT SDE
343.0	CONGENITALDIPLEGIA
343.1	CONGENITALHEMIPLEGIA
343.2	CONGENITALQUADRIPLEGIA
343.3	CONGENITALMONOPLEGIA
343.4	INFANTILEHEMIPLEGIA
343.8	CEREBRAL PALSY NEC
343.9	CEREBRAL PALSY NOS
344.00	QUADRIPLEGIA, UNSPECIFD
344.01	QUADRPLG C1–C4, COMPLETE
344.02	QUADRPLG C1–C4, INCOMPLT
344.03	QUADRPLG C5–C7, COMPLETE
344.04	QUADRPLG C5–C7, INCOMPLT
344.09	OTHERQUADRIPLEGIA
344.1	PARAPLEGIANOS
344.2	DIPLEGIA OF UPPER LIMBS
344.30	MONPLGA LWR LMB UNSP SDE
344.31	MONPLGA LWR LMB DMNT SDE
344.32	MNPLG LWR LMB NONDMNT SD
344.40	MONPLGA UPR LMB UNSP SDE
344.41	MONPLGA UPR LMB DMNT SDE
344.42	MNPLG UPR LMB NONDMNT SD
344.5	MONOPLEGIANOS
344.60	CAUDA EQUINA SYND NOS
344.61	NEUROGENICBLADDER
344.81	LOCKED–INSTATE
344.89	OTH SPCF PARALYTIC SYND
344.9	PARALYSISNOS
348.1	ANOXIC BRAIN DAMAGE
348.4	COMPRESSION OF BRAIN
356.1	PERONEAL MUSCLE ATROPHY
356.2	HERED SENSORY NEUROPATHY
356.4	IDIO PROG POLYNEUROPATHY
359.0	CONG HERED MUSC DYSTRPHY
359.1	HERED PROG MUSC DYSTRPHY
359.5	MYOPATHY IN ENDOCRIN DIS
359.6	INFL MYOPATHY IN OTH DIS

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
359.8	MYOPATHY NEC
359.9	MYOPATHYNOS
430	SUBARACHNOIDHEMORRHAGE
431	INTRACEREBRALHEMORRHAGE
432.0	NONTRAUM EXTRADURAL HEM
432.1	SUBDURALHEMORRHAGE
432.9	INTRACRANIAL HEMORR NOS
433.01	OCL BSLR ART W INFRCT
433.11	OCL CRTD ART W INFRCT
433.21	OCL VRTB ART W INFRCT
433.31	OCL MLT BI ART W INFRCT
433.81	OCL SPCF ART W INFRCT
433.91	OCL ART NOS W INFRCT
434.01	CRBL THRMBS W INFRCT
434.11	CRBL EMBLSM W INFRCT
434.91	CRBL ART OCL NOS W INFRC
438.11	LATE EFF CV DIS–APHASIA
438.20	LATE EF–HEMPLGA SIDE NOS
438.21	LATE EF–HEMPLGA DOM SIDE
438.22	LATE EF–HEMIPLGA NON–DOM
438.30	LATE EF–MPLGA UP LMB NOS
438.31	LATE EF–MPLGA UP LMB DOM
438.32	LT EF–MPLGA UPLMB NONDOM
438.40	LTE EF–MPLGA LOW LMB NOS
438.41	LTE EF–MPLGA LOW LMB DOM
438.42	LT EF–MPLGA LOWLMB NONDM
438.50	LT EF OTH PARAL SIDE NOS
438.51	LT EF OTH PARAL DOM SIDE
438.52	LT EF OTH PARALS NON–DOM
438.53	LT EF OTH PARALS–BILAT
710.0	SYST LUPUS ERYTHEMATOSUS
710.4	POLYMYOSITIS
714.0	RHEUMATOIDARTHRITIS
714.1	FELTYSSYNDROME
714.2	SYST RHEUM ARTHRITIS NEC
714.30	JUV RHEUM ARTHRITIS NOS
714.31	POLYART JUV RHEUM ARTHR
714.4	CHR POSTRHEUM ARTHRITIS
716.29	ALLERGARTHRITIS–MULT
720.0	ANKYLOSINGSPONDYLITIS
806.00	C1–C4 FX–CL/CORD INJ NOS
806.01	C1–C4 FX–CL/COM CORD LES
806.02	C1–C4 FX–CL/ANT CORD SYN
806.03	C1–C4 FX–CL/CEN CORD SYN
806.04	C1–C4 FX–CL/CORD INJ NEC
806.05	C5–C7 FX–CL/CORD INJ NOS
806.06	C5–C7 FX–CL/COM CORD LES
806.07	C5–C7 FX–CL/ANT CORD SYN
806.08	C5–C7 FX–CL/CEN CORD SYN
806.09	C5–C7 FX–CL/CORD INJ NEC
806.10	C1–C4 FX–OP/CORD INJ NOS
806.11	C1–C4 FX–OP/COM CORD LES
806.12	C1–C4 FX–OP/ANT CORD SYN
806.13	C1–C4 FX–OP/CEN CORD SYN
806.14	C1–C4 FX–OP/CORD INJ NEC
806.15	C5–C7 FX–OP/CORD INJ NOS
806.16	C5–C7 FX–OP/COM CORD LES

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
806.17	C5–C7 FX–OP/ANT CORD SYN
806.18	C5–C7 FX–OP/CEN CORD SYN
806.19	C5–C7 FX–OP/CORD INJ NEC
806.20	T1–T6 FX–CL/CORD INJ NOS
806.21	T1–T6 FX–CL/COM CORD LES
806.22	T1–T6 FX–CL/ANT CORD SYN
806.23	T1–T6 FX–CL/CEN CORD SYN
806.24	T1–T6 FX–CL/CORD INJ NEC
806.25	T7–T12 FX–CL/CRD INJ NOS
806.26	T7–T12 FX–CL/COM CRD LES
806.27	T7–T12 FX–CL/ANT CRD SYN
806.28	T7–T12 FX–CL/CEN CRD SYN
806.29	T7–T12 FX–CL/CRD INJ NEC
806.30	T1–T6 FX–OP/CORD INJ NOS
806.31	T1–T6 FX–OP/COM CORD LES
806.32	T1–T6 FX–OP/ANT CORD SYN
806.33	T1–T6 FX–OP/CEN CORD SYN
806.34	T1–T6 FX–OP/CORD INJ NEC
806.35	T7–T12 FX–OP/CRD INJ NOS
806.36	T7–T12 FX–OP/COM CRD LES
806.37	T7–T12 FX–OP/ANT CRD SYN
806.38	T7–T12 FX–OP/CEN CRD SYN
806.39	T7–T12 FX–OP/CRD INJ NEC
806.4	CL LUMBAR FX W CORD INJ
806.5	OPN LUMBAR FX W CORD INJ
806.60	FX SACRUM–CL/CRD INJ NOS
806.61	FX SACR–CL/CAUDA EQU LES
806.62	FX SACR–CL/CAUDA INJ NEC
806.69	FX SACRUM–CL/CRD INJ NEC
806.70	FX SACRUM–OP/CRD INJ NOS
806.71	FX SACR–OP/CAUDA EQU LES
806.72	FX SACR–OP/CAUDA INJ NEC
806.79	FX SACRUM–OP/CRD INJ NEC
806.8	VERT FX NOS–CL W CRD INJ
806.9	VERT FX NOS–OP W CRD INJ
850.2	CONCUSSION–MODERATECOMA
850.3	CONCUSSION–PROLONGCOMA
850.4	CONCUSSION–DEEPCOMA
851.02	CORTEX CONTUS–BRIEF COMA
851.03	CORTEX CONTUS–MOD COMA
851.04	CORTX CONTUS–PROLNG COMA
851.05	CORTEX CONTUS–DEEP COMA
851.12	OPN CORT CONTUS–BRF COMA
851.13	OPN CORT CONTUS–MOD COMA
851.14	OPN CORT CONTU–PROL COMA
851.15	OPN CORT CONTU–DEEP COMA
851.22	CORTEX LACERA–BRIEF COMA
851.23	CORTEX LACERAT–MOD COMA
851.24	CORTEX LACERAT–PROL COMA
851.25	CORTEX LACERAT–DEEP COMA
851.32	OPN CORTX LAC–BRIEF COMA
851.33	OPN CORTX LACER–MOD COMA
851.34	OPN CORTX LAC–PROLN COMA

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
851.35	OPN CORTEX LAC–DEEP COMA
851.42	CEREBELL CONTUS–BRF COMA
851.43	CEREBELL CONTUS–MOD COMA
851.44	CEREBEL CONTUS–PROL COMA
851.45	CEREBEL CONTUS–DEEP COMA
851.52	OPN CEREBE CONT–BRF COMA
851.53	OPN CEREBE CONT–MOD COMA
851.54	OPN CEREBE CONT–PROL COM
851.55	OPN CEREBE CONT–DEEP COM
851.62	CEREBEL LACER–BRIEF COMA
851.63	CEREBEL LACERAT–MOD COMA
851.64	CEREBEL LACER–PROLN COMA
851.65	CEREBELL LACER–DEEP COMA
851.72	OPN CEREBEL LAC–BRF COMA
851.73	OPN CEREBEL LAC–MOD COMA
851.74	OPN CEREBE LAC–PROL COMA
851.75	OPN CEREBE LAC–DEEP COMA
851.82	BRAIN LAC NEC–BRIEF COMA
851.83	BRAIN LACER NEC–MOD COMA
851.84	BRAIN LAC NEC–PROLN COMA
851.85	BRAIN LAC NEC–DEEP COMA
851.92	OPN BRAIN LAC–BRIEF COMA
851.93	OPN BRAIN LACER–MOD COMA
851.94	OPN BRAIN LAC–PROLN COMA
851.95	OPEN BRAIN LAC–DEEP COMA
852.03	SUBARACH HEM–MOD COMA
852.04	SUBARACH HEM–PROLNG COMA
852.05	SUBARACH HEM–DEEP COMA
852.06	SUBARACH HEM–COMA NOS
852.13	OP SUBARACH HEM–MOD COMA
852.14	OP SUBARACH HEM–PROL COM
852.15	OP SUBARACH HEM–DEEP COM
852.23	SUBDURAL HEMORR–MOD COMA
852.24	SUBDURAL HEM–PROLNG COMA
852.25	SUBDURAL HEM–DEEP COMA
852.26	SUBDURAL HEMORR–COMA NOS
852.33	OPN SUBDUR HEM–MOD COMA
852.34	OPN SUBDUR HEM–PROL COMA
852.35	OPN SUBDUR HEM–DEEP COMA

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
852.43	EXTRADURAL HEM–MOD COMA
852.44	EXTRADUR HEM–PROLN COMA
852.45	EXTRADURAL HEM–DEEP COMA
852.53	EXTRADURAL HEM–MOD COMA
852.54	EXTRADUR HEM–PROLN COMA
852.55	EXTRADUR HEM–DEEP COMA
853.03	BRAIN HEM NEC–MOD COMA
853.04	BRAIN HEM NEC–PROLN COMA
853.05	BRAIN HEM NEC–DEEP COMA
853.06	BRAIN HEM NEC–COMA NOS
853.13	BRAIN HEM OPEN–MOD COMA
853.14	BRAIN HEM OPN–PROLN COMA
853.15	BRAIN HEM OPEN–DEEP COMA
854.03	BRAIN INJ NEC–MOD COMA
854.04	BRAIN INJ NEC–PROLN COMA
854.05	BRAIN INJ NEC–DEEP COMA
854.06	BRAIN INJ NEC–COMA NOS
854.13	OPN BRAIN INJ–MOD COMA
854.14	OPN BRAIN INJ–PROLN COMA
854.15	OPN BRAIN INJ–DEEP COMA
887.0	AMPUT BELOW ELB, UNILAT
887.1	AMP BELOW ELB, UNIL–COMP
887.3	AMPUT ABV ELB, UNIL–COMP
887.4	AMPUTAT ARM, UNILAT NOS
887.5	AMPUT ARM, UNIL NOS–COMP
887.6	AMPUTATION ARM, BILAT
887.7	AMPUTAT ARM, BILAT–COMPL
897.0	AMPUT BELOW KNEE, UNILAT
897.1	AMPUTAT BK, UNILAT–COMPL
897.2	AMPUT ABOVE KNEE, UNILAT
897.3	AMPUT ABV KN, UNIL–COMPL
897.4	AMPUTAT LEG, UNILAT NOS
897.5	AMPUT LEG, UNIL NOS–COMP
897.6	AMPUTATION LEG, BILAT
897.7	AMPUTAT LEG, BILAT–COMPL
905.9	LATE EFF TRAUMAT AMPUTAT
907.0	LT EFF INTRACRANIAL INJ
907.2	LATE EFF SPINAL CORD INJ
952.00	C1–C4 SPIN CORD INJ NOS
952.01	COMPLETE LES CORD/C1–C4
952.02	ANTERIOR CORD SYND/C1–C4
952.03	CENTRAL CORD SYND/C1–C4
952.04	C1–C4 SPIN CORD INJ NEC
952.05	C5–C7 SPIN CORD INJ NOS
952.06	COMPLETE LES CORD/C5–C7
952.07	ANTERIOR CORD SYND/C5–C7
952.08	CENTRAL CORD SYND/C5–C7
952.09	C5–C7 SPIN CORD INJ NEC
952.10	T1–T6 SPIN CORD INJ NOS
952.11	COMPLETE LES CORD/T1–T6
952.12	ANTERIOR CORD SYND/T1–T6
952.13	CENTRAL CORD SYND/T1–T6
952.14	T1–T6 SPIN CORD INJ NEC
952.15	T7–T12 SPIN CORD INJ NOS
952.16	COMPLETE LES CORD/T7–T12
952.17	ANTERIOR CORD SYN/T7–T12
952.18	CENTRAL CORD SYN/T7–T12

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
952.19	T7–T12 SPIN CORD INJ NEC
952.2	LUMBAR SPINAL CORD INJUR
952.3	SACRAL SPINAL CORD INJUR
952.4	CAUDA EQUINA INJURY
952.8	SPIN CORD INJ–MULT SITE
952.9	SPINAL CORD INJURY NOS
997.60	AMPUTAT STUMP COMPL NOS
997.61	NEUROMA AMPUTATION STUMP

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
997.62	INFECTION AMPUTAT STUMP
997.69	AMPUTAT STUMP COMPL NEC
V49.63	STATUS AMPUT HAND
V49.64	STATUS AMPUT WRIST
V49.65	STATUS AMPUT BELOW ELBOW
V49.66	STATUS AMPUT ABOVE ELBOW
V49.67	STATUS AMPUT SHOULDER

TABLE 5.—ACCEPTABLE ICD–9–CM CODES—Continued

Code	Label
V49.75	STATUS AMPUT BELOW KNEE
V49.76	STATUS AMPUT ABOVE KNEE
V49.77	STATUS AMPUT HIP

*Note code 359.8 has been replaced by 359.81 and 359.89

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Part V

Securities and Exchange Commission

17 CFR Part 211

Staff Accounting Bulletin No. 103, "Update of Codification of Staff Accounting Bulletins"; Rules and Regulations

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release No. SAB 103]

Staff Accounting Bulletin No. 103, "Update of Codification of Staff Accounting Bulletins"

AGENCY: Securities and Exchange Commission.

ACTION: Publication of staff accounting bulletin.

SUMMARY: This staff accounting bulletin revises or rescinds portions of the interpretive guidance included in the codification of staff accounting bulletins in order to make this interpretive guidance consistent with current authoritative accounting and auditing guidance and SEC rules and regulations. The principal revisions relate to the rescission of material no longer necessary because of private sector developments in U.S. generally accepted accounting principles, as well as Commission rulemaking.

DATES: Effective May 9, 2003.

FOR FURTHER INFORMATION CONTACT: Paul Munter or Jack Albert, Office of the Chief Accountant (202–942–4400), or Craig Olinger, Division of Corporation Finance (202–942–2960), Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

Background

The last comprehensive review of the staff accounting bulletins was completed by the staff in 1981, which culminated in issuance of Staff Accounting Bulletin No. 40. At that time, the staff completed a comprehensive review of the material included in staff accounting bulletin numbers 1 through 38 to revise and update such materials, and to codify those staff accounting bulletins in order to make the interpretive guidance contained therein more useful to registrants, accountants and others (Staff Accounting Bulletin No. 39 was separately considered by the staff).

Since that time, the staff has issued 62 additional staff accounting bulletins (through number 102) and occasional amendments (*e.g.*, SAB No. 71A), and has, on a sporadic basis, revised or rescinded the guidance in individual staff accounting bulletins based on subsequent Commission rulemaking activities or developments by private sector accounting and auditing standards-setters. However, a comprehensive review of the guidance contained in the staff accounting bulletin codification has not been undertaken since 1981.

Recent guidance issued by the Financial Accounting Standards Board (FASB), specifically Statements of Financial Accounting Standards (Statements) 141, *Business Combinations,* 142, *Goodwill and Other Intangible Assets,* 143, *Accounting for Asset Retirement Obligations,* 144, *Accounting for the Impairment or Disposal of Long-Lived Assets,* 146, *Accounting for Costs Associated with Exit or Disposal Activities,* 147, *Acquisitions of Certain Financial Institutions—an Amendment of FASB Statements No. 72 and 144 and FASB Interpretation No. 9,* and Interpretations 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others—an Interpretation of FASB Statements No. 5, 57, and 107 and Rescission of FASB Interpretation No. 34* and 46, *Consolidation of Variable Interest Entities,* revise or supersede certain guidance contained in Accounting Principles Board (APB) Opinions 16, *Business Combinations,* 17, *Intangible Assets,* and 30, *Reporting the Results of Operations— Reporting the Effects of Disposal of a Segment of a Business, and Extraordinary, Unusual and Infrequently Occurring Events and Transactions,* Statements 5, *Accounting for Contingencies,* and 121, *Accounting for the Impairment of Long-Lived Assets and for Long-Lived Assets to Be Disposed Of,* as well as several issues addressed by the FASB's Emerging Issues Task Force (EITF) and other authoritative guidance. Provisions of the accounting standards identified above that have been revised or superseded were the subject of several staff interpretations included in the staff accounting bulletins. Furthermore, certain guidance contained in many of the staff accounting bulletins either is no longer useful or relevant due to the passage of time, or has been made obsolete by subsequent Commission rulemaking activities.

Therefore, the purpose of this staff accounting bulletin is to comprehensively update the existing codification to enhance the integrity and usefulness of this guidance.

The statements in staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws.

Dated: May 9, 2003.

Margaret H. McFarland,

Deputy Secretary.

PART 211—[AMENDED]

Accordingly, Part 211 of Title 17 of the Code of Federal Regulations is amended by adding Staff Accounting Bulletin No. 103 to the table found in Subpart B.

Staff Accounting Bulletin No. 103

The staff hereby revises the Staff Accounting Bulletin Series as follows:

1. Topic 1: Financial Statements

a. Topic 1.A is modified to delete the reference to previously-deleted Rules 3–07 and 3–08 of Regulation S–X.

b. Topic 1.B.1 is modified to reflect the provisions of FASB Statement 109, *Accounting for Income Taxes.*

c. Topic 1.D.1 is modified to conform such guidance with the revised disclosure requirements for foreign private issuers required under Form 20–F as a result of the Commission's International Disclosure Standards rule (Exchange Act Release No. 34–41936) which became effective September 30, 2000. The modifications primarily relate to changes in the former reference in this guidance to Item 9 (Management's Discussion and Analysis) of Form 20–F to make the reference consistent with the new non-financial disclosure requirements of this Form.

d. Topic 1.E.1 is deleted. A definition of the term "audit (or examination)," which was the subject of this interpretive guidance, is now provided in Rule 1–02 of Regulation S–X, thus making the guidance contained in this staff accounting bulletin unnecessary.

e. Topic 1.F is modified to change the references in this guidance from Form S–14 to Form S–4, since Form S–4 subsequently replaced Form S–14. This topic is also modified to delete question 3 and the related interpretive response. The guidance contained in this interpretive response, related to the appropriate accounting treatment for costs incurred to register securities issued for the formation of one-bank holding companies, has been superseded by American Institute of Certified Public Accountants' (AICPA) Statement of Position (SOP) 98–5, *Reporting on the Costs of Start-Up Activities.*

f. Topic 1.I is modified to update the former reference in this guidance to the American Institute of Certified Public Accountants' February 1986 Notice to Practitioners, *ADC Arrangements. ADC*

Arrangements was originally issued as a notice to practitioners, published in the April 1986 issue of *The Journal of Accountancy*. This notice was subsequently reprinted without modification as Exhibit I to the AICPA's Practice Bulletin 1 dated November 1987. Furthermore, question 8 of this topic is deleted because the guidance contained in this question and interpretive response, which related to transition to the guidance in Topic 1.I, is no longer relevant due to the passage of time. Furthermore, the reference in the interpretive response to question 1 to Rule 1–02(v) of Regulation S–X has been changed to Rule 1–02(w) of Regulation S–X, since this Rule was redesignated in Exchange Act Release No. 34–35094.

g. Topic 1.J, the first paragraph of the interpretative response is modified to remove the reference to specific percentages and refer to the significance tests in Rule 3–05.

h. Topic 1.L is deleted since it refers to the bankruptcy of a specific accounting firm (Laventhol & Horwath) which occurred in 1990.

i. Topic 1.M is modified to update references to authoritative literature such as SAS 99, *Consideration of Fraud in a Financial Statement Audit,* which superseded SAS 82, *Consideration of Fraud in a Financial Statement Audit.*

2. Topic 2: Business Combinations—Note: In June 2001, the FASB issued Statement 141, which superseded APB Opinion 16, and Statement 142 which superseded APB Opinion 17. Paragraph 13 of Statement 141 requires all business combinations within the scope of that statement to be accounted for using the purchase method as described in that statement. The provisions of Statement 141 are applicable to all business combinations initiated after June 30, 2001. The pooling-of-interests method of accounting for business combinations, as provided for in APB Opinion 16, is no longer permitted for business combinations initiated after June 30, 2001. Several of the interpretive questions in this topic relate to the conditions that must be met in order for a business combination to be appropriately accounted for under the pooling-of-interests method. Accordingly, these interpretive questions are no longer needed.

a. Topic 2.A.1 is deleted. This topic addresses the impact of cash contingencies on classifying a combination as a pooling-of-interests. Since business combinations cannot be accounted for using the pooling-of-interests method, the guidance is no longer relevant.

b. Topic 2.A.2 is deleted. This topic contained two interpretive questions regarding how the acquiring corporation should be determined in a purchase business combination, following the guidance in APB Opinion 16. These interpretations were premised on the language contained in paragraph 70 of APB Opinion 16, which indicated that "* * * presumptive evidence of the acquiring corporation in combinations effected by an exchange of stock is obtained by identifying the former common stockholder interests of a combining company which either retain or receive the larger portion of the voting rights in the combined corporation. That corporation should be treated as the acquirer unless other evidence clearly indicates that another corporation is the acquirer." Guidance on identifying the acquiring entity is now provided in paragraphs 15 through 19 of Statement 141. This guidance provides several factors to be considered in determining the acquiring entity, one of which is the relative voting rights in the combined entity after the combination. The presumptive language contained in APB Opinion 16 was not retained in Statement 141. Therefore, the guidance in Topic 2.A.2 is no longer relevant.

c. Topic 2.A.3 is deleted. This topic provided interpretive guidance regarding the application of the purchase method of accounting for business combinations to acquisitions of financial institutions during a period of unusual economic conditions (*i.e.*, a period of abnormally high interest rates). This guidance focused on: (1) Unique considerations in the allocation of purchase price to acquired tangible and intangible assets in financial institution acquisitions (such as the determination of the fair values of assets acquired, and the identification and valuation of identifiable intangible assets), (2) the appropriate measure of the fair value of deposit liabilities assumed in acquisitions of financial institutions, and (3) the appropriate amortization periods and methods for intangible assets acquired and goodwill arising from financial institution acquisitions. Statements 141 and 147 provide new guidance as to the criteria for recognizing an intangible asset apart from goodwill in a purchase business combination. Statement 142 provides new guidance on the initial recognition and measurement of intangible assets, and the determination of the useful lives and amortization methods for intangible assets subject to amortization. Statement 142 also provides new guidance on accounting for goodwill. Consequently, the guidance contained in this topic is no longer relevant.

d. Topic 2.A.4 is deleted. This topic provided guidance on the determination of the appropriate amortization period for goodwill arising from financial institution acquisitions which occurred after December 23, 1981 at the time an entity participating in such an acquisition became an SEC registrant. Under the provisions of Statement 142, goodwill is not amortized, but instead must be tested for impairment at least annually following the methodology provided in that statement. Therefore, the guidance in this topic is no longer relevant.

e. Topic 2.A.5 is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141.

f. Topic 2.A.6 is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141.

g. Topic 2.A.7 is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141.

h. Topic 2.A.8 is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141. Furthermore, footnote 2 is deleted, since this footnote provided transition guidance which is no longer necessary due to the passage of time.

i. Topic 2.A.9 is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141.

j. Topic 2.B is deleted. It addressed the treatment of merger expenses in a pooling-of-interests combination. Since, under Statement 141, all combinations are treated as purchases, this guidance is no longer necessary.

k. Topic 2.C is deleted. It addressed certain pro forma disclosures required for a pooling-of-interests combination. Since, under Statement 141, all combinations are treated as purchases, this guidance is no longer necessary.

l. Topic 2.D is modified to update the former references to APB Opinion 16 contained therein to the relevant portions of Statement 141, and to otherwise make the language in this guidance consistent with the provisions of Statement 141 and to delete portions of the guidance related to pooling-of-interests accounting.

m. Topic 2.E is deleted. The topic addressed the implications of risk sharing provisions on the classification of a combination as a pooling-of-interests. Since, under Statement 141, all combinations are treated as purchases, this guidance is no longer necessary.

n. Topic 2.F is deleted. This topic addressed the implications of treasury stock transactions following the consummation of a business combination on the classification of a combination as a pooling-of-interest. Since, under Statement 141, all combinations are treated as purchases, this guidance is no longer necessary.

3. Topic 3: Senior Securities

a. Topic 3.C is modified to include a reference to EIT Topic D–98 in the interpretive response to Question 1.

4. Topic 4: Equity Accounts

a. Topic 4.B is retitled. It previously referred to Subchapter S Corporations. Such entities are now referred to as S Corporations.

b. Topic 4.E is modified to revise the interpretive response to be consistent with revisions subsequently made in Rule 5–02.30 of Regulation S–X.

5. Topic 5: Miscellaneous Accounting

a. Topics 5.C.1 and 5.C.2 are deleted. These topics provided interpretive guidance related to the current recognition of tax loss carryforwards under APB Opinion 11, *Accounting for Income Taxes*. APB Opinion 11 has since been superseded by Statement 109 and the guidance contained in these topics is no longer relevant.

b. Topic 5.E, question 1 is modified to add an appropriate reference to FASB Interpretation 46.

c. Topic 5.E, question 2 is modified to remove, in the interpretive response, the reference to APB Opinion 30, since the relevant authoritative guidance that this response was referring to (accounting for the disposal of a segment of a business) has been superseded by Statement 144. Additionally, that interpretive response is modified to remove the reference to ASR 95, *Accounting for Real Estate Transactions Where Circumstances Indicate that Profits Were Not Earned at the Time the Transactions Were Recorded*, which previously was rescinded.

d. Topic 5.F is modified to delete the reference in the interpretive response to Statement 8, *Accounting for the Translation of Foreign Currency Transactions and Foreign Currency Financial Statements*, which has since been superseded.

e. Topic 5.J, footnote 1 has been modified to reflect the fact that the FASB has not determined when or whether it will address push down accounting. Additionally, the interpretive response to question 3 has been modified to include reference to the guidance provided in Interpretation 45.

f. Topic 5.M is modified in order to conform this guidance with the provisions of Statement 115, *Accounting for Certain Investments in Debt and Equity Securities*, which superseded Statement 12, *Accounting for Certain Marketable Securities*. The guidance contained in question 1 of this interpretation continues to be relevant, because Statement 115, like Statement 12, requires a determination of whether a decline in the fair value of debt or equity securities is other than temporary. References to the applicable authoritative literature in the interpretive response to this question are changed, and the language in the interpretive response to question 1 is modified, to be consistent with the new authoritative guidance. Question 2 and the related interpretive response are deleted since Statement 115, paragraph 16 now provides relevant guidance on determining the amount of the write down when a decline in fair value is judged to be other than temporary.

g. Topics 5.P.1 and 5.P.2 are deleted. These topics provided interpretive guidance related to APB Opinion 30 and EITF Issues 94–3, *Liability Recognition for Certain Employee Termination Benefits and Other Costs to Exit an Activity (Including Certain Costs Incurred in a Restructuring)*, and 95–3, *Recognition of Liabilities in Connection with a Purchase Business Combination*, as they applied to restructuring provisions. Statement 146 establishes standards for accruing liabilities related to exiting activities and requires that the liability be recorded when it has been incurred and that it be recorded at its fair value. Accordingly, the previous guidance provided in these topics is no longer needed.

h. Topic 5.P.3 is modified to delete the language that referred to the requirements of APB Opinion 30 regarding the reporting of discontinued operations, which has since been superseded by Statement 144. Footnote 13 of this guidance also has been modified and renumbered to make reference to Statement 131, *Disclosures about Segments of an Enterprise and Related Information*, which superseded Statement 14, *Financial Reporting for Segments of a Business Enterprise*. The guidance in this footnote continues to be relevant, considering the revisions hereby made, under Statement 131.

i. Topic 5.P.4 is modified to change the reference in former footnote 16 from Statement 38, *Accounting for Preacquisition Contingencies of Purchased Enterprises*, to Statement 141. Statement 141 superseded Statement 38, although the guidance in Statement 38 was carried forward into the new standard without reconsideration. Therefore, the guidance in this footnote remains relevant. Additionally, the topic is modified to reflect the disclosure requirements of Statement 146.

j. Topic 5.R is deleted. With the issuance of Statement 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*, and Interpretation 39, *Offsetting of Amounts Related to Certain Contracts*, this guidance is no longer needed.

k. Topic 5.S, question 4 is modified to change the references in the interpretive response from Statement 96, *Accounting for Income Taxes*, to the relevant provisions in Statement 109. Although Statement 109 superseded Statement 96, the guidance in this interpretive response remains relevant, considering the revisions hereby made, because Statement 109 carried forward the same guidance contained in Statement 96 with respect to quasi-reorganizations.

l. Topic 5.T, footnote 2 is modified to remove reference to APB Opinion 16, which was superseded, and Topic 2.B, which is being deleted.

m. Topic 5.U is modified to add new footnotes 4 and 5 to clarify the guidance applicable to gain deferral situations.

n. Topic 5.V is modified to note that the interpretive guidance therein does not apply to sales of the residual equity in an entity holding nonperforming loans to an unrelated party. Instead, the provisions of Statement 140 apply to such transactions. Also, it is modified to add an appropriate reference to FASB Interpretation 46 and to delete the reference to EITF Topic D–14, *Transactions involving Special-Purpose Entities*. In addition, footnote 5 has been modified to note that EITF Issue 87–17, *Spinoffs or Other Distributions of Loans Receivable to Shareholders*, was subsequently codified as issue 11 of EITF Issue 01–02, *Interpretations of APB Opinion No. 29*.

o. Topic 5.W is modified to incorporate the guidance of SOP 94–6, *Disclosure of Certain Significant Risks and Uncertainties.*

p. Topic 5.X is deleted. This interpretive guidance expressed the staff's views regarding the accounting for income tax benefits of thrift bad-debt losses. This guidance was intended to serve as interim guidance until a new standard on accounting for income taxes was adopted. The FASB subsequently issued Statement 109 which provides guidance on this issue.

q. Topic 5.Y is modified as follows:

i. The *Facts* section, questions 1, 2, and 3 are deleted. The remaining questions are renumbered. This information is no longer needed because the issues are addressed in SOP 96–1, *Environmental Remediation Liabilities.*

ii. Previously-numbered question 4 is modified to replace the reference to EITF Issue No. 93–5, *Accounting For Environmental Liabilities,* with SOP 96–1 (SOP 96–1 carried forward the guidance previously contained in EITF Issue 93–5). In addition, previously-numbered footnote 3, included in the interpretive response to question 4, is modified to provide the relevant language from Concepts Statement 7, *Using Cash Flow Information and Present Value in Accounting Measurements.*

iii. Previously-numbered question 5 is modified to incorporate guidance from and reference to SOP 96–1.

iv. The interpretive response to previously-numbered question 7 is modified to refer registrants to the disclosure requirements of Statement 143 for legal obligations associated with the retirement of tangible long-lived assets within the scope of that statement and to Interpretation 45 for guarantees.

v. Previously-numbered question 8 and the related interpretive response are deleted. This guidance, related to the appropriate accounting for site restoration costs, post-closure and monitoring costs, or other environmental costs incurred at the end of the useful life of an asset, is no longer relevant due to the issuance of Statement 143, which establishes accounting standards for recognition and measurement of liabilities for asset retirement obligations and associated asset retirement costs.

r. Topic 5.Z.1 is deleted. The guidance in this interpretive response provided the staff's views as to whether the criteria under APB Opinion 30 for presentation as discontinued operations had been met under certain facts and circumstances. Statement 144 provides new guidance on reporting discontinued operations that supersedes the portions of APB Opinion 30 that addressed this issue. Therefore, this interpretative guidance is no longer relevant.

s. Topic 5.Z.2 is deleted. The guidance in these interpretive responses provided the staff's views as to whether the criteria under APB Opinion 30 for presentation as discontinued operations had been met under certain facts and circumstances. Statement 144 provides new guidance on reporting discontinued operations that supersedes the portions of APB Opinion 30 that addressed this issue. Therefore, this interpretative guidance is no longer relevant.

t. Topic 5.Z.3 is deleted. The guidance in these interpretive responses provided the staff's views as to whether the criteria under APB Opinion 30 for presentation as discontinued operations had been met under certain facts and circumstances. Statement 144 provides new guidance on reporting discontinued operations that supersedes the portions of APB Opinion 30 that addressed this issue. Therefore, this interpretative guidance is no longer relevant.

u. Topic 5.Z.4 is modified to be consistent with the guidance of Statement 144, which superseded the previous guidance of APB Opinion 30.

v. Topic 5.Z.5 is modified to reflect the appropriate terminology from Statement 144 (separate component) rather than that previously provided by APB Opinion 30 (segment of a business), to make other changes related to the accounting provisions of Statement 144, and to remind registrants of the disclosure requirements of Interpretation 45.

w. Topic 5.Z.6 is deleted. This topic provided the staff's views as to whether subsidiaries that a company intends to sell, which cannot be reported as discontinued operations under APB Opinion 30, must be consolidated in the company's financial statements. This interpretive question arose as a result of the "temporary control" exception to consolidation in ARB 51, *Consolidated Financial Statements,* as amended by Statement 94, *Consolidation of all Majority-Owned Subsidiaries.* Statement 144 provides guidance which supersedes the guidance in APB Opinion 30 related to the reporting of discontinued operations. Statement 144 also amended ARB 51 to eliminate the exception to consolidation for a subsidiary for which control is likely to be temporary. Therefore, the interpretive guidance in this topic is no longer relevant.

x. Topic 5.Z.7 is modified to change the reference therein from APB Opinion 30 to Statement 144. Furthermore, the interpretive response is also amended to add language clarifying the staff's interpretation of the term "dissimilar" based on long-standing staff practice.

y. Topic 5.AA is deleted. Statement 140 superseded the previous guidance on extinguishments of debt. Accordingly, the guidance is no longer needed.

z. Topic 5.CC is modified. Topic 5.CC provides interpretive guidance on certain questions related to the recognition and measurement of impairment of the carrying amount of long-lived assets, certain identifiable intangible assets, and goodwill pursuant to the provisions of Statement 121 and APB Opinion 17. A portion of this guidance has since been superseded by Statements 142 and 144 and is now deleted. The remaining relevant guidance is rewritten so that it is consistent with the requirements of Statements 142 and 144.

6. Topic 6: Interpretations of Accounting Series Releases

a. Topic 6.A.1 is deleted. ASR 166, *Disclosure of Unusual Risks and Uncertainties in Financial Reporting,* has been rescinded. Therefore, the guidance contained in this topic is no longer relevant.

b. Topic 6.F.1 is deleted. This interpretation provided interpretive guidance on the requirements of Rule 12–03 of Regulation S–X. The schedule previously required under Rule 12–03 was eliminated by Exchange Act Release No. 34–35094. Therefore, the guidance contained in this topic is no longer necessary.

c. Topic 6.G.1 is modified as follows:

i. The interpretive response to Question 5 is modified to incorporate the terminology used in Statement 144.

ii. Question 7 and the related interpretive response under sub-section a. to this topic are modified to remove the reference to Form 8, which was rescinded by Exchange Act Release No. 34–31905.

iii. Sub-section c. and the related questions and interpretive responses thereunder are deleted. Item 302(a)(5) of Regulation S–K was amended by Exchange Act Release No. 34–42266 which made the requirements of Item 302(a) of Regulation S–K applicable to any registrant, except a foreign private issuer, that has securities registered pursuant to sections 12(b) or 12(g) of the Exchange Act. Therefore, the guidance contained in these questions and interpretive responses, which related to the former requirements of Item 302(a) of Regulation S–K, no longer applies.

d. Topic 6.G.2.a is modified as follows:

i. Question 4 is modified to refer to cash and cash equivalents rather than to

funds. APB Opinion 19, *Reporting Changes in Financial Position,* referred to flow of funds. Statement 95, *Statement of Cash Flows,* superseded APB Opinion 19 and refers to flow of cash and cash equivalents.

ii. Question 5 is deleted. Question 5 refers to an analysis of changes in each element of working capital, which is consistent with a "funds" model. However, with the provisions of Statement 95, which uses "cash and cash equivalents," this guidance is no longer relevant.

e. Topic 6.G.2.b.1 is modified to add a footnote reference to APB Opinion 20, *Accounting Changes,* which requires disclosure of the nature and justification of a change in accounting principle.

f. Topic 6.H is modified as follows:

i. The *Facts* section is modified to delete item (3), since the related supplemental schedule that this item was referring to (Rule 12–10 of Regulation S–X) was eliminated by Exchange Act Release No. 34–35094.

ii. Topic 6.H.1.b is modified to refer to Rule 17a–5 as currently numbered.

iii. Topic 6.H.2.a is modified to remove the reference to ASR 172, *Notice of Rescission of Guidelines Set Forth in Accounting Series Release No. 148 Pertaining to Classification of Short-Term Obligations Expected to be Refinanced.*

iv. Topic 6.H.4.c and the related question and interpretive response thereunder are deleted. The schedule formerly required pursuant to Rule 12–10 of Regulation S–X was eliminated by Exchange Act Release No. 34–35094. Therefore, this guidance, which related to the disclosures previously required under Rule 12–10, is no longer relevant.

g. Topic 6.I.3 is modified to refer to discontinued operations rather than discontinuance or disposals of business segments so that it is consistent with Statement 144.

h. Topic 6.I.7 is modified to refer to Rule 4–08(h) rather than Rule 4–08(g) to reflect current numbering.

i. Topic 6.K.1 is deleted. This topic provided interpretive guidance related to the early adoption of ASR 302, *Separate Financial Statements Required by Regulation S–X.* This guidance is no longer necessary due to the passage of time.

j. Topic 6.4.b is modified to refer to Rule 1–02(w). The rules for determining significant subsidiaries were previously renumbered and moved to subsection (w).

7. Topic 7: Real Estate Companies

a. Topic 7.A is deleted..This topic provided guidance on the presentation of funds data in quarterly reports on Form 10–Q for real estate companies. This guidance is no longer relevant due to the issuance Statement 95.

b. Topic 7.B is deleted. This topic provided guidance on the appropriate format for the statement of changes in financial position for registrants engaged in retail land development and sale activities. This guidance is no longer relevant due to the issuance of Statement 95.

8. Topic 8: Retail Companies

a. The *Facts* to Topic 8.A are rewritten to make them more generically applicable to retail companies.

9. Topic 9: Finance Companies

a. Topic 9.A is deleted. This topic provided interpretive guidance on the appropriate accounting for nonrefundable "points" charged by finance companies at the time a loan transaction is closed. Related guidance is now provided in Statement 91, *Accounting for Nonrefundable Fees and Costs Associated with Originating or Acquiring Loans and Initial Direct Costs of Leases,* making the continued need for the guidance in this topic unnecessary.

10. Topic 10: Utility Companies

a. In the interpretive response to Topic 10.A, reference to Rule 4–08(j) is deleted since that rule no longer exists.

b. Topic 10.B is deleted. This topic provided interpretive guidance on disclosures that should be made concerning the estimated future costs of storing spent nuclear fuel and decommissioning nuclear generating plants. Statement 143 establishes accounting standards for recognition and measurement of a liability for an asset retirement obligation and the associated asset retirement cost, including required disclosures. Therefore, the guidance in this topic is no longer relevant.

c. Topic 10.C is modified to add a footnote reminding registrants to consider the guidance provided in Interpretation 46.

d. In the interpretive response to Topic 10.D, the second, third and fourth sentences of the final paragraph are deleted. These sentences referred to ASR 122, *Coverage of Fixed Charges,* which has been rescinded. Additionally, a footnote is added to remind registrants of the need to consider the guidance provided in Interpretations 45 and 46 and Statement 133, *Accounting for Derivative Instruments and Hedging Activities* and related literature.

e. Topic 10.E, question 2 and related interpretive response dealing with transition to the requirements of Statement 90, *Regulated Enterprises—Accounting for Abandonments and Disallowances of Plant Costs* is deleted as no longer necessary due to the passage of time.

f. Topic 10.F is modified to incorporate a footnote to the interpretive response to relate the response to the requirements of SOP 96–1.

11. Topic 11: Miscellaneous Disclosure

a. Topic 11.D is deleted. This topic provided interpretive guidance on the offsetting of related assets and liabilities. This guidance is no longer necessary due to the issuance of Interpretation 39.

b. Question 1 of Topic 11.H.2 is deleted with Questions 2 and 3 being renumbered as Questions 1 and 2. Question 1 and the Interpretive Response are no longer needed in light of the provisions of Statements 15 and 114.

c. Topic 11.J is deleted. This topic provided interpretive guidance on reporting information related to financial guarantees. This guidance is no longer necessary due to the issuance of Interpretation 45.

d. Topic 11.K, footnote one is modified to remove reference to activities of the FASB's financial instruments project which subsequently have been completed.

e. Topic 11.N, footnote 2 is modified to remove reference to Statement 72, *Accounting for Certain Acquisitions of Banking or Thrift Institutions (an Amendment of APB Opinion No. 17, an Interpretation of APB Opinions 16 and 17, and an Amendment of FASB Interpretation No. 9).* With the issuance of Statement 147, the provisions of Statement 72 are no longer relevant to the accounting for such transactions.

12. Topic 12: Oil and Gas Producing Activities

a. Topic 12.A.1 is revised to delete, in the interpretive response to question 3, the reference to Item 2(b)(3) of Regulation S–K, which has been redesignated within Industry Guide 2.

b. Topic 12.A.2 is revised to update the references to the required disclosures of the standardized measure of discounted future net cash flows to the provisions of Statement 69, *Disclosures about Oil and Gas Producing Activities.* Consistent with this change, reference to "standardized measure of discounted future net cash flows" is substituted for "estimated future net revenues" and "year end prices" substituted for "current prices" for consistency with the terminology used in Statement 69. Furthermore, questions 4–11, and the related

interpretive responses to those questions which deal with the reporting implications of the Windfall Profits Tax and the 1985 natural gas price decontrol and disclosure of reserve information are deleted as no longer being relevant.

c. Topic 12 A.3.a is deleted. The required disclosures of the standardized measure of discounted future net cash flows is provided by Statement 69 and the guidance is no longer necessary.

d. Topic 12.A.3.c is revised to update the references to the required disclosures of the standardized measure of discounted future net cash flows to the provisions of Statement 69.

e. Topic 12.A.3.d is revised to update the references to the required disclosures of the standardized measure of discounted future net cash flows to the provisions of Statement 69.

f. Topic 12.A.4, regarding filings by Canadian registrants, is deleted as no longer being relevant.

g. Topic 12.B regarding supplemental disclosures on the basis of reserve recognition accounting is deleted as no longer being relevant.

h. Topic 12.C.2 is revised to update the references currently included in Regulation S–X.

i. Topic 12.D.1 is revised to update the references currently included in Regulation S–X.

j. Topic 12.D.2 is revised to update the references to the required disclosures of the standardized measure of discounted future net cash flows to the provisions of Statement 69.

k. Topic 12.D.3.a is revised to update the references currently included in Regulation S–X.

l. Topic 12.D.3.b is redesignated as Topic 12.D.3.c and revised to provide updated guidance consistent with Statement 133.

m. Topic 12.D.3.b is rewritten to reflect the changes in the computation as a result of changes in the authoritative literature related to derivatives accounted for in accordance with Statement 133.

n. Topic 12.F is revised to substitute the reference to Rule 4–10(c)(3)(iii) of Regulation S–X for outdated Rule 4–10(i)(3)(iii) of Regulation S–X.

o. Topic 12.G is revised to update the references to the required disclosures of the standardized measure of discounted future net cash flows to the provisions of Statement 69 and to substitute the reference to Rule 4–10(c)(4) of Regulation S–X for Rule 4–10(k)(4) of Regulation S–X.

13. Topic 13: Revenue Recognition

a. Topic 13.A.3, the following changes are made:

i. The interpretive response to question 3 is modified to incorporate the guidance on separate elements of an arrangement from EITF Issue 00–21. Additionally, footnote 24 is modified to remove the reference to Statement 53, *Financial Reporting by Producers and Distributors of Motion Picture Films,* which has been superseded and to add a reference to SOP 00–2, *Accounting by Producers or Distributors of Films.*

ii. The interpretive response to question 7 is modified to refer to Statement 140 which replaced Statement 125, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities.*

b. Topic 13.B, footnote 6 is modified to refer to SAS 99 which superseded SAS 82.

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3. Deleted by SAB 103
4. *Disposal of operation with significant interest retained*
5. *Classification and disclosure of contingencies relating to discontinued operations*
6. Deleted by SAB 103
7. *Accounting for the spin-off of a subsidiary*

AA. Deleted by SAB 103
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Topic 6: Interpretations of Accounting Series Releases and Financial Reporting Releases

A.1. Deleted by SAB 103
B. Accounting Series Release 280—General Revision of Regulation S–X: Income or Loss Applicable to Common Stock
C. Accounting Series Release 180—Institution of Staff Accounting Bulletins (SABs)—Applicability of Guidance Contained in SABs
D. Redesignated as Topic 12.A by SAB 47
E. Redesignated as Topic 12.B by SAB 47
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G. Accounting Series Releases 177 and 286—Relating to Amendments to Form 10–Q, Regulation S–K, and Regulation S–X Regarding Interim Financial Reporting
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H. Accounting Series Release 148—Disclosure of Compensating Balances and Short-Term Borrowing Arrangements (Adopted November 13, 1973 as Modified by ASR 172 Adopted on June 13, 1975 and ASR 280 Adopted on September 2, 1980)
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3. *Net of tox presentotion*
4. *Loss years*
5. *Foreign registrants*
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J. Deleted by SAB 47
K. Accounting Series Release 302—Separate Financial Statements Required by Regulation S–X
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L. Financial Reporting Release 28—Accounting for Loan Losses by Registrants Engaged in Lending Activities
1. *Accounting for loan losses*
2. *Developing and documenting a systematic methodology*
o. Developing o systemotic methodology
b. Documenting o systemotic methodology
3. *Applying o systemotic methodology—meosuring ond documenting loon losses under Statement 114*
o. Meosuring ond documenting loon losses under Stotement 114—generol
b. Measuring ond documenting loon losses under Stotement 114 for o colloterol dependent loon
c. Meosuring and documenting loon losses under Stotement 114—fully colloteralized loons
4. *Applying o systemotic methodology—meosuring ond documenting loon losses under Stotement 5*
o. Measuring ond documenting loon losses under Stotement 5—generol
b. Meosuring ond documenting loon losses under Stoteinent 5—adjusting loss rotes
c. Meosuring ond documenting loon losses under Statement 5—estimoting losses on loons individuolly reviewed for impoirment but not considered individuolly impoired
5. *Documenting the results of o systemotic methodology*
a. Documenting the results of o systematic methodology—generol
b. Documenting the results of o systemotic methodology—allowonce odjustments
6. *Volidoting o systemotic methodology*

Topic 7: Real Estate Companies

A. Deleted by SAB 103
B. Deleted by SAB 103
C. Schedules of Real Estate and Accumulated Depreciation, and of Mortgage Loans on Real Estate
D. Income Before Depreciation

Topic 8: Retail Companies

A. Sales of Leased or Licensed Departments
B. Finance Charges

Topic 9: Finance Companies

A. Deleted by SAB 103
B. Deleted by ASR 307

Topic 10: Utility Companies

A. Financing by Electric Utility Companies Through Use of Construction Intermediaries
B. Deleted by SAB 103
C. Jointly Owned Electric Utility Plants
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E. Classification of Charges for Abandonments and Disallowances
F. Presentation of Liabilities for Environmental Costs

Topic 11: Miscellaneous Disclosure

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B. Depreciation and Depletion Excluded From Cost of Sales
C. Tax Holidays
D. Deleted by SAB 103
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H. Disclosures by Bank Holding Companies Regarding Certain Foreign Loans
1. *Deposit/relending arrongements*
2. *Accounting and disclosures by bank holding componies for o "Mexicon Debt Exchonge" tronsoction*

I. Reporting of an Allocated Transfer Risk Reserve in Filings Under the Federal Securities Laws
J. Deleted by SAB 103
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M. Disclosure of the Impact That Recently Issued Accounting Standards Will Have on the Financial Statements of the Registrant When Adopted in a Future Period
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Topic 12: Oil and Gas Producing Activities

A. Accounting Series Release 257—Requirements for Financial Accounting and Reporting Practices for Oil and Gas Producing Activities
1. *Estimotes of quontities of proved reserves*
2. *Estimotes of future net revenues*
3. *Disclosure of reserve informotion*
a. Deleted by SAB 103
b. Unproved properties
c. Limited partnership 10–K reports
d. Limited partnership registrotion statements
e. Rote reguloted componies
4. Deleted by SAB 103

B. Deleted by SAB 103
C. Methods of Accounting by Oil and Gas Producers
1. *First-time registronts*
2. *Consistent use of accounting methods within o consolidated entity*

D. Application of Full Cost Method of Accounting
1. *Treatment of income tox effects in the computotion of the limitotion on copitolized costs*

Topic 1: Financial Statements

A. Target Companies

Facts: Company X proposes to file a registration statement covering an exchange offer to stockholders of Company Y, a publicly held company. Company X asks Company Y to furnish information about its business, including current audited financial statements, for inclusion in the prospectus. Company Y declines to furnish such information.

Question 1: In filing the registration statement without the required information about Company Y, may Company X rely on Rule 409 in that the information is "unknown or not reasonably available?"

Interpretive Response: Yes, but to determine whether such reliance is justified, the staff requests the registrant to submit as supplemental information copies of correspondence between the registrant and the target company evidencing the request for and the refusal to furnish the financial statements. In addition, the prospectus must include any financial statements which are relevant and available from the Commission's public files and must contain a statement adequately describing the situation and the sources of information about the target company. Other reliable sources of financial information should also be utilized.

Question 2: Would the response change if Company Y was a closely held company?

Interpretive Response: Yes. The staff does not believe that Rule 409 is applicable to negotiated transactions of this type.

B. Allocation of Expenses and Related Disclosure in Financial Statements of Subsidiaries, Divisions or Lesser Business Components of Another Entity

Facts: A company (the registrant) operates as a subsidiary of another company (parent). Certain expenses incurred by the parent on behalf of the subsidiary have not been charged to the subsidiary in the past. The subsidiary files a registration statement under the Securities Act of 1933 in connection with an initial public offering.

1. Costs Reflected in Historical Financial Statements

Question 1: Should the subsidiary's historical income statements reflect all of the expenses that the parent incurred on its behalf?

Interpretive Response: In general, the staff believes that the historical income statements of a registrant should reflect all of its costs of doing business. Therefore, in specific situations, the staff has required the subsidiary to revise its financial statements to include certain expenses incurred by the parent on its behalf. Examples of such expenses may include, but are not necessarily limited to, the following (income taxes and interest are discussed separately below):

1. Officer and employee salaries,
2. Rent or depreciation,
3. Advertising,
4. Accounting and legal services, and
5. Other selling, general and administrative expenses.

When the subsidiary's financial statements have been previously reported on by independent accountants and have been used other than for internal purposes, the staff has accepted a presentation that shows income before tax as previously reported, followed by adjustments for expenses not previously allocated, income taxes, and adjusted net income.

Question 2: How should the amount of expenses incurred on the subsidiary's behalf by its parent be determined, and what disclosure is required in the financial statements?

Interpretive Response: The staff expects any expenses clearly applicable to the subsidiary to be reflected in its income statements. However, the staff understands that in some situations a reasonable method of allocating common expenses to the subsidiary (*e.g.*, incremental or proportional cost allocation) must be chosen because specific identification of expenses is not practicable. In these situations, the staff has required an explanation of the allocation method used in the notes to the financial statements along with management's assertion that the method used is reasonable.

In addition, since agreements with related parties are by definition not at arms length and may be changed at any time, the staff has required footnote disclosure, when practicable, of management's estimate of what the expenses (other than income taxes and interest discussed separately below) would have been on a stand alone basis, that is, the cost that would have been incurred if the subsidiary had operated as an unaffiliated entity. The disclosure has been presented for each year for which an income statement was required when such basis produced materially different results.

Question 3: What are the staff's views with respect to the accounting for and disclosure of the subsidiary's income tax expense?

Interpretive Response: Recently, a number of parent companies have sold interests in subsidiaries, but have retained sufficient ownership interests to permit continued inclusion of the subsidiaries in their consolidated tax returns. The staff believes that it is material to investors to know what the effect on income would have been if the registrant had not been eligible to be included in a consolidated income tax return with its parent. Some of these subsidiaries have calculated their tax provision on the separate return basis, which the staff believes is the preferable method. Others, however, have used different allocation methods. When the historical income statements in the filing do not reflect the tax provision on the separate return basis, the staff has required a pro forma income statement for the most recent year and interim period reflecting a tax provision calculated on the separate return basis.[1]

Question 4: Should the historical income statements reflect a charge for interest on intercompany debt if no such charge had been previously provided?

Interpretive Response: The staff generally believes that financial statements are more useful to investors if they reflect all costs of doing business, including interest costs. Because of the inherent difficulty in distinguishing the elements of a subsidiary's capital structure, the staff has not insisted that

[1] Paragraph 40 of Statement 109 states: "The consolidated amount of current and deferred tax expense for a group that files a consolidated tax return shall be allocated among the members of the group when those members issue separate financial statements. * * * The method adopted * * * shall be systematic, rational, and consistent with the broad principles established by [Statement 109]. A method that allocates current and deferred taxes to members of the group by applying [Statement 109] to each member as if it were a separate taxpayer meets those criteria.

the historical income statements include an interest charge on intercompany debt if such a charge was not provided in the past, except when debt specifically related to the operations of the subsidiary and previously carried on the parent's books will henceforth be recorded in the subsidiary's books. In any case, financing arrangements with the parent must be discussed in a note to the financial statements. In this connection, the staff has taken the position that, where an interest charge on intercompany debt has not been provided, appropriate disclosure would include an analysis of the intercompany accounts as well as the average balance due to or from related parties for each period for which an income statement is required. The analysis of the intercompany accounts has taken the form of a listing of transactions (*e.g.*, the allocation of costs to the subsidiary, intercompany purchases, and cash transfers between entities) for each period for which an income statement was required, reconciled to the intercompany accounts reflected in the balance sheets.

2. Pro Forma Financial Statements and Earnings per Share

Question: What disclosure should be made if the registrant's historical financial statements are not indicative of the ongoing entity (*e.g.*, tax or other cost sharing agreements will be terminated or revised)?

Interpretive Response: The registration statement should include pro forma financial information that is in accordance with Article 11 of Regulation S–X and reflects the impact of terminated or revised cost sharing agreements and other significant changes.

3. Other Matters

Question: What is the staff's position with respect to dividends declared by the subsidiary subsequent to the balance sheet date?

Interpretive Response: The staff believes that such dividends either be given retroactive effect in the balance sheet with appropriate footnote disclosure, or reflected in a pro forma balance sheet. In addition, when the dividends are to be paid from the proceeds of the offering, the staff believes it is appropriate to include pro forma per share data (for the latest year and interim period only) giving effect to the number of shares whose proceeds were to be used to pay the dividend. A similar presentation is appropriate when dividends exceed earnings in the current year, even though the stated use of proceeds is other than for the payment of dividends. In these situations, pro forma per share data should give effect to the increase in the number of shares which, when multiplied by the offering price, would be sufficient to replace the capital in excess of earnings being withdrawn.

C. Unaudited Financial Statements for a Full Fiscal Year

Facts: Company A, which is a reporting company under the Securities Exchange Act of 1934, proposes to file a registration statement within 90 days of its fiscal year end but does not have audited year-end financial statements available. The company meets the criteria under Rule 3–01(c) of Regulation S–X and is therefore not required to include year-end audited financial statements in its registration statement. However, the Company does propose to include in the prospectus the unaudited results of operations for its entire fiscal year.

Question: Would the staff find this objectionable?

Interpretive Response: The staff recognizes that many registrants publish the results of their most recent year's operations prior to the availability of year-end audited financial statements. The staff will not object to the inclusion of unaudited results for a full fiscal year and indeed would expect such data in the registration statement if the registrant has published such information. When such data is included in a prospectus, it must be covered by a management's representation that all adjustments necessary for a fair statement of the results have been made.

D. Foreign Companies

1. Disclosures Required of Companies Complying With Item 17 of Form 20–F

Facts: A foreign private issuer may use Form 20–F as a registration statement under section 12 or as an annual report under section 13(a) or 15(d) of the Exchange Act. The registrant must furnish the financial statements specified in Item 17 of that form. However, in certain circumstances, Forms F–3 and F–2 require that the annual report include financial statements complying with Item 18 of the form. Also, financial statements complying with Item 18 are required for registration of securities under the Securities Act in most circumstances. Item 17 permits the registrant to use its financial statements that are prepared on a comprehensive basis other than U.S. GAAP, but requires quantification of the material differences in the principles, practices and methods of accounting. An issuer complying with Item 18 must satisfy the requirements of Item 17 and also must provide all other information required by U.S. GAAP and Regulation S–X.

Question: Assuming that the registrant's financial statements include a discussion of material variances from U.S. GAAP along with quantitative reconciliations of net income and material balance sheet items, does Item 17 of Form 20–F require other disclosures in addition to those prescribed by the standards and practices which comprise the comprehensive basis on which the registrant's primary financial statements are prepared?

Interpretive Response: No. The distinction between Items 17 and 18 is premised on a classification of the requirements of U.S. GAAP and Regulation S–X into those that specify the methods of measuring the amounts shown on the face of the financial statements and those prescribing disclosures that explain, modify or supplement the accounting measurements. Disclosures required by U.S. GAAP but not required under the foreign GAAP on which the financial statements are prepared need not be furnished pursuant to Item 17.

Notwithstanding the absence of a requirement for certain disclosures within the body of the financial statements, some matters routinely disclosed pursuant to U.S. GAAP may rise to a level of materiality such that their disclosure is required by Item 5 (Management's Discussion and Analysis) of Form 20–F. Among other things, this item calls for a discussion of any known trends, demands, commitments, events or uncertainties that are reasonably likely to affect liquidity, capital resources or the results of operations in a material way. Also, instruction 2 of this item requires "a discussion of any aspects of the differences between foreign and U.S. GAAP, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole." Matters that may warrant discussion in response to Item 5 include the following:

- Material undisclosed uncertainties (such as reasonably possible loss contingencies), commitments (such as those arising from leases), and credit risk exposures and concentrations;
- Material unrecognized obligations (such as pension obligations);
- Material changes in estimates and accounting methods, and other factors or events affecting comparability;

- Defaults on debt and material restrictions on dividends or other legal constraints on the registrant's use of its assets;
- Material changes in the relative amounts of constituent elements comprising line items presented on the face of the financial statements;
- Significant terms of financings which would reveal material cash requirements or constraints;
- Material subsequent events, such as events that affect the recoverability of recorded assets;
- Material related party transactions (as addressed by Statement 57) that may affect the terms under which material revenues or expenses are recorded; and
- Significant accounting policies and measurement assumptions not disclosed in the financial statements, including methods of costing inventory, recognizing revenues, and recording and amortizing assets, which may bear upon an understanding of operating trends or financial condition.

2. "Free Distributions" by Japanese Companies

Facts: It is the general practice in Japan for corporations to issue "free distributions" of common stock to existing shareholders in conjunction with offerings of common stock so that such offerings may be made at less than market. These free distributions usually are from 5 to 10 percent of outstanding stock and are accounted for in accordance with provisions of the Commercial Code of Japan by a transfer of the par value of the stock distributed from paid-in capital to the common stock account. Similar distributions are sometimes made at times other than when offering new stock and are also designated "free distributions." U.S. accounting practice would require that the fair value of such shares, if issued by U.S. companies, be transferred from retained earnings to the appropriate capital accounts.

Question: Should the financial statements of Japanese corporations included in Commission filings which are stated to be prepared in accordance with U.S. GAAP be adjusted to account for stock distributions of less than 25 percent of outstanding stock by transferring the fair value of such stock from retained earnings to appropriate capital accounts?

Interpretive Response: If registrants and their independent accountants believe that the institutional and economic environment in Japan with respect to the registrant is sufficiently different that U.S. accounting principles for stock dividends should not apply to free distributions, the staff will not object to such distributions being accounted for at par value in accordance with Japanese practice. If such financial statements are identified as being prepared in accordance with U.S. GAAP, then there should be footnote disclosure of the method being used which indicates that U.S. companies issuing shares in comparable amounts would be required to account for them as stock dividends, and including in such disclosure the fair value of any such shares issued during the year and the cumulative amount (either in an aggregate figure or a listing of the amounts by year) of the fair value of shares issued over time.

E. Requirements for Audited or Certified Financial Statements

1. Deleted by SAB 103

2. Qualified Auditors' Opinions

Facts: The accountants' report is qualified as to scope of audit, or the accounting principles used.

Question: Does the staff consider the requirements for audited or certified financial statements met when the auditors' opinion is so qualified?

Interpretive Response: No. The staff does not accept as consistent with the requirements of Rule 2–02(b) of Regulation S-X financial statements on which the auditors' opinions are qualified because of a limitation on the scope of the audit, since in these situations the auditor was unable to perform all the procedures required by professional standards to support the expression of an opinion. This position was discussed in ASR 90 in connection with representations concerning the verification of prior years' inventories in first audits.

Financial statements for which the auditors' opinions contain qualifications relating to the acceptability of accounting principles used or the completeness of disclosures made are also unacceptable. (See ASR 4, and with respect to a "going concern" qualification, ASR 115.)

F. Financial Statement Requirements in Filings Involving the Formation of a One-Bank Holding Company

Facts: Holding Company A is organized for the purpose of issuing common stock to acquire all of the common stock of Bank A. Under the plan of reorganization, each share of common stock of Bank A will be exchanged for one share of common stock of the holding company. The shares of the holding company to be issued in the transaction will be registered on Form S–4. The holding company will not engage in any operations prior to consummation of the reorganization, and its only significant asset after the transaction will be its investment in the bank. The bank has been furnishing its shareholders with an annual report that includes financial statements that comply with GAAP.

Item 14 of Schedule 14A of the proxy rules provides that financial statements generally are not necessary in proxy material relating only to changes in legal organization (such as reorganizations involving the issuer and one or more of its totally held subsidiaries).

Question 1: Must the financial statements and the information required by Securities Act Industry Guide ("Guide 3") [1] for Bank A be included in the initial registration statement on Form S–4?

Interpretive Response: No, provided that certain conditions are met. The staff will not take exception to the omission of financial statements and Guide 3 information in the initial registration statement on Form S–4 if all of the following conditions are met:

- There are no anticipated changes in the shareholders' relative equity ownership interest in the underlying bank assets, except for redemption of no more than a nominal number of shares of unaffiliated persons who dissent;
- In the aggregate, only nominal borrowings are to be incurred for such purposes as organizing the holding company, to pay nonaffiliated persons who dissent, or to meet minimum capital requirements;
- There are no new classes of stock authorized other than those corresponding to the stock of Bank A immediately prior to the reorganization;
- There are no plans or arrangements to issue any additional shares to acquire any business other than Bank A; and
- There has been no material adverse change in the financial condition of the bank since the latest fiscal year-end included in the annual report to shareholders.

If at the time of filing the S–4, a letter is furnished to the staff stating that all of these conditions are met, it will not be necessary to request the Division of Corporation Finance to waive the financial statement or Guide 3 requirements of Form S–4.

Although the financial statements may be omitted, the filing should include a section captioned, "Financial Statements," which states either that an annual report containing financial statements for at least the latest fiscal year prepared in conformity with GAAP was previously furnished to shareholders or is being delivered with

[1] Item 801 of Regulation S–K.

the prospectus. If financial statements have been previously furnished, it should be indicated that an additional copy of such report for the latest fiscal year will be furnished promptly upon request without charge to shareholders. The name and address of the person to whom the request should be made should be provided. One copy of such annual report should be furnished supplementally with the initial filing for purposes of staff review.

If any nominal amounts are to be borrowed in connection with the formation of the holding company, a statement of capitalization should be included in the filing which shows Bank A on an historical basis, the pro forma adjustments, and the holding company on a pro forma basis. A note should also explain the pro forma effect, in total and per share, which the borrowings would have had on net income for the latest fiscal year if the transaction had occurred at the beginning of the period.

Question 2: Are the financial statements of Bank A required to be audited for purposes of the initial Form S–4 or the subsequent Form 10–K report?

Interpretive Response: The staff will not insist that the financial statements in the annual report to shareholders used to satisfy the requirement of the initial Form S–4 be audited.

The consolidated financial statements of the holding company to be included in the registrant's initial report on Form 10–K should comply with the applicable financial statement requirements in Regulation S–X at the time such annual report is filed. However, the regulations also provide that the staff may allow one or more of the required statements to be unaudited where it is consistent with the protection of investors.[2] Accordingly, the policy of the Division of Corporation Finance is as follows:

- The registrant should file audited balance sheets as of the two most recent fiscal years and audited statements of income and cash flows for each of the three latest fiscal years, with appropriate footnotes and schedules as required by Regulation S–X unless the financial statements have not previously been audited for the periods required to be filed. In such cases, the Division will not object if the financial statements in the first annual report on Form 10–K (or the special report filed pursuant to Rule 15d–2)[3] are audited only for the two latest fiscal years.[4] This policy only applies to filings on Form 10–K, and not to any Securities Act filings made after the initial S–4 filing.

The above procedure may be followed without making a specific request of the Division of Corporation Finance for a waiver of the financial statement requirements of Form 10–K.

The information required by Guide 3 should also be provided in the Form 10–K for at least the periods for which audited financial statements are furnished. If some of the statistical information for the two most recent fiscal years for which audited financial statements are included (other than information on nonperforming loans and the summary of loan loss experience) is unavailable and cannot be obtained without unwarranted or undue burden or expense, such data may be omitted provided a brief explanation in support of such representation is included in the report on Form 10–K. In all cases, however, information with respect to nonperforming loans and loan loss experience, or reasonably comparable data, must be furnished for at least the two latest fiscal years in the initial 10–K. Thereafter, for subsequent years in reports on Form 10–K, all of the Guide 3 information is required; Guide 3 information which had been omitted in the initial 10–K in accordance with the above procedure can be excluded in any subsequent 10–Ks.

G. Deleted by FRR 55

H. Deleted by FRR 55

I. Financial Statements of Properties Securing Mortgage Loans

Facts: A registrant files a Securities Act registration statement covering a maximum of $100 million of securities. Proceeds of the offering will be used to make mortgage loans on operating residential or commercial property. Proceeds of the offering will be placed in escrow until $1 million of securities are sold at which point escrow may be broken, making the proceeds immediately available for lending, while the selling of securities would continue.

Question 1: Under what circumstances are the financial statements of a property on which the registrant makes or expects to make a loan required to be included in a filing?

Interpretive Response: Rule 3–14 of Regulation S–X specifies the requirements for financial statements when the registrant has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required has acquired or proposes to acquire one or more properties which in the aggregate are significant.

Included in the category of properties acquired or to be acquired under Rule 3–14 are operating properties underlying certain mortgage loans, which in economic substance represent an investment in real estate or a joint venture rather than a loan. Certain characteristics of a lending arrangement indicate that the "lender" has the same risks and potential rewards as an owner or joint venturer. Those characteristics are set forth in Exhibit I to the Appendix of the American Institute of Certified Public Accountants' Practice Bulletin 1[1] "ADC[2] Arrangements" ("Exhibit I to PB1"). In September 1986 the EITF[3] reached a consensus on this issue[4] to the effect that, although Exhibit I to PB1 was issued to address the real estate ADC arrangements of financial institutions, preparers and auditors should consider the guidance contained in Exhibit I to PB1 in accounting for shared appreciation mortgages, loans on operating real estate and real estate ADC arrangements entered into by enterprises other than financial institutions.

Statement 133 as amended by Statements 137 and 138, generally requires that embedded instruments meeting the definition of a derivative and not clearly and closely related to the host contract be accounted for separately from the host instrument. If the embedded the expected residual profit component of an ADC arrangement need not be separately accounted for as a derivative under Statement 133, then the disclosure requirements discussed below for ADC loans and similar arrangements should be followed.[5]

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[2] Rule 3–13 of Regulation S–X.

[3] Rule 15d–2 would be applicable if the annual report furnished with the Form S–4 was not for the registrant's most recent fiscal year. In such a situation, Rule 15d–2 would require the registrant to file a special report within 90 days after the effective date of the Form S–4 furnishing audited financial statements for the most recent fiscal year.

[4] Unaudited statements of income and cash flows should be furnished for the earliest period.

[1] "ADC Arrangements" was originally issued as a *notice to practitioners* (February 1986, as published in the April 1986 issue of the Journal of Accountancy). The notice to practitioners was reprinted without change as Exhibit I to the Appendix of the American Institute of Certified Public Accountants' *Practice Bulletin 1* (November 1987).

[2] Acquisition, development and construction.

[3] The Emerging Issues Task Force ("EITF") was formed in 1984 to assist the Financial Accounting standards Board in the early identification and resolution of emerging accounting issues. Topics to be discussed by the EITF are publicly announced prior to its meetings and minutes of all EITF meetings are available to the public.

[4] See Issue 86–21.

[5] The equity kicker (the expected residual profit) would typically not be separated from the host contract and accounted for as a derivative because

In certain cases the "lender" has virtually the same potential rewards as those of an owner or a joint venturer by virtue of participating in expected residual profit.[6] In addition, Exhibit I to PB1 includes a number of other characteristics which, when considered individually or in combination, would suggest that the risks of an ADC arrangement are similar to those associated with an investment in real estate or a joint venture or, conversely, that they are similar to those associated with a loan. Among those other characteristics is whether the lender agrees to provide all or substantially all necessary funds to acquire the property, resulting in the borrower having title to, but little or no equity in, the underlying property. The staff believes that the borrower's equity in the property is adequate to support accounting for the transaction as a mortgage loan when the borrower's initial investment meets the criteria in paragraph 11 of Statement 66[7] and the borrower's payments of principal and interest on the loan are adequate to maintain a continuing investment in the property which meets the criteria in paragraph 12 of Statement 66.[8]

The financial statements of properties which will secure mortgage loans made or to be made from the proceeds of the offering which have the characteristics of real estate investments or joint ventures should be included as required by Rule 3–14 in the registration statement when such properties secure loans previously made, or have been identified as security for probable loans prior to effectiveness, and in filings made pursuant to the undertaking in Item 20D of Securities Act Industry Guide 5.

Rule 1–02(w) of Regulation S–X includes the conditions used in determining whether an acquisition is significant. The separate financial statements of an individual property should be provided when a property would meet the requirements for a significant subsidiary under this rule using the amount of the "loan" as a substitute for the "investment in the subsidiary" in computing the specified conditions. The combined financial statements of properties which are not individually significant should also be provided. However, the staff will not object if the combined financial statements of such properties are not included if none of the conditions specified in Rule 1–02(w), with respect to all such properties combined, exceeds 20% in the aggregate.

Under certain circumstances, information may also be required regarding operating properties underlying mortgage loans where the terms do not result in the lender having virtually the same risks and potential rewards as those of owners or joint venturers. Generally, the staff believes that, where investment risks exist due to substantial asset concentration, financial and other information should be included regarding operating properties underlying a mortgage loan that represents a significant amount of the registrant's assets. Such presentation is consistent with Rule 3–13 of Regulation S–X and Rule 408 under the Securities Act of 1933.

Where the amount of a loan exceeds 20% of the amount in good faith expected to be raised in the offering, disclosures would be expected to consist of financial statements for the underlying operating properties for the periods contemplated by Rule 3–14. Further, where loans on related properties are made to a single person or group of affiliated persons which in the aggregate amount to more than 20% of the amount expected to be raised, the staff believes that such lending arrangements result in a sufficient concentration of assets so as to warrant the inclusion of financial and other information regarding the underlying properties.

Question 2: Will the financial statements of the mortgaged properties be required in filings made under the 1934 Act?

Interpretive Response: Rule 3–09 of Regulation S–X specifies the requirement for significant, as defined, investments in operating entities, the operations of which are not included in the registrant's consolidated financial statements.[9] Accordingly, the staff believes that the financial statements of properties securing significant loans which have the characteristics of real estate investments or joint ventures should be included in subsequent filings as required by Rule 3–09. The materiality threshold for determining whether such an investment is significant is the same as set forth in paragraph (a) of that Rule.[10]

Likewise, the staff believes that filings made under the 1934 Act should include the same financial and other information relating to properties underlying any loans which are significant as discussed in the last paragraph of Question 1, except that in the determination of significance the 20% disclosure threshold should be measured using total assets. The staff believes that this presentation would be consistent with Rule 12b–20 under the Securities Exchange Act of 1934.

Question 3: The interpretive response to question 1 indicates that the staff believes that the borrower's equity in an operating property is adequate to support accounting for the transaction as a mortgage loan when the borrower's initial investment meets the criteria in paragraph 11 of Statement 66 and the borrower's payments of principal and interest on the loan are adequate to maintain a continuing investment in the property which meets the criteria in paragraph 12 of Statement 66. Is it the staff's view that meeting these criteria is the only way the borrower's equity in the property is considered adequate to support accounting for the transaction as a mortgage loan?

Interpretive Response: No. It is the staff's position that the determination of whether loan accounting is appropriate for these arrangements should be made by the registrant and its independent accountants based on the facts and circumstances of the individual arrangements, using the guidance

paragraph 12(c) of Statement 133 exempts a hybrid contract from bifurcation if a separate instrument with the same terms as the embedded equity kicker is not a derivative instrument subject to the requirements of Statement 133.

[6] Expected residual profit is defined in Exhibit I to PB1 as the amount of profit, whether called interest or another name, such as equity kicker, above a reasonable amount of interest and fees expected to be earned by the "lender."

[7] Statement 66 establishes standards for the recognition of profit on real estate sales transactions. Paragraph 11 states that the buyer's initial investment shall be adequate to demonstrate the buyer's commitment to pay for the property and shall indicate a reasonable likelihood that the seller will collect the receivable. Guidance on minimum initial investments in various types of real estate is provided in paragraphs 53 and 54 of Statement 66.

[8] Paragraph 12 of Statement 66 states that the buyer's continuing investment in a real estate transaction shall not qualify unless the buyer is contractually required to pay each year on its total debt for the purchase price of the property an amount at least equal to the level annual payment that would be needed to pay that debt and interest on the unpaid balance over not more than (a) 20 years for debt for land and (b) the customary amortization term of a first mortgage loan by an independent established lending institution for other real estate.

[9] Rule 3–14 states that the financial statements of an acquired property should be furnished if the acquisition took place during the period for which the registrant's income statements are required. Paragraph (b) of the Rule states that the information required by the Rule is not required to be included in a filing on Form 10–K. That exception is consistent with Item 8 of Form 10-K which excludes acquired company financial statements, which would otherwise be required by Rule 3–05 of Regulation S–X, from inclusion in filings on that Form. Those exceptions are based, in part, on the fact that acquired properties and acquired companies will generally be included in the registrant's consolidated financial statements from the acquisition date.

[10] Rule 3–09(a) states, in part, that "[i]f any of the conditions set forth in [Rule] 1–02(w), substituting 20 percent for 10 percent in the tests used therein to determine significant subsidiary, are met * * * separate financial statements * * * shall be filed."

provided in the Exhibit I to the Appendix of the American Institute of Certified Public Accountants Practice Bulletin 1 (November, 1987) ("Exhibit I to PB1"). As stated in Exhibit I to PB1, loan accounting may not be appropriate when the lender participates in expected residual profit and has virtually the same risks as those of an owner, or joint venturer. In assessing the question of whether the lender has virtually the same risks as an owner, or joint venturer, the essential test that needs to be addressed is whether the borrower has and is expected to continue to have a substantial amount at risk in the project.[11] The criteria described in Statement 66 provide a "safe harbor" for determining whether the borrower has a substantial amount at risk in the form of a substantial equity investment. The borrower may have a substantial amount at risk without meeting the criteria described in Statement 66.

Question 4: What financial statements should be included in filings made under the Securities Act regarding investment-type arrangements that individually amount to 10% or more of total assets?

Interpretive Response: In the staff's view, separate audited financial statements should be provided for any investment-type arrangement that constitutes 10% or more of the greater of (i) the amount of minimum proceeds or (ii) the total assets of the registrant, including the amount of proceeds raised, as of the date the filing is required to be made. Of course, the narrative information required by items 14 and 15 of Form S–11 should also be included with respect to these investment-type arrangements.

Question 5: What information must be provided under the Securities Act for investment-type arrangements that individually amount to less than 10%?

Interpretive Response: No specific financial information need be presented for investment-type arrangements that amount to less than 10%. However, where such arrangements aggregate more than 20%, a narrative description of the general character of the properties and arrangements should be included that gives an investor an understanding of the risks and rewards associated with these arrangements. Such information may, for example, include a description of the terms of the arrangements, participation by the registrant in expected residual profits, and property types and locations.

Question 6: What financial statements should be included in annual reports filed under the Exchange Act with respect to investment-type arrangements that constitute 10% or more of the registrant's total assets?

Interpretive Response: In annual reports filed with the Commission, the staff has advised registrants that separate audited financial statements should be provided for each nonconsolidated investment-type arrangement that is 20% or more of the registrant's total assets. While the distribution is on-going, however, the percentage may be calculated using the greater of (i) the amount of the minimum proceeds or (ii) the total assets of the registrant, including the amount of proceeds raised, as of the date the filing is required to be made. In annual reports to shareholders registrants may either include the separate audited financial statements for 20% or more nonconsolidated investment-type arrangements or, if those financial statements are not included, present summarized financial information for those arrangements in the notes to the registrant's financial statements.

The staff has also indicated that separate summarized financial information (as defined in Rule 1–02(bb) of Regulation S–X) should be provided in the footnotes to the registrant's financial statements for each nonconsolidated investment-type arrangement that is 10% or more but less than 20%. Of course, registrants should also make appropriate textural disclosure with respect to material investment-type arrangements in the "business" and "property" sections of their annual reports to the Commission.[12]

Question 7: What information should be provided in annual reports filed under the Exchange Act with respect to investment-type arrangements that do not meet the 10% threshold?

Interpretive Response: The staff believes it will not be necessary to provide any financial information (full or summarized) for investment-type arrangements that do not meet the 10% threshold. However, in the staff's view, where such arrangements aggregate more than 20%, a narrative description of the general character of the properties and arrangements would be necessary. The staff believes that information should be included that would give an investor an understanding of the risks and rewards associated with these arrangements. Such information may, for example, include a description of the terms of the arrangements, participation by the registrant in expected residual profits, and property types and locations. Of course, disclosure regarding the operations of such components should be included as part of the Management's Discussion and Analysis where there is a known trend or uncertainty in the operations of such properties, either individually or in the aggregate, which would be reasonably likely to result in a material impact on the registrant's future operations, liquidity or capital resources.

J. Application of Rule 3–05 in Initial Public Offerings

Facts: Rule 3–05 of Regulation S–X establishes the financial statement requirements for businesses acquired or to be acquired. If required, financial statements must be provided for one, two or three years depending upon the relative significance of the acquired entity as determined by the application of Rule 1–02(w) of Regulation S–X. The calculations required for these tests are applied by comparison of the financial data of the registrant and acquiree(s) for the fiscal years most recently completed prior to the acquisition. The staff has recognized that these tests literally applied in some initial public offerings may require financial statements for an acquired entity which may not be significant to investors because the registrant has had substantial growth in assets and earnings in recent years.[1]

Question: How should Rules 3–05 and 1–02(w) of Regulation S–X be applied in determining the periods for which financial statements of acquirees are required to be included in registration statements for initial public offerings?

Interpretive Response: It is the staff's view that initial public offerings involving businesses that have been built by the aggregation of discrete businesses that remain substantially intact after acquisition [2] were not

[11] Regarding the composition of the borrower's investment, paragraph 9b of Exhibit I to PB1 indicates that the borrower's investment may include the value of land or other assets contributed by the borrower, net of encumbrances. The staff emphasizes that such paragraph indicates, "* * * recently acquired property generally should be valued at no higher than cost * * *" Thus, for such recently acquired property, appraisals will not be sufficient to justify the use of a value in excess of cost.

[12] Registrants are reminded that in filings on Form 8–K that are triggered in connection with an acquisition of an investment-type arrangement, separate audited financial statements are required for any such arrangement that individually constitues 10% or more.

[1] An acquisition which was relatively significant in the earliest year for which a registrant is required to file financial statements may be insignificant to its latest fiscal year due to internal growth and/or subsequent acquisitions. Literally applied, Rules 3–05 and 1–02(w) might still require separate financial statements for the now insignificant acquisition.

[2] For example, nursing homes, hospitals or cable TV systems. This interpretation would not apply to

contemplated during the drafting of Rule 3–05 and that the significance of an acquired entity in such situations may be better measured in relation to the size of the registrant at the time the registration statement is filed, rather than its size at the time the acquisition was made. Therefore, for a first time registrant, the staff has indicated that in applying the significance tests in Rule 3–05, the three tests in Rule 1–02(w) generally can be measured against the combined entities, including those to be acquired, which comprise the registrant at the time the registration statement is filed. The staff's policy is intended to ensure that the registration statement will include not less than three, two and one year(s) of audited financial statements for not less than 60%, 80% and 90%, respectively, of the constituent businesses that will comprise the registrant on an ongoing basis. In all circumstances, the audited financial statements of the registrant are required for three years, or since its inception if less than three years. The requirement to provide the audited financial statements of a constituent business in the registration statement is satisfied for the post-acquisition period by including the entity's results in the audited consolidated financial statements of the registrant. If additional periods are required, the entity's separate audited financial statements for the immediate pre-acquisition period(s) should be presented.[3] In order for the pre-acquisition audited financial statements of an acquiree to be omitted from the registration statement, the following conditions must be met:

a. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 9 months [4] may not exceed 10%;

b. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 21 months may not exceed 20%; and

c. The combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 33 months may not exceed 40%.

Combined significance is the total, for all included companies, of each individual company's highest level of significance computed under the three tests of significance. The significance tests should be applied to pro forma financial statements of the registrant, prepared in a manner consistent with Article 11 of Regulation S–X. The pro forma balance sheet should be as of the date of the registrant's latest balance sheet included in the registration statement, and should give effect to businesses acquired subsequent to the end of the latest year or to be acquired as if they had been acquired on that date. The pro forma statement of operations should be for the registrant's most recent fiscal year included in the registration statement and should give effect to all acquisitions consummated during and subsequent to the end of the year and probable acquisitions as if they had been consummated at the beginning of that fiscal year.

The three tests specified in Rule 1–02(w) should be made in comparison to the registrant's pro forma consolidated assets and pretax income from continuing operations. The assets and pretax income of the acquired businesses which are being evaluated for significance should reflect any new cost basis arising from purchase accounting.

Example: On February 20, 20X9 Registrant files Form S–1 containing its audited consolidated financial statements as of and for the three years ended December 31, 20X8. Acquisitions since inception have been:

Acquiree	Fiscal year end	Date of acquisition	Highest significance at acquisition (percent)
A	3/31	1/1/x7	60
B	7/31	4/1/x7	45
C	9/30	9/1/x7	40
D	12/31	2/1/x8	21
E	3/31	11/1/x8	11
F	12/31	To be acquired	11

The following table reflects the application of the significance tests to the combined financial information at the time the registration statement is filed.

Component entity	Assets (percent)	Significance of earnings (percent)	Investment (percent)	Highest level of signficance (percent)
A	12	23	12	23
B	10	21	10	21
C	21	3	4	21
D	10	5	13	13
E	4	[1]9	3	9
F	2	11	6	11

[1] Loss

businesses for which the relative significance of one portion of the business to the total business may be altered by post-acquisition decisions as to the allocation of incoming orders between plants or locations. This bulletin does not address all possible cases in which similar relief may be appropriate but, rather, attempts to describe a general framework within which administrative policy has been established. In other distinguishable situations, registrants may request relief as appropriate to their individual facts and circumstances.

[3] If audited pre-acquisition financial statements of a business are necessary pursuant to the alternative tests described here, the interim period following that entity's latest pre-acquisition fiscal year end but prior to its acquisition by the registrant generally would be required to be audited.

[4] As a matter of policy the staff accepts financial statements for periods of not less than 9, 21 and 33 consecutive months (not more than 12 months may be included in any period reported on) as substantial compliance with requirements for financial statements for 1, 2 and 3 years, respectively.

Year 1 (most recent fiscal year)—Entity E is the only acquiree for which pre-acquisition financial statements may be omitted for the latest year since significance for each other entity exceeds 10% under one or more test.

Year 2 (preceding fiscal year)—Financial statements for E and F may be omitted since their combined significance is 20% and no other combination can be formed with E which would not exceed 20%.

Year 3 (second preceding fiscal year)—Financial statements for D, E and F may be omitted since the combined significance of these entities is 33% [5] and no other combination can be formed with E and F which would not exceed 40%.

The financial statement requirements must be satisfied by filing separate pre-acquisition audited financial statements for each entity that was not included in the consolidated financial statements for the periods set forth above. The following table illustrates the requirements for this example.

Component entity	Date of acquisition	Minimum financial statement requirement (months)	Period in consolidated financial statements (months)	Separate pre-acquisition audited financial statement (months)
Registrant	N/A	33	36	
A	1/1/x7	33	24	9
B	4/1/x7	33	21	[6]12
C	9/1/x7	33	16	17
D	2/1/x8	21	11	10
E	11/1/x8		2	
F	To be acquired	9		9

[6] The audited pre-acquisition period need not correspond to the acquiree's pre-acquisition fiscal year. However, audited periods must not be for periods in excess of 12 months.

K. Financial Statements of Acquired Troubled Financial Institutions

Facts: Federally insured depository institutions are subject to regulatory oversight by various federal agencies including the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision. During the 1980s, certain of these institutions experienced significant financial difficulties resulting in their inability to meet necessary capital and other regulatory requirements. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 was adopted to address various issues affecting this industry.

Many troubled institutions have merged into stronger institutions or reduced the scale of their operations through the sale of branches and other assets pursuant to recommendation or directives of the regulatory agencies. In other situations, institutions that were taken over by or operated under the management of a federal regulator have been reorganized, sold or transferred by that federal agency to financial and nonfinancial companies.

A number of registrants have acquired, or are contemplating acquisition of, these troubled financial institutions. Complete audited financial statements of the institutions for the periods necessary to comply fully with Rule 3–05 of Regulation S–X may not be reasonably available in some cases. Some troubled institutions have never obtained an audit while others have been operated under receivership by regulators for a significant period without audit. Auditors' reports on the financial statements of some of these acquirees may not satisfy the requirements of Rule 2–02 of Regulation S–X because they contain qualifications due to audit scope limitations or disclaim an opinion.

A registrant that acquires a troubled financial institution for which complete audited financial statements are not reasonably available may be precluded from raising capital through a public offering of securities for up to three years following the acquisition because of the inability to comply with Rule 3–05.

Question 1: Are there circumstances under which the staff would conclude that financial statements of an acquired troubled financial institution are not required by Rule 3–05?

Interpretive Response: Yes. In some case, financial statements will not be required because there is not sufficient continuity of the acquired entity's operations prior to and after the acquisition, so that disclosure of prior financial information is material to an understanding of future operations, as discussed in Rule 11–01 of Regulation S–X. For example, such a circumstance may exist in the case of an acquisition solely of the physical facilities of a banking branch with assumption of the related deposits if neither income-producing assets (other than treasury bills and similar low-risk investment) nor the management responsible for its historical investment and lending activities transfer with the branch to the registrant. In this and other circumstances, where the registrant can persuasively demonstrate that continuity of operations is substantially lacking and a representation to this effect is included in the filing, the staff will not object to the omission of financial statements. However, applicable disclosures specified by Industry Guide 3, Article 11 of Regulation S–X (pro forma information), and other information which is descriptive of the transaction and of the assets acquired and liabilities assumed should be furnished to the extent reasonably available.

Question 2: If the acquired financial institution is found to constitute a business having material continuity of operations after the transaction, are there circumstances in which the staff will waive the requirements of Rule 3–05?

Interpretive Response: Yes. The staff believes the circumstances surrounding the present restructuring of U.S. depository institutions are unique. Accordingly, the staff has identified situations in which it will grant a waiver of the requirements of Rule 3–05 of Regulation S–X to the extent that

[5] Combined significance is the sum of the significance of D's investment test (13%), E's earnings test (9%) and F's earnings test (11%).

audited financial statements are not reasonably available.

For purposes of this waiver a "troubled financial institution" is one which either:

a. Is in receivership, conservatorship or is otherwise operating under a similar supervisory agreement with a federal financial regulatory agency; or

b. Is controlled by a federal regulatory agency; or

c. Is acquired in a federally assisted transaction.

A registrant that acquires a troubled financial institution that is deemed significant pursuant to Rule 3–05 may omit audited financial statements of the acquired entity, if such statements are not reasonably available and the total acquired assets of the troubled institution do not exceed 20% of the registrant's assets before giving effect to the acquisition. The staff will consider requests for waivers in situations involving more significant acquisitions, where federal financial assistance or guarantees are an essential part of the transaction, or where the nature and magnitude of federal assistance is so pervasive as to substantially reduce the relevance of such information to an assessment of future operations. Where financial statements are waived, disclosure concerning the acquired business as outlined in response to Question 3 must be furnished.

Question 3: Where historical financial statements meeting the requirements of Rule 3–05 of Regulation S–X are waived, what financial statements and other disclosures would the staff expect to be provided in filings with the Commission?

Interpretive Response: Where complete audited historical financial statements of a significant acquiree that is a troubled financial institution are not provided, the staff would expect filings to include an audited statement of assets acquired and liabilities assumed if the acquisition is not already reflected in the registrant's most recent audited balance sheet at the time the filing is made. Where reasonably available, unaudited statement of operations and cash flows that are prepared in accordance with GAAP and otherwise comply with Regulation S–X should be filed in lieu of any audited financial statements which are not provided if historical information may be relevant.

In all cases where a registrant succeeds to assets and/or liabilities of a troubled financial institution which are significant to the registrant pursuant to the tests in Rule 1–02(w) of Regulation S–X, narrative description should be required, quantified to the extent practicable, of the anticipated effects of the acquisition on the registrant's financial condition, liquidity, capital resources and operating results. If federal financial assistance (including any commitments, agreements or understandings made with respect to capital, accounting or other forbearances) may be material, the limits, conditions and other variables affecting its availability should be disclosed, along with an analysis of its likely short term and long term effects on cash flows and reported results.

If the transaction will result in the recognition of any significant intangibles that cannot be separately sold, such as goodwill or a core deposit intangible, the discussion of the transaction should describe the amount of such intangibles, the necessarily subjective nature of the estimation of the life and value of such intangibles, and the effects upon future results of operations, liquidity and capital resources, including any consequences if a recognized intangible will be excluded from the calculation of capital for regulatory purposes. The discussion of the impact on future operations should specifically address the period over which intangibles will be amortized and the period over which any discounts on acquired assets will be taken into income. If amortization of intangibles will be over a period which differs from the period over which income from discounts on acquired assets will be recognized (whether from amortization of discounts or sale of discounted assets), disclosure should be provided concerning the disparate effects of the amortization and income recognition on operating results for all affected periods.

Information specified by Industry Guide 3 should be furnished to the extent applicable and reasonably available. For the categories identified in the Industry Guide, the registrant should disclose the carrying value of loans and investments acquired, as well as their principal amount and average contractual yield and term. Amounts of acquired investments, loans, or other assets that are nonaccrual, past due or restructured, or for which other collectibility problems are indicated should be disclosed. Where historical financial statements of the acquired entity are furnished, pro forma information presented pursuant to Rule 11–02 should be supplemented as necessary with a discussion of the likely effects of any federal assistance and changes in operations subsequent to the acquisition. To the extent historical financial statements meeting all the requirements of Rule 3–05 are not furnished, the filing should include an explanation of the basis for their omission.

Question 4: If an audited statement of assets acquired and liabilities assumed is required, but certain of the assets conveyed in the transaction are subject to rights allowing the registrant to put the assets back to the seller upon completion of a due diligence review, will the staff grant an extension of time for filing the required financial statement until the put period lapses?

Interpretive Response: If it is impracticable to provide an audited statement at the time the Form 8–K reporting the transaction is filed, an extension of time is available under certain circumstances. Specifically, if more than 25% of the acquired assets may be put and the put period does not exceed 120 days, the registrant should timely file a statement of assets acquired and liabilities assumed on an unaudited basis with full disclosure of the terms and amounts of the put arrangement. Within 21 days after the put period lapses, the registrant should furnish an audited statement of assets acquired and liabilities assumed unless the effects of the transaction are already reflected in an audited balance sheet which has been filed with the Commission. However, until the audited financial statement has been filed, certain offerings under the Securities Act of 1933 would be prevented, as described in Instruction 1 to Item 7 of Form 8–K.

L. Deleted by SAB 103

M. Materiality

1. Assessing Materiality

Facts: During the course of preparing or auditing year-end financial statements, financial management or the registrant's independent auditor becomes aware of misstatements in a registrant's financial statements. When combined, the misstatements result in a 4% overstatement of net income and a $.02 (4%) overstatement of earnings per share. Because no item in the registrant's consolidated financial statements is misstated by more than 5%, management and the independent auditor conclude that the deviation from GAAP is immaterial and that the accounting is permissible.[1]

[1] AU 312 states that the auditor should consider audit risk and materiality both in (a) planning and setting the scope for the audit and (b) evaluating whether the financial statements taken as a whole are fairly presented in all material respects in conformity with GAAP. The purpose of this SAB is to provide guidance to financial management and independent auditors with respect to the evaluation of the materiality of misstatements that are identified in the audit process or preparation of the financial statements (*i.e.*, (b) above). This SAB is not

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Question: Each Statement of Financial Accounting Standards adopted by the FASB states, "The provisions of this Statement need not be applied to immaterial items." In the staff's view, may a registrant or the auditor of its financial statements assume the immateriality of items that fall below a percentage threshold set by management or the auditor to determine whether amounts and items are material to the financial statements?

Interpretive Response: No. The staff is aware that certain registrants, over time, have developed quantitative thresholds as "rules of thumb" to assist in the preparation of their financial statements, and that auditors also have used these thresholds in their evaluation of whether items might be considered material to users of a registrant's financial statements. One rule of thumb in particular suggests that the misstatement or omission [2] of an item that falls under a 5% threshold is not material in the absence of particularly egregious circumstances, such as self-dealing or misappropriation by senior management. The staff reminds registrants and the auditors of their financial statements that exclusive reliance on this or any percentage or numerical threshold has no basis in the accounting literature or the law.

The use of a percentage as a numerical threshold, such as 5%, may provide the basis for a preliminary assumption that—without considering all relevant circumstances—a deviation of less than the specified percentage with respect to a particular item on the registrant's financial statements is unlikely to be material. The staff has no objection to such a "rule of thumb" as an initial step in assessing materiality. But quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations. Materiality concerns the significance of an item to users of a registrant's financial statements. A matter is "material" if there is a substantial likelihood that a reasonable person would consider it important. In its Concepts Statement 2, the FASB stated the essence of the concept of materiality as follows:

> The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.[3]

This formulation in the accounting literature is in substance identical to the formulation used by the courts in interpreting the federal securities laws. The Supreme Court has held that a fact is material if there is—

> a substantial likelihood that the * * * fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[4]

Under the governing principles, an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[5] Court decisions, Commission rules and enforcement actions, and accounting and auditing literature [6] have all considered "qualitative" factors in various contexts.

The FASB has long emphasized that materiality cannot be reduced to a numerical formula. In its Concepts Statement 2, the FASB noted that some had urged it to promulgate quantitative materiality guides for use in a variety of situations. The FASB rejected such an approach as representing only a "minority view, stating—

> The predominant view is that materiality judgments can properly be made only by those who have all the facts. The Board's present position is that no general standards of materiality could be formulated to take into account all the considerations that enter into an experienced human judgment.[7]

The FASB noted that, in certain limited circumstances, the Commission and other authoritative bodies had issued quantitative materiality guidance, citing as examples guidelines ranging from one to ten percent with respect to a variety of disclosures.[8] And it took account of contradictory studies, one showing a lack of uniformity among auditors on materiality judgments, and another suggesting widespread use of a "rule of thumb" of five to ten percent of net income.[9] The FASB also considered whether an evaluation of materiality could be based solely on anticipating the market's reaction to accounting information.[10]

The FASB rejected a formulaic approach to discharging "the onerous duty of making materiality decisions" [11] in favor of an approach that takes into account all the relevant considerations. In so doing, it made clear that—

> [M]agnitude by itself, without regard to the nature of the item and the circumstances in which the judgment has to be made, will not generally be a sufficient basis for a materiality judgment.[12]

Evaluation of materiality requires a registrant and its auditor to consider all the relevant circumstances, and the staff believes that there are numerous circumstances in which misstatements below 5% could well be material. Qualitative factors may cause

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intended to provide definitive guidance for assessing "materiality" in other contexts, such as evaluations of auditor independence, as other factors may apply. There may be other rules that address financial presentation. See, *e.g.*, Rule 2a–4, 17 CFR 270.2a–4, under the Investment Company Act of 1940.

[2] See, e.g., Rule 2a–4, 17 CFR 270.2a–4, under the Investment Company Act of 1940. As used in this SAB, "misstatement" or "omission" refers to a financial statement assertion that would not be in conformity with GAAP.

[3] Concepts Statement 2, paragraph 132. *See* also Concepts Statement 2, Glossary of Terms—Materiality.

[4] *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). See also *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988). As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him. * * *" TSC Industries, 426 U.S. at 450.

[5] *See, e.g.*, Concepts Statement 2, paragraphs 123–124; AU 312A.10 (materiality judgments are made in light of surrounding circumstances and necessarily involve both quantitative and qualitative considerations); AU 312A.34 ("Qualitative considerations also influence the auditor in reaching a conclusion as to whether misstatements are material."). As used in the accounting literature and in this SAB, "qualitative" materiality refers to the surrounding circumstances that inform an investor's evaluation of financial statement entries. Whether events may be material to investors for non-financial reasons is a matter not addressed by this SAB.

[6] *See, e.g.*, Rule 1–02(o) of Regulation S–X, 17 CFR 210.1–02(o), Rule 405 of Regulation C, 17 CFR 230.405, and Rule 12b–2, 17 CFR 240.12b–2; AU 312A.10—.11, 317.13, 411.04 n. 1, and 508.36; In re Kidder Peabody Securities Litigation, 10 F. Supp. 2d 398 (S.D.N.Y. 1998); *Parnes* v. *Gateway 2000, Inc.*, 122 F.3d 539 (8th Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696 (3d Cir. 1996); In the Matter of W.R. Grace & Co., Accounting and Auditing Enforcement Release ("AAER") 1140 (June 30, 1999); In the Matter of Eugene Gaughan, AAER 1141 (June 30, 1999); In the Matter of Thomas Scanlon, AAER 1142 (June 30, 1999); and In re Sensormatic Electronics Corporation, Sec. Act Rel. No. 7518 (March 25, 1998).

[7] Concepts Statement 2, paragraph 131.

[8] Concepts Statement 2, paragraphs 131 and 166.

[9] Concepts Statement 2, paragraph 167.

[10] Concepts Statement 2, paragraphs 168–169.

[11] Concepts Statement 2, paragraph 170.

[12] Concepts Statement 2, paragraph 125.

misstatements of quantitatively small amounts to be material; as stated in the auditing literature:

> As a result of the interaction of quantitative and qualitative considerations in materiality judgments, misstatements of relatively small amounts that come to the auditor's attention could have a material effect on the financial statements.[13]

Among the considerations that may well render material a quantitatively small misstatement of a financial statement item are—

- Whether the misstatement arises from an item capable of precise measurement or whether it arises from an estimate and, if so, the degree of imprecision inherent in the estimate.[14]
- Whether the misstatement masks a change in earnings or other trends.
- Whether the misstatement hides a failure to meet analysts' consensus expectations for the enterprise.
- Whether the misstatement changes a loss into income or vice versa.
- Whether the misstatement concerns a segment or other portion of the registrant's business that has been identified as playing a significant role in the registrant's operations or profitability.
- Whether the misstatement affects the registrant's compliance with regulatory requirements.
- Whether the misstatement affects the registrant's compliance with loan covenants or other contractual requirements.
- Whether the misstatement has the effect of increasing management's compensation—for example, by satisfying requirements for the award of bonuses or other forms of incentive compensation.
- Whether the misstatement involves concealment of an unlawful transaction.

This is not an exhaustive list of the circumstances that may affect the materiality of a quantitatively small misstatement.[15] Among other factors, the demonstrated volatility of the price of a registrant's securities in response to certain types of disclosures may provide guidance as to whether investors regard quantitatively small misstatements as material. Consideration of potential market reaction to disclosure of a misstatement is by itself "too blunt an instrument to be depended on" in considering whether a fact is material.[16] When, however, management or the independent auditor expects (based, for example, on a pattern of market performance) that a known misstatement may result in a significant positive or negative market reaction, that expected reaction should be taken into account when considering whether a misstatement is material.[17]

For the reasons noted above, the staff believes that a registrant and the auditors of its financial statements should not assume that even small intentional misstatements in financial statements, for example those pursuant to actions to "manage" earnings, are immaterial.[18] While the intent of management does not render a misstatement material, it may provide significant evidence of materiality. The evidence may be particularly compelling where management has intentionally misstated items in the financial statements to "manage" reported earnings. In that instance, it presumably has done so believing that the resulting amounts and trends would be significant to users of the registrant's financial statements.[19] The staff believes that investors generally would regard as significant a management practice to over-or under-state earnings up to an amount just short of a percentage threshold in order to "manage" earnings. Investors presumably also would regard as significant an accounting practice that, in essence, rendered all earnings figures subject to a management-directed margin of misstatement.

The materiality of a misstatement may turn on where it appears in the financial statements. For example, a misstatement may involve a segment of the registrant's operations. In that instance, in assessing materiality of a misstatement to the financial statements taken as a whole, registrants and their auditors should consider not only the size of the misstatement but also the significance of the segment information to the financial statements taken as a whole.[20] "A misstatement of the revenue and operating profit of a relatively small segment that is represented by management to be important to the future profitability of the entity."[21] is more likely to be material to investors than a misstatement in a segment that management has not identified as especially important. In assessing the materiality of misstatements in segment information—as with materiality generally—

> Situations may arise in practice where the auditor will conclude that a matter relating to segment information is qualitatively material even though, in his or her judgment, it is quantitatively immaterial to the financial statements taken as a whole.[22]

Aggregating and Netting Misstatements

In determining whether multiple misstatements cause the financial statements to be materially misstated, registrants and the auditors of their financial statements should consider each misstatement separately and the aggregate effect of all misstatements.[23] A registrant and its auditor should evaluate misstatements in light of quantitative and qualitative factors and "consider whether, in relation to individual amounts, subtotals, or totals in the financial statements, they materially misstate the financial statements taken as a whole." [24] This requires consideration of—

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[13] AU 312.11.

[14] As stated in Concepts Statement 2, paragraph 130:

> Another factor in materiality judgments is the degree of precision that is attainable in estimating the judgment item. The amount of deviation that is considered immaterial may increase as the attainable degree of precision decreases. For example, accounts payable usually can be estimated more accurately than can contingent liabilities arising from litigation or threats of it, and a deviation considered to be material in the first case may be quite trivial in the second.

This SAB is not intended to change current law or guidance in the accounting literature regarding accounting estimates. *See, e.g.*, Accounting Principles Board Opinion 20, Accounting Changes 10, 11, 31–33 (July 1971).

[15] The staff understands that the Big Five Audit Materiality Task Force ("Task Force") was convened in March of 1998 and has made recommendations to the Auditing Standards Board including suggestions regarding communications with audit committees about unadjusted misstatements. See generally Big Five Audit Materiality Task Force. "Materiality in a Financial Statement Audit—Considering Qualitative Factors When Evaluating Audit Findings" (August 1998).

[16] See Concepts Statement 2, paragraph 169.

[17] If management does not expect a significant market reaction, a misstatement still may be material and should be evaluated under the criteria discussed in this SAB.

[18] Intentional management of earnings and intentional misstatements, as used in this SAB, do not include insignificant errors and omissions that may occur in systems and recurring processes in the normal course of business. See notes 37 and 49 infra.

[19] Assessments of materiality should occur not only at year-end, but also during the preparation of each quarterly or interim financial statement. See, *e.g.*, In the Matter of Venator Group, Inc., AAER 1049 (June 29, 1998).

[20] See, *e.g.*, In the Matter of W.R. Grace & Co., AAER 1140 (June 30, 1999).

[21] AU 9326.33.

[22] *Id.*

[23] The auditing literature notes that the "concept of materiality recognizes that some matters, either individually or in the aggregate, are important for fair presentation of financial statements in conformity with generally accepted accounting principles." AU 312.03. See also AU 312.04.

[24] AU 312.34. Quantitative materiality assessments often are made by comparing adjustments to revenues, gross profit, pretax and net income, total assets, stockholders' equity, or individual line items in the financial statements. The particular items in the financial statements to be considered as a basis for the materiality determination depend on the proposed adjustment to be made and other factors, such as those

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the significance of an item to a particular entity (for example, inventories to a manufacturing company), the pervasiveness of the misstatement (such as whether it affects the presentation of numerous financial statement items), and the effect of the misstatement on the financial statements taken as a whole. * * *[25]

Registrants and their auditors first should consider whether each misstatement is material, irrespective of its effect when combined with other misstatements. The literature notes that the analysis should consider whether the misstatement of "individual amounts" causes a material misstatement of the financial statements taken as a whole. As with materiality generally, this analysis requires consideration of both quantitative and qualitative factors.

If the misstatement of an individual amount causes the financial statements as a whole to be materially misstated, that effect cannot be eliminated by other misstatements whose effect may be to diminish the impact of the misstatement on other financial statement items. To take an obvious example, if a registrant's revenues are a material financial statement item and if they are materially overstated, the financial statements taken as a whole will be materially misleading even if the effect on earnings is completely offset by an equivalent overstatement of expenses.

Even though a misstatement of an individual amount may not cause the financial statements taken as a whole to be materially misstated, it may nonetheless, when aggregated with other misstatements, render the financial statements taken as a whole to be materially misleading. Registrants and the auditors of their financial statements accordingly should consider the effect of the misstatement on subtotals or totals. The auditor should aggregate all misstatements that affect each subtotal or total and consider whether the misstatements in the aggregate affect the subtotal or total in a way that causes the registrant's financial statements taken as a whole to be materially misleading.[26]

The staff believes that, in considering the aggregate effect of multiple misstatements on a subtotal or total, registrants and the auditors of their financial statements should exercise particular care when considering whether to offset (or the appropriateness of offsetting) a misstatement of an estimated amount with a misstatement of an item capable of precise measurement. As noted above, assessments of materiality should never be purely mechanical; given the imprecision inherent in estimates, there is by definition a corresponding imprecision in the aggregation of misstatements involving estimates with those that do not involve an estimate.

Registrants and auditors also should consider the effect of misstatements from prior periods on the current financial statements. For example, the auditing literature states,

> Matters underlying adjustments proposed by the auditor but not recorded by the entity could potentially cause future financial statements to be materially misstated, even though the auditor has concluded that the adjustments are not material to the current financial statements.[27]

This may be particularly the case where immaterial misstatements recur in several years and the cumulative effect becomes material in the current year.

2. Immaterial Misstatements That Are Intentional

Facts: A registrant's management intentionally has made adjustments to various financial statement items in a manner inconsistent with GAAP. In each accounting period in which such actions were taken, none of the individual adjustments is by itself material, nor is the aggregate effect on the financial statements taken as a whole material for the period. The registrant's earnings "management" has been effected at the direction or acquiescence of management in the belief that any deviations from GAAP have been immaterial and that accordingly the accounting is permissible.

Question: In the staff's view, may a registrant make intentional immaterial misstatements in its financial statements?

Interpretive Response: No. In certain circumstances, intentional immaterial misstatements are unlawful.

Considerations of the Books and Records Provisions under the Exchange Act

Even if misstatements are immaterial,[1] registrants must comply with Sections 13(b)(2)–(7) of the Securities Exchange Act of 1934 (the "Exchange Act").[2] Under these provisions, each registrant with securities registered pursuant to Section 12 of the Exchange Act,[3] or required to file reports pursuant to Section 15(d),[4] must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant and must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.[5] In this context, determinations of what constitutes "reasonable assurance" and "reasonable detail" are based not on a "materiality" analysis but on the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.[6] Accordingly, failure to record accurately immaterial items, in some instances, may result in violations of the securities laws.

The staff recognizes that there is limited authoritative guidance[7] regarding the "reasonableness" standard in Section 13(b)(2) of the Exchange Act.

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identified in this SAB. For example, an adjustment to inventory that is immaterial to pretax income or net income may be material to the financial statements because it may affect a working capital ratio or cause the registrant to be in default of loan covenants.

[25] AU 508.36.

[26] AU 312.34.

[27] AU 380.09.

[1] FASB Statements generally provide that "[t]he provisions of this Statement need not be applied to immaterial items." This SAB is consistent with that provision of the Statements. In theory, this language is subject to the interpretation that the registrant is free intentionally to set forth immaterial items in financial statements in a manner that plainly would be contrary to GAAP if the misstatement were material. The staff believes that the FASB did not intend this result.

[2] 15 U.S.C. 78m(b)(2)–(7).

[3] 15 U.S.C. 78l.

[4] 15 U.S.C. 78o(d).

[5] Criminal liability may be imposed if a person knowingly circumvents or knowingly fails to implement a system of internal accounting controls or knowingly falsifies books, records or accounts. 15 U.S.C. 78m(4) and (5). See also Rule 13b2–1 under the Exchange Act, 17 CFR 240.13b2–1, which states, "No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act."

[6] 15 U.S.C. 78m(b)(7). The books and records provisions of section 13(b) of the Exchange Act originally were passed as part of the Foreign Corrupt Practices Act ("FCPA"). In the conference committee report regarding the 1988 amendments to the FCPA, the committee stated:

> The conference committee adopted the prudent man qualification in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision. The concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.

Cong. Rec. H2116 (daily ed. April 20, 1988).

[7] So far as the staff is aware, there is only one judicial decision that discusses Section 13(b)(2) of the Exchange Act in any detail, SEC v. World-Wide Coin Investments, Ltd., 567 F. Supp. 724 (N.D. Ga. 1983), and the courts generally have found that no private right of action exists under the accounting and books and records provisions of the Exchange Act. See *e.g.*, Lamb v. Phillip Morris Inc., 915 F.2d 1024 (6th Cir. 1990) and JS Service Center Corporation v. General Electric Technical Services Company, 937 F. Supp. 216 (S.D.N.Y. 1996).

A principal statement of the Commission's policy in this area is set forth in an address given in 1981 by then Chairman Harold M. Williams.[8] In his address, Chairman Williams noted that, like materiality, "reasonableness" is not an "absolute standard of exactitude for corporate records."[9] Unlike materiality, however, "reasonableness" is not solely a measure of the significance of a financial statement item to investors. "Reasonableness," in this context, reflects a judgment as to whether an issuer's failure to correct a known misstatement implicates the purposes underlying the accounting provisions of Sections 13(b)(2)–(7) of the Exchange Act.[10]

In assessing whether a misstatement results in a violation of a registrant's obligation to keep books and records that are accurate "in reasonable detail," registrants and their auditors should consider, in addition to the factors discussed above concerning an evaluation of a misstatement's potential materiality, the factors set forth below.

- The significance of the misstatement. Though the staff does not believe that registrants need to make finely calibrated determinations of significance with respect to immaterial items, plainly it is "reasonable" to treat misstatements whose effects are clearly inconsequential differently than more significant ones.
- How the misstatement arose. It is unlikely that it is ever "reasonable" for registrants to record misstatements or not to correct known misstatements—even immaterial ones—as part of an ongoing effort directed by or known to senior management for the purposes of "managing" earnings. On the other hand, insignificant misstatements that arise from the operation of systems or recurring processes in the normal course of business generally will not cause a registrant's books to be inaccurate "in reasonable detail."[11]
- The cost of correcting the misstatement. The books and records provisions of the Exchange Act do not require registrants to make major expenditures to correct small misstatements.[12] Conversely, where there is little cost or delay involved in correcting a misstatement, failing to do so is unlikely to be "reasonable."
- The clarity of authoritative accounting guidance with respect to the misstatement. Where reasonable minds may differ about the appropriate accounting treatment of a financial statement item, a failure to correct it may not render the registrant's financial statements inaccurate "in reasonable detail." Where, however, there is little ground for reasonable disagreement, the case for leaving a misstatement uncorrected is correspondingly weaker.

There may be other indicators of "reasonableness" that registrants and their auditors may ordinarily consider. Because the judgment is not mechanical, the staff will be inclined to continue to defer to judgments that "allow a business, acting in good faith, to comply with the Act's accounting provisions in an innovative and cost-effective way."[13]

The Auditor's Response to Intentional Misstatements

Section 10A(b) of the Exchange Act requires auditors to take certain actions upon discovery of an "illegal act."[14] The statute specifies that these obligations are triggered "whether or not [the illegal acts are] perceived to have a material effect on the financial statements of the issuer. * * *" Among other things, Section 10A(b)(1) requires the auditor to inform the appropriate level of management of an illegal act (unless clearly inconsequential) and assure that the registrant's audit committee is "adequately informed" with respect to the illegal act.

As noted, an intentional misstatement of immaterial items in a registrant's financial statements may violate Section 13(b)(2) of the Exchange Act and thus be an illegal act. When such a violation occurs, an auditor must take steps to see that the registrant's audit committee is "adequately informed" about the illegal act. Because Section 10A(b)(1) is triggered regardless of whether an illegal act has a material effect on the registrant's financial statements, where the illegal act consists of a misstatement in the registrant's financial statements, the auditor will be required to report that illegal act to the audit committee irrespective of any "netting" of the misstatements with other financial statement items.

The requirements of Section 10A echo the auditing literature. See, for example, SAS Nos. 54 and 99. Pursuant to paragraph 77 of SAS 99, if the auditor determines there is evidence that fraud may exist, the auditor must discuss the matter with the appropriate level of management that is at least one level above those involved, and with senior management and the audit committee. The auditor must report directly to the audit committee fraud involving senior management and fraud that causes a material misstatement of the financial statements. Paragraph 6 of SAS 99 states that "misstatements arising from fraudulent financial reporting are intentional misstatements or omissions of amounts or disclosures in financial statements designed to deceive financial statement users * * *."[15] SAS 99 further states that fraudulent financial reporting may involve falsification or alteration of accounting records; misrepresenting or omitting events, transactions or other information in the financial statements; and the intentional misapplication of accounting principles relating to amounts, classifications, the manner of presentation, or disclosures in the financial statements.[16] The clear

[8] 8 The Commission adopted the address as a formal statement of policy in Securities Exchange Act Release No. 17500 (January 29, 1981), 46 FR 11544 (February 9, 1981), 21 SEC Docket 1466 (February 10, 1981).

[9] 9 *Id.* at 46 FR 11546.

[10] 10 *Id.*

[11] For example, the conference report regarding the 1988 amendments to the FCPA stated:

The Conferees intend to codify current Securities and Exchange Commission (SEC) enforcement policy that penalties not be imposed for insignificant or technical infractions or inadvertent conduct. The amendment adopted by the Conferees [Section 13(b)(4)] accomplishes this by providing that criminal penalties shall not be imposed for failing to comply with the FCPA's books and records or accounting provisions. This provision [Section 13(b)(5)] is meant to ensure that criminal penalties would be imposed where acts of commission or omission in keeping books or records or administering accounting controls have the purpose of falsifying books, records or accounts, or of circumventing the accounting controls set forth in the Act. This would include the deliberate falsification of books and records and other conduct calculated to evade the internal accounting controls requirement.

Cong. Rec. H2115 (daily ed. April 20, 1988).

[12] As Chairman Williams noted with respect to the internal control provisions of the FCPA, "[t]housands of dollars ordinarily should not be spent conserving hundreds." 46 FR 11546.

[13] *Id.*, at 11547.

[14] Section 10A(f) defines, for purposes of Section 10A, an "illegal act" as "an act or omission that violates any law, or any rule or regulation having the force of law." This is broader than the definition of an "illegal act" in AU 317.02, which states, "Illegal acts by clients do not include personal misconduct by the entity's personnel unrelated to their business activities."

[15] An unintentional illegal act triggers the same procedures and considerations by the auditor as a fraudulent misstatement if the illegal act has a direct and material effect on the financial statements. See AU 110 n. 1, 317.05 and 317.07. Although distinguishing between intentional and unintentional misstatements is often difficult, the auditor must plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatements in either case.

[16] Although the auditor is not required to plan or perform the audit to detect misstatements that are immaterial to the financial statements, SAS 99 requires the auditor to evaluate several fraud "risk factors" that may bring such misstatements to his or her attention. For example, an analysis of fraud risk factors under SAS 99 must include, among other things, consideration of management's interest in maintaining or increasing the registrant's stock price or earnings trend through the use of unusually aggressive accounting practices, whether

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implication of SAS 99 is that immaterial misstatements may be fraudulent financial reporting.[17]

Auditors that learn of intentional misstatements may also be required to (1) re-evaluate the degree of audit risk involved in the audit engagement, (2) determine whether to revise the nature, timing, and extent of audit procedures accordingly, and (3) consider whether to resign.[18]

Intentional misstatements also may signal the existence of reportable conditions or material weaknesses in the registrant's system of internal accounting control designed to detect and deter improper accounting and financial reporting.[19] As stated by the National Commission on Fraudulent Financial Reporting, also known as the Treadway Commission, in its 1987 report,

> The tone set by top management—the corporate environment or culture within which financial reporting occurs—is the most important factor contributing to the integrity of the financial reporting process. Notwithstanding an impressive set of written rules and procedures, if the tone set by management is lax, fraudulent financial reporting is more likely to occur.[20]

An auditor is required to report to a registrant's audit committee any reportable conditions or material weaknesses in a registrant's system of internal accounting control that the auditor discovers in the course of the examination of the registrant's financial statements.[21]

GAAP Precedence Over Industry Practice

Some have argued to the staff that registrants should be permitted to follow an industry accounting practice even though that practice is inconsistent with authoritative accounting literature. This situation might occur if a practice is developed when there are few transactions and the accounting results are clearly inconsequential, and that practice never changes despite a subsequent growth in the number or materiality of such transactions. The staff disagrees with this argument. Authoritative literature takes precedence over industry practice that is contrary to GAAP.[22]

General Comments

This SAB is not intended to change current law or guidance in the accounting or auditing literature.[23] This SAB and the authoritative accounting literature cannot specifically address all of the novel and complex business transactions and events that may occur. Accordingly, registrants may account for, and make disclosures about, these transactions and events based on analogies to similar situations or other factors. The staff may not, however, always be persuaded that a registrant's determination is the most appropriate under the circumstances. When disagreements occur after a transaction or an event has been reported, the consequences may be severe for registrants, auditors, and, most importantly, the users of financial statements who have a right to expect consistent accounting and reporting for, and disclosure of, similar transactions and events. The staff, therefore, encourages registrants and auditors to discuss on a timely basis with the staff proposed accounting treatments for, or disclosures about, transactions or events that are not specifically covered by the existing accounting literature.

Topic 2: Business Combinations

A. Purchase Method

1. Deleted by SAB 103

2. Deleted by SAB 103

3. Deleted by SAB 103

4. Deleted by SAB 103

5. Adjustments to Allowances for Loan Losses in Connection With Business Combinations

Facts: Bank A acquires Bank B in a business combination.

Question: Are there circumstances in which it is appropriate for Bank A, in assigning acquisition cost to the loan receivables acquired from Bank B, to adjust Bank B's carrying value for those loans not only to reflect appropriate current interest rates, but also to reflect a different estimate of uncollectibility?[1]

Interpretive Response: Needed changes in allowances for loan losses are ordinarily to be made through provisions for loan losses rather than through purchase accounting adjustments. Except in the limited circumstances discussed below, where Bank A has plans for ultimate recovery of loans acquired from Bank B that are demonstrably different from plans that had served as the basis for Bank B's estimate of loan losses, purchase accounting adjustments reflecting different estimates of uncollectibility may raise questions from the staff as to: (a) The reasonableness of the preacquisition allowance for loan losses recorded by Bank B, or (b) whether the adjustments will have a distortive effect on current or future period financial statements of Bank A. Similar questions may be raised by the staff regarding significant changes in allowances for loan losses that are recorded by a bank shortly before it is acquired.

Estimation of probable loan losses involves judgment, and Banks A and B

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management has a practice of committing to analysts or others that it will achieve unduly aggressive or clearly unrealistic forecasts, and the existence of assets, liabilities, revenues, or expenses based on significant estimates that involve unusually subjective judgments or uncertainties.

[17] In requiring the auditor to consider whether fraudulent misstatements are material, and in requiring differing responses depending on whether the misstatement is material, SAS 99 makes clear that fraud can involve immaterial misstatements. Indeed, a misstatement can be "inconsequential" and still involve fraud.

Under SAS 99, assessing whether misstatements due to fraud are material to the financial statements is a "cumulative process" that should occur both during and at the completion of the audit. SAS 99 further states that this accumulation is primarily a "qualitative matter" based on the auditor's judgment. The staff believes that in making these assessments, management and auditors should refer to the discussion in Part 1 of this SAB.

[18] Auditors should document their determinations in accordance with SAS 96, SAS 99, and other appropriate sections of the audit literature.

[19] See, e.g., SAS 99.

[20] Report of the National Commission on Fraudulent Financial Reporting at 32 (October 1987). See also Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 8, 1999).

[21] AU 325.02. See also AU 380.09, which, in discussing matters to be communicated by the auditor to the audit committee, states:

> The auditor should inform the audit committee about adjustments arising from the audit that could, in his judgment, either individually or in the aggregate, have a significant effect on the entity's financial reporting process. For purposes of this section, an audit adjustment, whether or not recorded by the entity, is a proposed correction of the financial statements. * * *

[22] See AU 411.05

[23] The FASB Discussion Memorandum, "Criteria for Determining Materiality;" states that the financial accounting and reporting process considers that "a great deal of the time might be spent during the accounting process considering insignificant matters. * * * If presentations of financial information are to be prepared economically on a timely basis and presented in a concise intelligible form, the concept of materiality is crucial." This SAB is not intended to require that misstatements arising from insignificant errors and omissions (individually and in the aggregate) arising from the normal recurring accounting close processes, such as a clerical error or an adjustment for a missed accounts payable invoice, always be corrected, even if the error is identified in the audit process and known to management. Management and the auditor would need to consider the various factors described elsewhere in this SAB in assessing whether such misstatements are material, need to be corrected to comply with the FCPA. or trigger procedures under Section 10A of the Exchange Act. Because this SAB does not change current law or guidance in the accounting or auditing literature, adherence to the principles described in this SAB should not raise the costs associated with recordkeeping or with audits of financial statements.

[1] Under Statement 141, the guidelines for allocating acquisition cost to receivable is "at present values of amounts to be received determined at appropriate current interest rates, less allowances for uncollectibility and collection cost, if necessary."

may differ in their systematic approaches to such estimation. Nevertheless, assuming that appropriate methodology (*i.e.*, giving due consideration to all relevant facts and circumstances affecting collectibility) is followed by each bank, the staff believes that each bank's estimate of the uncollectible portion of Bank B's loan portfolio should fall within a range of acceptability. That is, the staff believes that the uncollectible portion of Bank B's loans as estimated separately by the two banks ordinarily should not be different by an amount that is material to the financial statements of Bank B and, therefore, an adjustment to the net carrying value of Bank B's loan portfolio at the acquisition date to reflect a different estimate of uncollectibility ordinarily would be unnecessary and inappropriate.

However, a purchase accounting adjustment to reflect a different estimate of uncollectibility may be appropriate where Bank A has plans regarding ultimate recovery of certain acquired loans demonstrably different from the plans that had served as the basis for Bank B's estimation of losses on those loans.[2] In such circumstances, Bank B's estimate of uncollectibility for those certain loans may be largely or entirely irrelevant for purposes of determining the net carrying value at which those loans should be recorded by Bank A. For example, if Bank B had intended to hold certain loans to maturity but Bank A plans to sell them, the acquisition cost allocated to those loans should equal the value that currently could be obtained for them in a sale.[3] In that case, Bank A would report those loans as assets held for sale rather than as part of its loan portfolio, and would report them in postacquisition periods at the lower of cost or market value until sold.

The staff does not intend to suggest that an acquiring bank should record acquired loans at an amount that reflects an unreasonable estimate of uncollectibility. If Bank B's financial statements as of the acquisition date are not fairly stated in accordance with generally accepted accounting principles because of an unreasonable allowance for loan losses, that allowance for loan losses should not serve as a basis for recording the acquired loans. Rather, Bank B's preacquisition financial statements should be restated to reflect an appropriate allowance, with the resultant adjustment being applied to the restated preacquisition income statement of Bank B for the period(s) in which the events or changes in conditions that gave rise to the needed change in the allowance occurred.

6. Debt Issue Costs

Facts: Company A is to acquire the net assets of Company B in a transaction to be accounted for as a business combination. In connection with the transaction, Company A has retained an investment banker to provide advisory services in structuring the acquisition and to provide the necessary financing. It is expected that the acquisition will be financed on an interim basis using "bridge financing" provided by the investment banker. Permanent financing will be arranged at a later date through a debt offering, which will be underwritten by the investment banker. Fees will be paid to the investment banker for the advisory services, the bridge financing and the underwriting of the permanent financing. These services may be billed separately or as a single amount.

Question 1: Are all fees paid to the investment banker a direct cost of the acquisition and, as such, accounted for as an element of the purchase price of the business acquired?

Interpretive Response: No. Fees paid to an investment banker in connection with a business combination, when the investment banker is also providing interim financing or underwriting services, must be allocated between direct costs of the acquisition and debt issue costs.

Statement 141 provides that direct costs such as finder's fees and fees paid to outside consultants should be treated as components of the cost of the acquisition, while the costs of registering and issuing any equity securities are treated as a reduction of the otherwise determined fair value of the equity securities. However, debt issue costs are an element of the effective interest cost of the debt, and neither the source of the debt financing nor the use of the debt proceeds changes the nature of such costs. Accordingly, they should not be considered a direct cost of the acquisition.

The portions of the fees allocated to direct costs and to debt issue costs should be representative of the actual services provided. Thus, in making a reasonable allocation (or in determining that an allocation made by the investment banker is reasonable[1] factors such as (i) the fees charged by investment bankers in connection with other recent bridge financings and (ii) fees charged for advisory services when obtained separately, should normally be considered to determine the relative fair values of the two services. Whether these or other factors are considered, the allocation should normally result in an effective debt service cost (interest and amortization of debt issue costs[2] which is comparable to the effective cost of other recent debt issues of similar investment risk and maturity. The amount accounted for as debt issue costs should be separately disclosed, if material.[3]

Question 2: May the debt issue costs of the interim "bridge financing" be amortized over the anticipated combined life of the bridge and permanent financings?

Interpretive Response: No. Debt issue costs should be amortized by the interest method over the life of the debt to which they relate. Debt issue costs related to the bridge financing should be recognized as interest cost during the estimated interim period preceding the placement of the permanent financing with any unamortized amounts charged to expense if the bridge loan is repaid prior to the expiration of the estimated period. Where the bridged financing consists of increasing rate debt, the consensus reached in EITF Issue 86–15 should be followed.[4]

7. Loss Contingencies Assumed in a Business Combination

Facts: A registrant acquires a business enterprise in a business combination. In connection with the acquisition, the acquiring company assumes certain contingent liabilities of the acquired company.

Question: How should the acquiring company account for and disclose contingent liabilities that have been assumed in a business combination?

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[2] A bank's plans for recovering the net carrying value of certain individual loans or groups of loans may differ from its plans regarding other loans. The plan for recovering the net carrying value of a loan might be, for example, (a) holding the loan to maturity, (b) selling it, or (c) foreclosing on the collateral underlying the loan. The assigned value of loans should be based on the plan for recovery.

[3] It is not acceptable to recognize losses on loans that are due to concerns as to ultimate collectibility through a purchase accounting adjustment, nor is it acceptable to report such losses as "loss on sale." An excess of carrying value of Bank B's loans over their market value at the acquisition date that is due to concerns as to ultimate collectibility should have been recognized by Bank B through its provision for loan losses.

[1] This would apply irrespective of whether the fees for the services were billed as a single amount or separately, since the separate billing of the services implicitly involves an allocation by the investment banker.

[2] See Question 2 regarding the period over which the debt issue costs related to bridge financings should be amortized.

[3] See Rule 5–02(17) of Regulations S–X.

[4] As noted in the "Status" section of the Abstract to Issue 86–15, the term-extending provisions of the debt instrument should be analyzed to determine whether they constitute an embedded derivative requiring separate accounting in accordance with Statement 133 (as amended).

Interpretive Response: In accordance with Statement 141, the acquiring company should allocate the cost of an acquired company to the assets acquired and liabilities assumed based on their fair values at the date of acquisition. With respect to contingencies for which a fair value is not determinable at the date of acquisition, the guidance of Statement 5 and Interpretation 14 should be applied. If the registrant is awaiting additional information that it has arranged to obtain for the measurement of a contingency during the allocation period specified by Statement 141, the staff believes that the registrant should disclose that the purchase price allocation is preliminary. In that circumstance, the registrant should describe the nature of the contingency and furnish other available information that will enable a reader to understand its potential effects on the final allocation and on post-acquisition operating results. Management's Discussion and Analysis should include appropriate disclosure regarding any unrecognized preacquisition contingency and its reasonably likely effects on operating results, liquidity, and financial condition.

The staff believes that the allocation period should not extend beyond the minimum reasonable period necessary to gather the information that the registrant has arranged to obtain for purposes of the estimate. Since an allocation period usually should not exceed one year, registrants believing that they will require a longer period are encouraged to discuss their circumstances with the staff. If it is unlikely that the liability can be estimated on the basis of information known to be obtainable at the time of the initial purchase price allocation, the allocation period should not be extended with respect to that liability. An adjustment to the contingent liability after the expiration of the allocation period would be recognized as an element of net income.

8. Business Combinations Prior to an Initial Public Offering

Facts: Two or more businesses combine in a single combination just prior to or contemporaneously with an initial public offering.

Question: Does the guidance in SAB Topic 5.G apply to business combinations entered into just prior to or contemporaneously with an initial public offering?

Interpretive Response: No. The guidance in SAB Topic 5.G is intended to address the transfer, just prior to or contemporaneously with an initial public offering, of nonmonetary assets in exchange for a company's stock. The guidance in SAB Topic 5.G is not intended to modify the requirements of Statement 141.[1] Accordingly, the staff believes that the combination of two or more businesses should be accounted for in accordance with Statement 141.

9. Liabilities Assumed in a Business Combination

Facts: Company A acquires Company Z in a business combination. Company Z has recorded liabilities for contingencies such as product warranties and environmental costs.

Question: Are there circumstances in which it is appropriate for Company A to adjust Company Z's carrying value for these liabilities in the purchase price allocation?

Interpretive Response: Yes. Statement 141 requires that receivables, liabilities, and accruals be recorded in the purchase price allocation at their fair value, typically the present value of amounts to be received or paid, determined using appropriate current market interest rates. In some cases, fair value is readily determinable from contemporaneous arms-length transactions involving substantially identical assets or liabilities, or from amounts quoted by a third party to purchase the assets or assume the liabilities. More frequently, fair values are based on estimations of the underlying cash flows to be received or paid, discounted to their present value using appropriate current market interest rates.

The historical accounting by Company Z for receivables or liabilities may often be premised on estimates of the amounts to be received or paid. Amounts recorded by Company A in its purchase price allocation may be expected to differ from Company Z's historical carrying values due, at least, to the effects of the acquirer's discounting, including differences in interest rates. Estimation of probable losses and future cash flows involves judgment, and companies A and Z may differ in their systematic approaches to such estimation. Nevertheless, assuming that both companies employ a methodology that appropriately considers all relevant facts and circumstances affecting cash flows, the staff believes that the two estimates of undiscounted cash inflows and outflows should not differ by an amount that is material to the financial statements of Company Z, unless Company A will settle the liability in a manner demonstrably different from the manner in which Company Z had planned to do so (for example, settlement of the warranty obligation through outsourcing versus an internal service department). But the source of other differences in the estimates of the undiscounted cash flows to be received or paid should be investigated and reconciled. If those estimates of undiscounted cash flows are materially different, an accounting error in Company Z's historical financial statements may be present, or Company A may be unaware of important information underlying Company Z's estimates that also is relevant to an estimate of fair value.

The staff is not suggesting that an acquiring company should record assumed liabilities at amounts that reflect an unreasonable estimate. If Company Z's financial statements as of the acquisition date are not fairly stated in accordance with GAAP because of an improperly recorded liability, that liability should not serve as a basis for recording assumed amounts. That is, the correction of a seller's erroneous application of GAAP should not occur through the purchase price allocation. Rather, Company Z's financial statements should be restated to reflect an appropriate amount, with the resultant adjustment being applied to the historical income statement of Company Z for the period(s) in which the trends, events, or changes in operations and conditions that gave rise to the needed change in the liability occurred. It would also be inappropriate for Company Z to report the amount of any necessary adjustment in the period just prior to the acquisition, unless that is the period in which the trends, events, or changes in operations and conditions occurred. The staff would expect that such trends, events, and changes would be disclosed in Management's Discussion and Analysis in the appropriate period(s) if their effect was material to a company's financial position, results of operations or cash flows.

In summary, the staff believes that purchase price adjustments necessary to record liabilities and loss accruals at fair value typically are required, while merely adding an additional "cushion" of 10 or 20 or 30 percent to such account balances is not appropriate. To arrive at those fair values, the undiscounted cash flows must be projected, period by period, based on historical experience and discounted at the appropriate current market discount rate.

[1] The provisions of Statement 141 apply to transactions involving the transfer of net assets as well as the acquisition of stock of a corporation. This guidance does not address the accounting for joint ventures or leverage buy-out transactions as discussed in EITF Issue 88–16.

B. Deleted by SAB 103

C. Deleted by SAB 103

D. Financial Statements of Oil and Gas Exchange Offers

Facts: The oil and gas industry has experienced periods of time where there have been a significant number of "exchange offers" (also referred to as "roll-ups" or "put-togethers") to form a publicly held company, take an existing private company public, or increase the size of an existing publicly held company. An exchange offer transaction involves a swap of shares in a corporation for interests in properties, typically limited partnership interests. Such interests could include direct interests such as working interests and royalties related to developed or undeveloped properties and indirect interests such as limited partnership interests or shares of existing oil and gas companies. Generally, such transactions are structured to be tax-free to the individual or entity trading the property interest for shares of the corporation. Under certain circumstances, however, part or all of the transaction may be taxable. For purposes of the discussion in this Topic, in each of these situations, the entity(ies) or property(ies) are deemed to constitute a business.

The fundamental accounting issues in exchange transactions involve determining the basis at which the properties exchanged should be recorded and deciding what prior financial results of the entities should be reported. In this regard, Statement 141 specifies that a business combination be accounted for using the purchase method. Statement 141 speaks specifically to business combinations between nonaffiliated enterprises. When affiliated enterprises (under common control) are involved, the guidance in paragraphs D11–D13 of Statement 141 should be followed. In particular, paragraph D12 states:

> When accounting for a transfer of assets or exchange of shares between entities under common control, the entity that receives the net assets or the equity interest shall initially recognize the assets and liabilities transferred at their carrying amounts in the accounts of the transferring entity at the date of transfer.

Paragraph D13 states:

> The purchase method of accounting shall be applied if the effect of the transfer or exchange * * * is the acquisition of all or a part of the noncontrolling equity interests in a subsidiary.

The staff has developed administrative policies which it has followed with respect only to the financial statements of oil and gas exchange offers included in filings with the Commission and the conclusions expressed in this Topic should not be analogized to other circumstances.

Question 1: What are the staff's general guidelines in determining the appropriate basis of accounting in an exchange transaction?

Interpretive Response: The staff believes the basis of accounting should be determined pursuant to the provisions of Statement 141, if it is applicable. Accordingly, where unrelated parties are involved, it is appropriate to apply purchase accounting based on the fair value of either the stock issued or the properties involved.

The following chart shows the method of accounting to be used under some relatively simple sets of circumstances.

ACCOUNTING—BASED ON STATUS OF ISSUING ENTITY

Condition	Public company [1]	Non-public company [2]
High degree of common ownership or common control between issuing corporation and offerees [3].	Purchase accounting based on fair value of stock [4].	Entities under common control—carry-over basis
All other, *i.e.*, without common ownership or control.	Purchase accounting based on fair value of stock.	Purchase accounting based on fair value of properties.

[1] Issuing corporation is an existing public company before the exchange offer with an established market for its stock (includes situations involving use of a shell company established by a public company).

[2] Issuing corporation is not public prior to the exchange offer and thus has no established market for its stock.

[3] Common control ordinarily exists where the issuing corporation acts as general partner for the offeree partnership(s). Where all the following conditions apply, common control will be considered to exist between the issuing corporation and the offerees even though the issuer does not exercise the same legal powers as a general partner:

a. The issuer or its survivor initially acquired the property for exploration and development *and*

b. Other investors were of a passive nature, solicited to provide financing with the hope of a return on their investment, and

c. The issuer or its survivor has continued to exercise day-to-day managerial control.

[4] In rare instances, such as when the property interest owners accepting the exchange offer acquire a majority of the voting shares of the company emerging from the exchange transaction, reorganization accounting may be considered appropriate. In such cases, the particular facts and circumstances should be reviewed with the Commission staff.

This chart reflects the staff's view that purchase accounting is generally appropriate except in situations where the principles for transactions involving common control apply. When a nonpublic entity acts as offeror to a group of related entities, the transaction is essentially a reorganization, and thus there is no basis for a change in the cost basis of the properties involved. If an existing public company (with an established market for its stock) has common ownership or control with the offerees, and the offerees acquire a majority interest in the emerging company, a question may arise as to whether the transaction is a reorganization.

Question 2: In some situations, a nonpublic issuer may be affiliated with some but not all of the offerees. Assuming the nonaffiliated offerees are not deemed "co-promoters" of the new entity, how should such a transaction be accounted for?

Interpretive Response: The property interests acquired from affiliated and nonaffiliated parties should each be accounted for as though acquired in separate exchange offer transactions. Thus in some circumstances, it may be necessary to record the interests owned by affiliated persons at predecessor cost while recording the interests of nonaffiliated persons as a purchase.

Example: Facts—D Company (a nonpublic company) forms a shell, E Company, to become its successor and to sponsor an exchange offer. E makes the exchange offer to four entities: A, B, C and D. A and B are unaffiliated; C is a limited partnership sponsored by D. The shareholders of D will become the principal or controlling shareholders of E.

Basis of Accounting—Since there is no market for E's stock, it should record the properties received from C and from D at their predecessor cost. The properties received from A and B

should be recorded at their fair market value.

Question 3: How should "common control accounting" be applied to the specific assets and liabilities of the new exchange company?

Interpretive Response: Under "common control accounting" the various accounting methods followed by the offeree entities should be conformed to the methods adopted by the new exchange company. It is not appropriate to combine assets and liabilities accounted for on different bases. Accordingly, as in the case of any merger between oil and gas companies, all of the oil and gas properties of the new entity must be accounted for on the same basis (either full cost or successful efforts) applied retroactively.

Question 4: In Form 10–K filings with the Commission, the staff has permitted limited partnerships to omit certain of the oil and gas reserve data disclosures required by Statement 69 in some circumstances. Is it permissible to omit these disclosures from the financial statements included in an exchange offering?

Interpretive Response: No. Normally full disclosures of reserve data and related information are required. The exemptions previously allowed relate only to partnerships where value-oriented data are otherwise available to the limited partners pursuant to the partnership agreement. The staff has previously stated that it will require all of the required disclosures for partnerships which are the subject of merger or exchange offers.[5] These disclosures may, however, be presented on a combined basis.

The staff believes that the financial statements in an exchange offer registration statement should provide sufficient historical reserve quantity and value-based disclosures to enable offerees and secondary market public investors to evaluate the effect of the exchange proposal. Accordingly, in all cases, it will be necessary to present information as of the latest year-end on reserve quantities and the future net revenues associated with such quantities. In certain circumstances, where the exchange is accounted for as a purchase, the staff will consider, on a case-by-case basis, granting exemptions from (i) the disclosure requirements for year-to-year reconciliations of reserve quantities, and (ii) the requirements for a summary of oil and gas producing activities and a summary of changes in the net present value of reserves. For instance, the staff may consider requests for exemptions in cases where the properties acquired in the exchange transaction are fully explored and developed, particularly if the management of the emerging company has not been involved in the exploration and development of such properties.

Question 5: Assume an exchange transaction is to be accounted for as a purchase and recorded at the fair value of the properties. If the exchange company will use the full cost method of accounting, does the full cost ceiling limitation apply as of the date of the financial statements reflecting the exchange?

Interpretive Response: Yes. The full cost ceiling limitation on costs capitalized does apply. However, as discussed under Topic 12.D.3, the Commission has stated that in unusual circumstances, registrants may request an exemption if as a result of a major purchase, a write-down would be required even though it can be demonstrated that the fair value of the properties clearly exceeds the unamortized costs.

Question 6: What pro forma financial information is required in an exchange offer filing?

Interpretive Response: The requirements for pro forma financial information in exchange offer filings are the same as in any other filings with the Commission and are detailed in Article 11 of Regulation S–X.[6] Rule 11–02(b) specifies the presentation requirements, including periods presented and types of adjustments to be made. The general criteria of Rule 11–02(b)(6) are that pro forma adjustments should give effect to events that are (i) directly attributable to the transaction, (ii) expected to have a continuing impact on the registrant and (iii) factually supportable. In the case of an exchange offer, such adjustments typically are made to:

(1) Show varying levels of acceptance of the offer.

(2) Conform the accounting methods used in the historical financial statements to those to be applied by the new entity.

(3) Recompute the depreciation, depletion and amortization charges, in cases where the new entity will use full-cost accounting, on a combined basis. If this computation is not practicable, and the exchange offer is accounted for as a reorganization, historical depreciation, depletion and amortization provisions may be aggregated, with appropriate disclosure.

(4) Reflect purchase cost in the pro forma statements (where the exchange offer is accounted for on the purchase basis), including depreciation, depletion and amortization based on the purchase cost.

(5) Provide pro forma reserve information.

(6) Reflect significant changes, if any, in levels of operations (revenues or costs), or in income tax status and to reflect debt incurred in connection with the transaction.

In addition, the depreciation, depletion and amortization rate which will apply for the initial period subsequent to consummation of the exchange offer should be disclosed.

Question 7: Are there conditions under which the presentation of other than full historical financial statements would be acceptable?

Interpretive Response: Generally, full historical financial statements as specified in Rules 3–01 and 3–02 of Regulations S–X are considered necessary to enable offerees and secondary market investors to evaluate the transaction. Where securities are being registered to offer to the security holders (including limited partners and other ownership interests) of the businesses to be acquired, such financial statements are normally required pursuant to Rule 3–05 of Regulation S–X, either individually for each entity or, where appropriate, separately for the offeror and on a combined basis for other entities, generally excluding corporations. However, certain exceptions may apply as explained in the outline below:

A. Purchase Accounting

1. If the registrant can demonstrate that full historical financial statements of the offeree partnerships are not reasonably available, the staff may permit presentation of audited Statements of Combined Gross Revenues and Direct Lease Operating Expenses for all years for which an income statement would otherwise be required. In these circumstances, the registrant should also disclose in an unaudited footnote the amounts of total exploration and development costs, and general and administrative expenses along with the reasons why presentation of full historical financial statements is not practicable.

2. The staff will consider requests to waive the requirement for prior year financial statements of the offeree partnerships and instead allow presentation of only the latest fiscal year and interim period, if the registrant can demonstrate that the prior years' data would not be meaningful because the offeree partnerships had no material quantity of production.

[5] *See* SAB 40, Topic 12.A.3.c.

[6] As announced in FRR 2 (July 9, 1982).

B. Common Control Accounting

The staff would expect the full historical financial statements as specified in Rules 3–01 and 3–02 of Regulation S–X would be included in the registration statement for exchange offers accounted for as reorganizations, including all required supplemental reserve information. The presentation of individual or combined financial statements would depend on the circumstances of the particular exchange offer.

Registrants are also reminded that wherever historical results are presented, it may be appropriate to explain the reasons why historical costs are not necessarily indicative of future expenditures.

E. Deleted by SAB 103

F. Deleted by SAB 103

Topic 3: Senior Securities

A. Convertible Securities

Facts: Company B proposes to file a registration statement covering convertible securities.

Question: In registration, what consideration should be given to the dilutive effects of convertible securities?

Interpretive Response: In a registration statement of convertible preferred stock or debentures, the staff believes that disclosure of pro forma earnings per share (EPS) is important to investors when the proceeds will be used to extinguish existing preferred stock or debt and such extinguishments will have a material effect on EPS. That disclosure is required by Article 11, Rule 11–01(a)(8) and Rule 11–02(a)(7) of Regulation S–X, if material.

B. Deleted by ASR 307

C. Redeemable Preferred Stock

Facts: Rule 5–02.28 of Regulation S–X states that redeemable preferred stocks are not to be included in amounts reported as stockholders' equity, and that their redemption amounts are to be shown on the face of the balance sheet. However, the Commission's rules and regulations do not address the carrying amount at which redeemable preferred stock should be reported, or how changes in its carrying amount should be treated in calculations of earnings per share and the ratio of earnings to combined fixed charges and preferred stock dividends.

Question 1: How should the carrying amount of redeemable preferred stock be determined?

Interpretive Response: The initial carrying amount of redeemable preferred stock should be its fair value at date of issue. Where fair value at date of issue is less than the mandatory redemption amount, the carrying amount shall be increased by periodic accretions, using the interest method, so that the carrying amount will equal the mandatory redemption amount at the mandatory redemption date. The carrying amount shall be further periodically increased by amounts representing dividends not currently declared or paid, but which will be payable under the mandatory redemption features, or for which ultimate payment is not solely within the control of the registrant (*e.g.*, dividends that will be payable out of future earnings). Each type of increase in carrying amount shall be effected by charges against retained earnings or, in the absence of retained earnings, by charges against paid-in capital.

The accounting described in the preceding paragraph would apply irrespective of whether the redeemable preferred stock may be voluntarily redeemed by the issuer prior to the mandatory redemption date, or whether it may be converted into another class of securities by the holder. Companies also should consider the guidance in EITF Topic D–98.

Question 2: How should periodic increases in the carrying amount of redeemable preferred stock be treated in calculations of earnings per share and ratios of earnings to combined fixed charges and preferred stock dividends?

Interpretive Response: Each type of increase in carrying amount described in the Interpretive Response to Question 1 should be treated in the same manner as dividends on nonredeemable preferred stock.

Topic 4: Equity Accounts

A. Subordinated Debt

Facts: Company E proposes to include in its registration statement a balance sheet showing its subordinate debt as a portion of stockholders' equity.

Question: Is this presentation appropriate?

Interpretive Response: Subordinated debt may not be included in the stockholders' equity section of the balance sheet. Any presentation describing such debt as a component of stockholders' equity must be eliminated. Furthermore, any caption representing the combination of stockholders' equity and only subordinated debts must be deleted.

B. S Corporations

Facts: An S corporation has undistributed earnings on the date its S election is terminated.

Question: How should such earnings be reflected in the financial statements?

Interpretive Response: Such earnings must be included in the financial statements as additional paid-in capital. This assumes a constructive distribution to the owners followed by a contribution to the capital of the corporation.

C. Change In Capital Structure

Facts: A capital structure change to a stock dividend, stock split or reverse split occurs after the date of the latest reported balance sheet but before the release of the financial statements or the effective date of the registration statement, whichever is later.

Question: What effect must be given to such a change?

Interpretive Response: Such changes in the capital structure must be given retroactive effect in the balance sheet. An appropriately cross-referenced note should disclose the retroactive treatment, explain the change made and state the date the change became effective.

D. Earnings Per Share Computations In An Initial Public Offering

Facts: A registration statement is filed in connection with an initial public offering (IPO) of common stock. During the periods covered by income statements that are included in the registration statement or in the subsequent period prior to the effective date of the IPO, the registrant issued for nominal consideration [1] common stock, options or warrants to purchase common stock or other potentially dilutive instruments (collectively, referred to hereafter as "nominal issuances").

Prior to the effective date of Statement 128, the staff believed that certain stock and warrants [2] should be treated as outstanding for all reporting periods in the same manner as shares issued in a stock split or a recapitalization effected contemporaneously with the IPO. The dilutive effect of such stock and warrants could be measured using the treasury stock method.

Question 1: Does the staff continue to believe that such treatment for stock and warrants would be appropriate upon adoption of Statement 128?

[1] Whether a security was issued for nominal consideration should be determined based on facts and circumstances. The consideration the entity receives for the issuance should be compared to the security's fair value to determine whether the consideration is nominal.

[2] The stock and warrants encompasses by the prior guidance were those issuances of common stock at prices below the IPO price and options or warrants with exercise prices below the IPO price that were issued within a one-year period prior to the initial filing of the registration statement relating to the IPO through the registration statement's effective date.

Interpretive Response: Generally, no. Historical EPS should be prepared and presented in conformity with Statement 128.

In applying the requirements of Statement 128, the staff believes that nominal issuances are recapitalizations in substance. In computing basic EPS for the periods covered by income statements included in the registration statement and in subsequent filings with the SEC, nominal issuances of common stock should be reflected in a manner similar to a stock split or stock dividend for which retroactive treatment is required by paragraph 54 of Statement 128. In computing diluted EPS for such periods, nominal issuances of common stock and potential common stock [3] should be reflected in a manner similar to a stock split or stock dividend.

Registrants are reminded that disclosure about materially dilutive issuances is required outside the financial statements. Item 506 of Regulation S–K requires tabular presentation of the dilutive effects of those issuances on net tangible book value. The effects of dilutive issuances on the registrant's liquidity, capital resources and results of operations should be addressed in Management's Discussion and Analysis.

Question 2: Does reflecting nominal issuances as outstanding for all historical periods in the computation of earnings per share alter the registrant's responsibility to determine whether compensation expense must be recognized for such issuances to employees?

Interpretive Response: No. Registrants must follow GAAP in determining whether the recognition of compensation expense for any issuances of equity instruments to employees is necessary.[4] Reflecting nominal issuances as outstanding for all historical periods in the computation of earnings per share does not alter that existing responsibility under GAAP.

E. Receivables From Sale of Stock

Facts: Compensation often arises when capital stock is issued or is to be issued to officers or other employees at prices below market.

Question: How should the deferred compensation be presented in the balance sheet?

Interpretive Response: The amounts recorded as deferred compensation should be presented in the balance sheet as a deduction from stockholders' equity. This is generally consistent with Rule 5–02.30 of Regulation S–X which states that accounts or notes receivable arising from transactions involving the registrant's capital stock should be presented as deductions from stockholders' equity and not as assets.

It should be noted generally that all amounts receivable from officers and directors resulting from sales of stock or from other transactions (other than expense advances or sales on normal trade terms) should be separately stated in the balance sheet irrespective of whether such amounts may be shown as assets or are required to be reported as deductions from stockholders' equity.

The staff will not suggest that a receivable from an officer or director be deducted from stockholders' equity if the receivable was paid in cash prior to the publication of the financial statements and the payment date is stated in a note to the financial statements. However, the staff would consider the subsequent return of such cash payment to the officer or director to be part of a scheme or plan to evade the registration or reporting requirements of the securities laws.

F. Limited Partnerships

Facts: There exist a number of publicly held partnerships having one or more corporate or individual general partners and a relatively larger number of limited partners. There are no specific requirements or guidelines relating to the presentation of the partnership equity accounts in the financial statements. In addition, there are many approaches to the parallel problem of relating the results of operations to the two classes of partnership equity interests.

Question: How should the financial statements of limited partnerships be presented so that the two ownership classes can readily determine their relative participations in both the net assets of the partnership and in the results of its operations?

Interpretive Response: The equity section of a partnership balance sheet should distinguish between amounts ascribed to each ownership class. The equity attributed to the general partners should be stated separately from the equity of the limited partners, and changes in the number of equity units authorized and outstanding should be shown for each ownership class. A statement of changes in partnership equity for each ownership class should be furnished for each period for which an income statement is included.

The income statements of partnerships should be presented in a manner which clearly shows the aggregate amount of net income (loss) allocated to the general partners and the aggregate amount allocated to the limited partners. The statement of income should also state the results of operations on a per unit basis.

G. Notes and Other Receivables From Affiliates

Facts: The balance sheet of a corporate general partner is often presented in a registration statement. Frequently, the balance sheet of the general partner discloses that it holds notes or other receivables from a parent or another affiliate. Often the notes or other receivables were created in order to meet the "substantial assets" test which the Internal Revenue Service utilizes in applying its "Safe Harbor" doctrine in the classification of organizations for income tax purposes.

Question: How should such notes and other receivables be reported in the balance sheet of the general partner?

Interpretive Response: While these notes and other receivables evidencing a promise to contribute capital are often legally enforceable, they seldom are actually paid. In substance, these receivables are equivalent to unpaid subscriptions receivable for capital shares which Rule 5–02.30 of Regulation S–X requires to be deducted from the dollar amount of capital shares subscribed.

The balance sheet display of these or similar items is not determined by the quality or actual value of the receivable or other asset "contributed" to the capital of the affiliated general partner, but rather by the relationship of the parties and the control inherent in that relationship. Accordingly, in these situations, the receivable must be treated as a deduction from stockholders' equity in the balance sheet of the corporate general partner.

Topic 5: Miscellaneous Accounting

A. Expenses of Offering

Facts: Prior to the effective date of an offering of equity securities, Company Y incurs certain expenses related to the offering.

Question: Should such costs be deferred?

Interpretive Response: Specific incremental costs directly attributable to a proposed or actual offering of securities may properly be deferred and charged against the gross proceeds of the offering. However, management salaries or other general and administrative expenses may not be allocated as costs of the offering and deferred costs of an aborted offering

[3] Statement 128 defines potential common stock as "a security or other contract that may entitle its holder to obtain common stock during the reporting period or after the end of the reporting period."

[4] As prescribed by APB Opinion 25, Statement 123, and related interpretations.

may not be deferred and charged against proceeds of a subsequent offering. A short postponement (up to 90 days) does not represent an aborted offering.

B. Gain or Loss From Disposition of Equipment

Facts: Company A has adopted the policy of treating gains and losses from disposition of revenue producing equipment as adjustments to the current year's provision for depreciation. Company B reflects such gains and losses as a separate item in the statement of income.

Question: Does the staff have any views as to which method is preferable?

Interpretive Response: Gains and losses resulting from the disposition of revenue producing equipment should not be treated as adjustments to the provision for depreciation in the year of disposition, but should be shown as a separate item in the statement of income.

If such equipment is depreciated on the basis of group of composite accounts for fleets of like vehicles, gains (or losses) may be charged (or credited) to accumulated depreciation with the result that depreciation is adjusted over a period of years on an average basis. It should be noted that the latter treatment would not be appropriate for (1) an enterprise (such as an airline) which replaces its fleet on an episodic rather than a continuing basis or (2) an enterprise (such as a car leasing company) where equipment is sold after limited use so that the equipment on hand is both fairly new and carried at amounts closely related to current acquisition cost.

C.1. Deleted by SAB 103

C.2. Deleted by SAB 103

D. Organization and Offering Expenses and Selling Commissions—Limited Partnerships Trading in Commodity Futures

Facts: Partnerships formed for the purpose of engaging in speculative trading in commodity futures contracts sell limited partnership interests to the public and frequently have a general partner who is an affiliate of the partnership's commodity broker or the principal underwriter selling the limited partnership interests. The commodity broker or a subsidiary typically assumes the liability for all or part of the organization and offering expenses and selling commissions in connection with the sale of limited partnership interests. Funds raised from the sale of partnership interests are deposited in a margin account with the commodity broker and are invested in Treasury Bills or similar securities. The arrangement further provides that interest earned on the investments for an initial period is to be retained by the broker until it has been reimbursed for all or a specified portion of the aforementioned expenses and commissions and that thereafter interest earned accrues to the partnership.

In some instances, there may be no reference to reimbursement of the broker for expenses and commissions to be assumed. The arrangements may provide that all interest earned on investments accrues to the partnership but that commissions on commodity transactions paid to the broker are at higher rates for a specified initial period and at lower rates subsequently.

Question 1: Should the partnership recognize a commitment to reimburse the commodity broker for the organization and offering expenses and selling commissions?

Interpretive Response: Yes. A commitment should be recognized by reducing partnership capital and establishing a liability for the estimated amount of expenses and commissions for which the broker is to be reimbursed.

Question 2: Should the interest income retained by the broker for reimbursement of expenses be recognized as income by the partnership?

Interpretive Response: Yes. All the interest income on the margin account investments should be recognized as accruing to the partnership as earned. The portion of income retained by the broker and not actually realized by the partnership in cash should be applied to reduce the liability for the estimated amount of reimbursable expenses and commissions.

Question 3: If the broker retains all of the interest income for a specified period and thereafter it accrues to the partnership, should an equivalent amount of interest income be reflected on the partnership's financial statements during the specified period?

Interpretive Response: Yes. If it appears from the terms of the arrangement that it was the intent of the parties to provide for full or partial reimbursement for the expenses and commissions paid by the broker, then a commitment to reimbursement should be recognized by the partnership and an equivalent amount of interest income should be recognized on the partnership's financial statements as earned.

Question 4: Under the arrangements where commissions on commodity transactions are at a lower rate after a specified period and there is no reference to reimbursement of the broker for expenses and commissions, should recognition be given on the partnership's financial statements to a commitment to reimburse the broker for all or part of the expenses and commissions?

Interpretive Response: If it appears from the terms of the arrangement that the intent of the parties was to provide for full or partial reimbursement of the broker's expenses and commissions, then the estimated commitment should be recognized on the partnership's financial statements. During the specified initial period commissions on commodity transactions should be charged to operations at the lower commission rate with the difference applied to reduce the aforementioned commitment.

E. Accounting for Divestiture of a Subsidiary or Other Business Operation

Facts: Company X transferred certain operations (including several subsidiaries) to a group of former employees who had been responsible for managing those operations. Assets and liabilities with a net book value of approximately $8 million were transferred to a newly formed entity—Company Y—wholly owned by the former employees. The consideration received consisted of $1,000 in cash and interest bearing promissory notes for $10 million, payable in equal annual installments of $1 million each, plus interest, beginning two years from the date of the transaction. The former employees possessed insufficient assets to pay the notes and Company X expected the funds for payments to come exclusively from future operations of the transferred business.

Company X remained contingently liable for performance on existing contracts transferred and agreed to guarantee, at its discretion, performance on future contracts entered into by the newly formed entity. Company X also acted as guarantor under a line of credit established by Company Y.

The nature of Company Y's business was such that Company X's guarantees were considered a necessary predicate to obtaining future contracts until such time as Company Y achieved profitable operations and substantial financial independence from Company X.

Question 1: Company X proposes to account for the transaction as a divestiture, but to defer recognition of gain until the owners of Company Y begin making payments on the promissory notes. Does this proposed accounting treatment reflect the economic substance of the transaction?

Interpretive Response: No. The circumstances are such that the risks of the business have not, in substance, been transferred to Company Y or its owners. In assessing whether the legal transfer of ownership of one or more business operations has resulted in a divestiture for accounting purposes, the principal consideration must be an assessment of whether the risks and other incidents of ownership have been transferred to the buyer with sufficient certainty.

When the facts and circumstances are such that there is a continuing involvement by the seller in the business, recognition of the transaction as a divestiture for accounting purposes is questionable. Such continuing involvement may take the form of effective veto power over major contracts or customers, significant voting power on the board of directors, or other involvement in the continuing operations of the business entailing risks or managerial authority similar to that of ownership.

Other circumstances may also raise questions concerning whether the incidents of ownership have, in substance, been transferred to the buyer. These include:

- Absence of significant financial investment in the business by the buyer, as evidenced, for instance, by a token down payment;
- Repayment of debt which constitutes the principal consideration in the transaction is dependent on future successful operations of the business; or
- The continued necessity for debt or contract performance guarantees on behalf of the business by the seller.

In the above transaction, the seller's continuing involvement in the business and the presence of certain of the other factors cited evidence the fact that the seller has not been divorced from the risks of ownership. Accounting for this proposed transaction as a divestiture—even with deferral of the "gain"—does not reflect its economic substance and therefore is not appropriate.

Further, Company X may need to consider whether it should consolidate Company Y by way of its variable interests pursuant to the provisions of FASB Interpretation 46.

Question 2: If the transaction is not to be treated as a divestiture for accounting purposes, what is the proper accounting treatment?

Interpretive Response: If, in the circumstances surrounding a particular transaction, a determination is made that a legal transfer of business ownership should not be recognized as a divestiture for accounting purposes, an accounting treatment consistent with that determination is required. In this instance, if Company Y is not consolidated by Company X, the assets and liabilities of the business which were the subject of the transaction should be segregated in the balance sheet of the selling entity under captions such as: "Assets of business transferred under contractual arrangements (notes receivable)," and "Liabilities of business transferred" or similar captions which appropriately convey the distinction between the legal form of the transaction and its accounting treatment.

A note to the financial statements should describe the nature of the legal arrangements, relevant financing and other details and the accounting treatment.

Where, as in this instance, realization of the sale price is wholly or principally dependent on the operating results of the business operations which were the subject of the transaction, the uncertainty associated with such realization should be reflected in the financial statements of the seller. Thus, absent a deterioration in the business, any operating losses of the divested business should be considered the best evidence of a change in valuation of the business in a manner somewhat analogous to equity accounting for an investment in common stock.[1] If the business suffered a loss during its initial period of operations after the transaction, that loss should be reflected in the financial statements of the seller by recording a valuation allowance and a corresponding charge to income. The amount of the valuation allowance (absent unusual circumstances) would be at least the amount of the loss attributable to the business. Other evidence, however (such as a question as to the ability of the business to continue as a going concern), might require that a higher valuation allowance be established.

This accounting treatment should be continued for each period until either:

1. The net assets of the business have been written down to zero (or a net liability recognized in accordance with GAAP); or

2. Circumstances have changed sufficiently that it has become appropriate to recognize the transaction as a divestiture.

In the latter instance, it would normally also be appropriate to recaption any asset balance remaining on the balance sheet of the seller in keeping with the changed circumstances, *e.g.*, "Notes receivable."

In the case where the business reports net income, such net income should not be recorded by the former owner, because the rewards of ownership (but not the risks) have been passed to Company Y. Any payments received on obligations of the buyer arising out of the transaction should be treated as a reduction of the carrying value of the segregated assets of the business.

Question 3: Should Company X recognize interim (quarterly) losses of the business even if it is projected that it will have a profit for the full year?

Interpretive Response: Yes. However, for quarters for which the business has net income, such net income may be recognized by Company X to the extent of any cumulative quarterly losses within the same fiscal year. Similarly, quarterly losses of the business need not be recognized by Company X except to the extent that they exceed any cumulative quarterly net income within the same fiscal year. Disclosure of this accounting treatment should be made in the notes to Company X's interim financial statements.

Question 4: If the accounting treatment described above is applied to the transaction, when should a gain or loss on the transaction be recognized?

Interpretive Response: Whether or not the transaction is treated as a divestiture for accounting purposes, GAAP require that losses on such transactions be recognized. When it is determined that no divestiture should be recognized for accounting purposes, it follows that gain should not be recognized until:

1. The circumstances precluding treatment of the transaction as a divestiture have changed sufficiently to permit such recognition; and,

2. Any major uncertainties as to ultimate realization of profit have been removed, that is, the consideration received in the transaction can be reasonably evaluated.

The authoritative literature indicates that:

> Profit is deemed to be realized when a sale in the ordinary course of business is effected, unless the circumstances are such that the collection of the sale price is not reasonably assured.[2]

[1] The staff recognizes that APB Opinion 18 is specifically applicable only to the use of the equity method of accounting for investments in common stock. The principles enunicated in Opinion 18 are also relevant in these particular circumstances, however, notably paragraph 12, which states, in pertinent part: "The equity method tends to be most appropriate if an investment enables the investor to influence the operating of financial decisions of the investee. The investor then has a degree of responsibility for the return on its investment, and it is appropriate to include in the results of operations of the investor its share of the earnings or losses of the investee."

[2] ARB 43, Chapter 1, Section A. This passage is also quoted in paragraph 12 of APB Opinion 10,

The considerations discussed above regarding recognition of a divestiture for accounting purposes are also of importance in reaching a determination as to whether or not collection of the sale price is reasonably assured and profit recognition is therefore appropriate. In addition, circumstances such as the following tend to raise questions as to the propriety of profit recognition at any given time subsequent to the transaction:

1. Evidence of financial weakness of the buyer.
2. Substantial uncertainty as to the amount of future costs and expenses to be incurred by the seller.
3. Substantial uncertainty as to the amount of proceeds to be realized because of the form of consideration received; *e.g.*, nonrecourse debt, notes with optional settlement provisions, purchaser's stock, or other nonmonetary consideration which may be of indeterminable value.

(Where satisfaction of the buyer's obligations to the seller remains dependent on earnings of the business divested, it will frequently be appropriate for the seller to continue to measure the uncertainty of ultimate collection by the operating losses of the business.)

The degree of uncertainty surrounding ultimate realization of the consideration is a matter which must be evaluated in the light of the attendant circumstances each time realization is evaluated. The degree of uncertainty is enhanced, however, by the presence of any of the factors referred to above, and such factors must be considered in reaching a determination with respect to recognition of gain.

F. Accounting Changes Not Retroactively Applied Due to Immateriality

Facts: A registrant is required to adopt an accounting principle by means of restatement of prior periods' financial statements. However, the registrant determines that the accounting change does not have a material effect on prior periods' financial statements and, accordingly, decides not to restate such financial statements.

Question: In these circumstances, is it acceptable to adjust the beginning balance of retained earnings of the period in which the change is made for the cumulative effect of the change on the financial statements of prior periods?

Interpretive Response: No. If prior periods are not restated, the cumulative effect of the change should be included in the statement of income for the period in which the change is made (not to be reported as a cumulative effect adjustment in the manner of APB Opinion 20). Even in cases where the total cumulative effect is not significant, the staff believes that the amount should be reflected in the results of operations for the period in which the change is made. However, if the cumulative effect is material to current operations or to the trend of the reported results of operations, then the individual income statements of the earlier years should be retroactively adjusted.

This position is consistent with the requirements of Statement 5 and Statement 13, which indicate that "the cumulative effect [of the change] on retained earnings at the beginning of the earliest period restated shall be included in determining net income of that period."

G. Transfers of Nonmonetary Assets by Promoters or Shareholders

Facts: Nonmonetary assets are exchanged by promoters or shareholders for all or part of a company's common stock just prior to or contemporaneously with a first-time public offering.

Question: Since paragraph 4 of APB Opinion 29 states that Opinion 29 is not applicable to transactions involving the acquisition of nonmonetary assets or services on issuance of the capital stock of an enterprise, what value should be ascribed to the acquired assets by the company?

Interpretive Response: The staff believes that transfers of nonmonetary assets to a company by its promoters or shareholders in exchange for stock prior to or at the time of the company's initial public offering normally should be recorded at the transferors' historical cost basis determined under GAAP.

The staff will not always require that predecessor cost be used to value nonmonetary assets received from an enterprise's promoters or shareholders. However, deviations from this policy have been rare applying generally to situations where the fair value of either the stock issued [1] or assets acquired is objectively measurable and the transferor's stock ownership following the transaction was not so significant that the transferor had retained a substantial indirect interest in the assets as a result of stock ownership in the company.

H. Accounting for Sales of Stock by a Subsidiary

Facts: The registrant owns 95% of its subsidiary's stock. The subsidiary sells its unissued shares in a public offering, which decreases the registrant's ownership of the subsidiary from 95% to 90%. The offering price per share exceeds the registrant's carrying amount per share of subsidiary stock.

Question 1: When an offering takes the form of a subsidiary's direct sale of its unissued shares, will the staff permit the amount in excess of the parent's carrying value to be reflected as a gain in the consolidated income statement of the parent?

Interpretive Response: Yes, in some circumstances. Although the staff at one time insisted that such transactions be accounted for as capital transactions in the consolidated financial statements, it has reconsidered its views on this matter with respect to certain of these transactions where the sale of such shares by a subsidiary is not a part of a broader corporate reorganization contemplated or planned by the registrant. In situations where no other such capital transactions are contemplated, the staff has determined that it will accept accounting treatment for such transactions that is in accordance with the Advisory Conclusions in paragraph 30 of the June 3, 1980 Issues Paper, "Accounting in Consolidation for Issuances of a Subsidiary's Stock." The staff believes that this issues paper should provide appropriate guidance on this matter until the FASB addresses this issue as a part of its project on Accounting for the Reporting Entity, including Consolidations, the Equity Method, and Related Matters.

Question 2: What is meant by the phrase "broader corporate reorganization contemplated or planned by the registrant" and are there other situations where the staff has objected to gain recognition?

Interpretive Response: The staff believes that gain recognition is not appropriate in situations where subsequent capital transactions are contemplated that raise concerns about the likelihood of the registrant realizing that gain, such as where the registrant intends to spin-off its subsidiary to shareholders or where reacquisition of shares is contemplated at the time of issuance. The staff will presume that repurchases were contemplated at the date of issuance in those situations

footnote 8, which states, in pertinent part: "The Board recognizes that there are exceptional cases where receivables are collectible over an extended period of time and, because of the terms of the transactions or other conditions, there is no reasonable basis for estimating the degree of collectibility. When such circumstances exist, and as long as they exist, either the installment method or the cost recovery method of accounting may be used."

[1] Estimating the fair value of the common stock issued, however, is not appropriate when the stock is closely held and/or seldom or ever traded.

where shares are repurchased within one year of issuance or where a specific plan existed to repurchase shares at the time shares were issued. In addition, the staff believes that realization is not assured where the subsidiary is a newly-formed, non-operating entity; a research and development, start-up or development stage company; an entity whose ability to continue in existence is in question; or other similar circumstances. In those situations, the staff believes that the change in the parent company's proportionate share of subsidiary equity resulting from the additional equity raised by the subsidiary should be accounted for as an equity transaction in consolidation. Gain deferral is not appropriate.

Question 3: In the staff's opinion, may gain be recognized for issuances of subsidiary stock in situations other than sales of unissued shares in a public offering?

Interpretive Response: Yes. The staff believes that gain recognition is acceptable in situations other than sales of unissued shares in a public offering as long as the value of the proceeds can be objectively determined. With respect to issuances of stock options, warrants, and convertible and other similar securities, gain should not be recognized before exercise or conversion into common stock, and then only provided that realization of the gain is reasonably assured (see Question 2 above) at the time of such exercise or conversion.

Question 4: Will repurchasing shares of a subsidiary's stock affect the potential for gain recognition by the registrant in consolidation for subsequent issuances of that subsidiary's stock? [1]

Interpretive Response: Yes. Where previous gains have been recognized in consolidation on issuances of a subsidiary's stock and shares of the subsidiary are subsequently repurchased by the subsidiary, its parent or any member of the consolidated group, gain recognition should not occur on issuances subsequent to the date of a repurchase until such time as shares have been issued in an amount equivalent to the number of repurchased shares. The staff views such transactions as analogous to treasury stock transactions from the standpoint of the consolidated entity that should not result in recognition of gains or losses.

Question 5: May registrants selectively apply the guidance in the SAB by recognizing the impact of certain issuances by a subsidiary in the income statement and other issuances as equity transactions?

Interpretive Response: No. The staff believes that income statement treatment in consolidation for issuances of stock by a subsidiary represents a choice among alternative accounting methods and, therefore, must be applied consistently to all stock transactions that meet the conditions for income statement treatment set forth herein for any subsidiary. If a registrant recognizes gains on issuances of stock by a subsidiary, thus adopting income statement recognition as its accounting policy, then it must also recognize losses for stock issuances by that or any other subsidiary that result in decreases in its proportionate share of the dollar amount of the subsidiary's equity. Regardless of the method of accounting selected, when a subsidiary issues securities at prices less than the parent's carrying value per share, the registrant must assess whether the investment has been impaired, in which case a provision should be reflected in the income statement.

Question 6: How should the registrant disclose the accounting for issuances of a subsidiary's stock in the consolidated financial statements?

Interpretive Response: The staff believes that gains (or losses) arising from issuances by a subsidiary of its own stock, if recorded in income by the parent, should be presented as a separate line item in the consolidated income statement without regard to materiality and clearly be designated as non-operating income. An appropriate description of the transaction should be included in the notes to the financial statements, as further described below.

The accounting method adopted by the registrant for issuances of a subsidiary's stock should be disclosed in its accounting policy footnote and consistently applied (See Question 5). The staff believes that the registrant also should include a separate footnote that describes issuances of subsidiary stock that have occurred during all periods presented. This footnote should clearly describe the transaction, the identification of the subsidiary and nature of its operations, the number of shares issued, the price per share and the total dollar amount and nature of consideration received, and the percentage ownership of the parent both before and after the transaction. Additionally, the registrant should clearly state whether deferred income taxes have been provided on gains recognized and, if no provision has been recorded, a clear explanation of the reasons. Finally, the staff expects registrants to include disclosure in their Management Discussion and Analysis of the impact of specific transactions that have occurred and the likelihood of similar transactions occurring in future years.

I. Deleted by SAB 70

J. Push Down Basis of Accounting Required in Certain Limited Circumstances

Facts: Company A (or Company A and related persons) acquired substantially all of the common stock of Company B in one or a series of purchase transactions.

Question 1: Must Company B's financial statements presented in either its own or Company A's subsequent filings with the Commission reflect the new basis of accounting arising from Company A's acquisition of Company B when Company B's separate corporate entity is retained?

Interpretive Response: Yes. The staff believes that purchase transactions that result in an entity becoming substantially wholly owned (as defined in Rule 1–02(aa) of Regulation S–X) establish a new basis of accounting for the purchased assets and liabilities.

When the form of ownership is within the control of the parent the basis of accounting for purchased assets and liabilities should be the same regardless of whether the entity continues to exist or is merged into the parent's operations. Therefore, Company A's cost of acquiring Company B should be "pushed down," *i.e.*, used to establish a new accounting basis in Company B's separate financial statements.[1]

Question 2: What is the staff's position if Company A acquired less than substantially all of the common stock of Company B or Company B had publicly held debt or preferred stock at the time Company B became wholly owned?

Interpretative Response: The staff recognizes that the existence of outstanding public debt, preferred stock or a significant minority interest in a subsidiary might impact the parent's ability to control the form of ownership. Although encouraging its use, the staff generally does not insist on the application of push down accounting in these circumstances.

[1] This question and interpretive response assume that the repurchases were not contemplated at the time of earlier gain recognition. See Question 2.

[1] The Task Force on Consolidation Problems, Accounting Standards Division of the American Institute of Certified Public Accountants issued a paper entitled "Push Down" Accounting, October 30, 1979. This paper addresses the issues relating to "push down" accounting, cities authoritative literature and indicates that a substantial change in ownership justifies a new basis of accounting.

Question 3: Company A borrows funds to acquire substantially all of the common stock of Company B. Company B subsequently files a registration statement in connection with a public offering of its stock or debt.[2] Should Company B's new basis ("push down") financial statements include Company A's debt related to its purchase of Company B?

Interpretive Response: The staff believes that Company A's debt,[3] related interest expense, and allocable debt issue costs should be reflected in Company B's financial statements included in the public offering (or an initial registration under the Exchange Act) if: (1) Company B is to assume the debt of Company A, either presently or in a planned transaction in the future; (2) the proceeds of a debt or equity offering of Company B will be used to retire all or a part of Company A's debt; or (3) Company B guarantees or pledges its assets as collateral for Company A's debt.

Other relationships may exist between Company A and Company B, such as the pledge of Company B's stock as collateral for Company A's debt.[4] While in this latter situation, it may be clear that Company B's cash flows will service all or part of Company A's debt, the staff does not insist that the debt be reflected in Company B's financial statements providing there is full and prominent disclosure of the relationship between Companies A and B and the actual or potential cash flow commitment. In this regard, the staff believes that Statements 5 and 57 as well as Interpretation 45 require sufficient disclosure to allow users of Company B's financial statements to fully understand the impact of the relationship on Company B's present and future cash flows. Rule 4–08(e) of Regulation S–X also requires disclosure of restrictions which limit the payment of dividends. Therefore, the staff believes that the equity section of Company B's balance sheet and any pro forma financial information and capitalization tables should clearly disclose that this arrangement exists.[5]

Regardless of whether the debt is reflected in Company B's financial statements, the notes to Company B's financial statements should generally disclose, at a minimum: (1) The relationship between Company A and Company B; (2) a description of any arrangements that result in Company B's guarantee, pledge of assets[6] or stock, etc. that provides security for Company A's debt; (3) the extent (in the aggregate and for each of the five years subsequent to the date of the latest balance sheet presented) to which Company A is dependent on Company B's cash flows to service its debt and the method by which this will occur; and (4) the impact of such cash flows on Company B's ability to pay dividends or other amounts to holders of its securities.

Additionally, the staff believes Company B's Management's Discussion and Analysis of Financial Condition and Results of Operations should discuss any material impact of its servicing of Company A's debt on its own liquidity pursuant to Item 303(a)(1) of Regulation S–K.

K. Deleted by SAB 95

L. LIFO Inventory Practices

Facts: On November 30, 1984, AcSEC and its Task Force on LIFO Inventory Problems (task force) issued a paper, "Identification and Discussion of Certain Financial Accounting and Reporting Issues Concerning LIFO Inventories." This paper identifies and discusses certain financial accounting and reporting issues related to the last-in, first-out (LIFO) inventory method for which authoritative accounting literature presently provides no definitive guidance. For some issues, the task force's advisory conclusions recommend changes in current practice to narrow the diversity which the task force believes exists. For other issues, the task force's advisory conclusions recommend that current practice should be continued for financial reporting purposes and that additional accounting guidance is unnecessary. Except as otherwise noted in the paper, AcSEC generally supports the task force's advisory conclusions. As stated in the issues paper, "Issues papers of the AICPA's accounting standards division are developed primarily to identify financial accounting and reporting issues the division believes need to be addressed or clarified by the Financial Accounting Standards Board." On February 6, 1985, the FASB decided not to add to its agenda a narrow project on the subject of LIFO inventory practices.

Question 1: What is the SEC staff's position on the issues paper?

Interpretive Response: In the absence of existing authoritative literature on LIFO accounting, the staff believes that registrants and their independent accountants should look to the paper for guidance in determining what constitutes acceptable LIFO accounting practice.[1] In this connection, the staff considers the paper to be an accumulation of existing acceptable LIFO accounting practices which does not establish any new standards and does not diverge from GAAP.

The staff also believes that the advisory conclusions recommended in the issues paper are generally consistent with conclusions previously expressed by the Commission, such as:

1. Pooling—paragraph 4–6 of the paper discusses LIFO inventory pooling and concludes "establishing separate pools with the principal objective of facilitating inventory liquidations is unacceptable." In Accounting and Auditing Enforcement Release 35, August 13, 1984, the Commission stated that it believes that the Company improperly realigned its LIFO pools in such a way as to maximize the likelihood and magnitude of LIFO liquidations and thus, overstated net income.

2. New Items—paragraph 4–27 of the paper discusses determination of the cost of new items and concludes "if the double extension or an index technique is used, the objective of LIFO is

[2] The guidance in this SAB should also be considered for Company B's separate financial statements included in its public offering following Company B's spin-off or carve-out from Company A.

[3] The guidance in this SAB should also be considered where Company A has financed the acquisition of Company B through the issuance of mandatory redeemable preferred stock.

[4] The staff does not believe Company B's financial statements must reflect the debt in this situation because in the event of default on the debt by Company A, the debt holder(s) would only be entitled to B's stock held by Company A. Other equity or debt holders of Company B would retain their priority with respect to the net assets of Company B.

[5] For example, the staff has noted that certain registrants have indicated on the face of such financial statements (as part of the stockholder's equity section) the actual or potential financing arrangement and the registrant's intent to pay dividends to satisfy its parent's debt service requirements. The staff believes such disclosures are useful to highlight the existence of arrangements that could result in the use of Company B's cash to service Company A's debt.

[6] A material asset pledge should be clearly indicated on the face of the balance sheet. For example, if all or substantially all of the assets are pledged, the "assets" and "total assets" captions should include parenthetically: "pledged for parent company debt—See Note X."

[1] In ASR 293 (July 2, 1981) see Financial Reporting Codification § 205, the Commission expressed its concerns about the inappropriate use of Internal Revenue Service (IRS) LIFO practices for financial statement preparation. Because the IRS amended its regulations concerning the LIFO conformity rule on January 13, 1981, allowing companies to apply LIFO differently for financial reporting purposes than for tax purposes, the Commission strongly encouraged registrants and their independent accountants to examine their financial reporting LIFO practices. In that release, the Commission acknowledged the "task force which has been established by AcSEC to accumulate information about [LIFO] application problems" and noted that "This type of effort, in addition to self-examination [of LIFO practices] by individual registrants, is appropriate * * * "

achieved by reconstructing the base year cost of new items added to existing pools." In ASR 293, the Commission stated that when the effects of inflation on the cost of new products are measured by making a comparison with current cost as the base-year cost, rather than a reconstructed base-year cost, income is improperly increased.

Question 2: If a registrant utilizes a LIFO practice other than one recommended by an advisory conclusion in the issues paper, must the registrant change its practice to one specified in the paper?

Interpretive Response: Now that the issues paper is available, the staff believes that a registrant and its independent accountants should re-examine previously adopted LIFO practices and compare them to the recommendations in the paper. In the event that the registrant and its independent accountants conclude that the registrant's LIFO practices are preferable in the circumstances, they should be prepared to justify their position in the event that a question is raised by the staff.

Question 3: If a registrant elects to change its LIFO practices to be consistent with the guidance in the issues paper and discloses such changes in accordance with APB Opinion 20 will the registrant be requested by the staff to explain its past practices and its justification for those practices?

Interpretive Response: The staff does not expect to routinely raise questions about changes in LIFO practices which are made to make a company's accounting consistent with the recommendations in the issues paper.

M. Other Than Temporary Impairment of Certain Investments in Debt and Equity Securities

Facts: Paragraph 16 of Statement 115 specifies that "[f]or individual securities classified as either available-for-sale or held-to-maturity, an enterprise shall determine whether a decline in fair value below the amortized cost basis is other than temporary * * * If the decline in fair value is judged to be other than temporary, the cost basis of the individual security shall be written down to fair value as a new cost basis and the amount of the write-down shall be included in earnings (that is, accounted for as a realized loss)."

Statement 115 does not define the phrase "other than temporary." In applying this guidance to its own situation, Company A has interpreted "other than temporary" to mean permanent impairment. Therefore, because Company A's management has not been able to determine that its investment in Company B is permanently impaired, no realized loss has been recognized even though the market price of B's shares is currently less than one-third of A's average acquisition price.

Question: Does the staff believe that the phrase "other than temporary" should be interpreted to mean "permanent"?

Interpretive Response: No. The staff believes that the FASB consciously chose the phrase "other than temporary" because it did not intend that the test be "permanent impairment," as has been used elsewhere in accounting practice.[1]

The value of investments in marketable securities classified as either available-for-sale or held-to-maturity may decline for various reasons. The market price may be affected by general market conditions which reflect prospects for the economy as a whole or by specific information pertaining to an industry or an individual company. Such declines require further investigation by management. Acting upon the premise that a write-down may be required, management should consider all available evidence to evaluate the realizable value of its investment.

There are numerous factors to be considered in such an evaluation and their relative significance will vary from case to case. The staff believes that the following are only a few examples of the factors which, individually or in combination, indicate that a decline is other than temporary and that a write-down of the carrying value is required:

a. The length of the time and the extent to which the market value has been less than cost;

b. The financial condition and near-term prospects of the issuer, including any specific events which may influence the operations of the issuer such as changes in technology that may impair the earnings potential of the investment or the discontinuance of a segment of the business that may affect the future earnings potential; or

c. The intent and ability of the holder to retain its investment in the issuer for a period of time sufficient to allow for any anticipated recovery in market value.

Unless evidence exits to support a realizable value equal to or greater than the carrying value of the investment, a write-down to fair value accounted for as a realized loss should be recorded. In accordance with the guidance of paragraph 16 of Statement 115, such loss should be recognized in the determination of net income of the period in which it occurs and the written down value of the investment in the company becomes the new cost basis of the investment.

N. Discounting by Property-Casualty Insurance Companies

Facts: A registrant which is an insurance company discounts certain unpaid claims liabilities related to short-duration [1] insurance contracts for purposes of reporting to state regulatory authorities, using discount rates permitted or prescribed by those authorities ("statutory rates") which approximate 3½ percent. The registrant follows the same practice in preparing its financial statements in accordance with GAAP. It proposes to change for GAAP purposes, to using a discount rate related to the historical yield on its investment portfolio ("investment related rate") which is represented to approximate 7 percent, and to account for the change as a change in accounting estimate, applying the investment related rate to claims settled in the current and subsequent years while the statutory rate would continue to be applied to claims settled in all prior years.

Question 1: What is the staff's position with respect to discounting claims liabilities related to short-duration insurance contracts?

Interpretive Response: The staff is aware of efforts by the accounting profession to assess the circumstances under which discounting may be appropriate in financial statements. Pending authoritative guidance resulting from those efforts however, the staff will raise no objection if a registrant follows a policy for GAAP reporting purposes of:

- Discounting liabilities for unpaid claims and claim adjustment expenses at the same rates that it uses for reporting to state regulatory authorities with respect to the same claims liabilities, or

[1] Footnote 4 to Statement 115 refers to this SAB for a discussion of considerations applicable to a determination as to whether a decline in market value below cost, at a particular point in time, is other than temporary. FASB's implementation guide "A Guide to Implementation of Statement 115 on Accounting for Certain Investments in Debt and Equity Securities," SAS 92, "Auditing Derivative Instruments, Hedging Activities, and Investments in Securities," AICPA Audit Guide, "Auditing Derivative Instruments, Hedging Activities, and Investments in Securities," and EITF Topic D–44 also address issues related to the determination of whether a decline in fair value of an investment security is other than temporary.

[1] The term "short-duration" refers to the period of coverage (see statement 60, paragraph 7), not the period that the liabilities are expected to be outstanding.

• Discounting liabilities with respect to settled claims under the following circumstances:

• The payment pattern and ultimate cost are fixed and determinable on an individual claim basis, and

• The discount rate used is reasonable on the facts and circumstances applicable to the registrant at the time the claims are settled.

Question 2: Does the staff agree with the registrant's proposal that the change from a statutory rate to an investment related rate be accounted for as a change in accounting estimate?

Interpretive Response: No. The staff believes that such a change involves a change in the method of applying an accounting principle, *i.e.*, the method of selecting the discount rate was changed. The staff therefore believes that the registrant should reflect the cumulative effect of the change in accounting by applying the new selection method retroactively to liabilities for claims settled in all prior years, in accordance with the requirements of APB Opinion 20. Initial adoption of discounting for GAAP purposes would be treated similarly. In either case, in addition to the disclosures required by APB Opinion 20 concerning the change in accounting principle, a preferability letter from the registrant's independent accountant is required.

O. Research and Development Arrangements

Facts: Statement 68 paragraph 7 states that conditions other than a written agreement may exist which create a presumption that the enterprise will repay the funds provided by other parties under a research and development arrangement. Paragraph 8(c) lists as one of those conditions the existence of a "significant related party relationship" between the enterprise and the parties funding the research and development.

Question 1: What does the staff consider a "significant related party relationship" as that term is used in paragraph 8(c) of Statement 68?

Interpretive Response: The staff believes that a significant related party relationship exists when 10 percent or more of the entity providing the funds is owned by related parties.[1] In unusual circumstances, the staff may also question the appropriateness of treating a research and development arrangement as a contract to perform service for others at the less than 10 percent level. In reviewing these matters the staff will consider, among other factors, the percentage of the funding entity owned by the related parties in relationship to their ownership in and degree of influence or control over the enterprise receiving the funds.

Question 2: Paragraph 7 of Statement 68 states that the presumption of repayment "can be overcome only by substantial evidence to the contrary." Can the presumption be overcome by evidence that the funding parties were assuming the risk of the research and development activities since they could not reasonably expect the enterprise to have resources to repay the funds based on its current and projected future financial condition?

Interpretive Response: No. Paragraph 5 of Statement 68 specifically indicates that the enterprise "may settle the liability by paying cash, by issuing securities, or by some other means." While the enterprise may not be in a position to pay cash or issue debt, repayment could be accomplished through the issuance of stock or various other means. Therefore, an apparent or projected inability to repay the funds with cash (or debt which would later be paid with cash) does not necessarily demonstrate that the funding parties were accepting the entire risks of the activities.

P. Restructuring Charges

1. Deleted by SAB 103

2. Deleted by SAB 103

3. Income Statement Presentation of Restructuring Charges

Facts: Restructuring charges often do not relate to a separate component of the entity, and, as such, they would not qualify for presentation as losses on the disposal of a discontinued operation. Additionally, since the charges are not both unusual and infrequent [1] they are not presented in the income statement as extraordinary items.

Question 1: May such restructuring charges be presented in the income statement as a separate caption after income from continuing operations before income taxes (*i.e.*, preceding income taxes and/or discontinued operations)?

Interpretive Response: No. Paragraph 26 of APB Opinion 30 states that items that do not meet the criteria for classification as an extraordinary item should be reported as a component of income from continuing operations.[2] Neither Opinion 30 nor Rule 5–03 of Regulation S–X contemplate a category in between continuing and discontinued operations. Accordingly, the staff believes that restructuring charges should be presented as a component of income from continuing operations, separately disclosed if material. Furthermore, the staff believes that a separately presented restructuring charge should not be preceded by a subtotal representing "income from continuing operations before restructuring charge" (whether or not it is so captioned). Such a presentation would be inconsistent with the intent of Opinion 30.

Question 2: Some registrants utilize a classified or "two-step" income statement format (i.e., one which presents operating revenues, expenses and income followed by other income and expense items). May a charge which relates to assets or activities for which the associated revenues and expenses have historically been included in operating income be presented as an item of "other expense" in such an income statement?

Interpretive Response: No. The staff believes that the proper classification of a restructuring charge depends on the nature of the charge and the assets and operations to which it relates. Therefore, charges which relate to activities for which the revenues and expenses have historically been included in operating income should generally be classified as an operating expense, separately disclosed if material. Furthermore, when a restructuring charge is classified as an operating expense, the staff believes that it is generally inappropriate to present a preceding subtotal captioned or representing operating income before restructuring charges. Such an amount does not represent a measurement of operating results under GAAP.

Conversely, charges relating to activities previously included under "other income and expenses" should be similarly classified, also separately disclosed if material.

Question 3: Is it permissible to disclose the effect on net income and earnings per share of such a restructuring charge?

Interpretive Response: Discussions in MD&A and elsewhere which quantify the effects of unusual or infrequent items on net income and earnings per share are beneficial to a reader's understanding of the financial statements and are therefore acceptable.

MD&A also should discuss the events and decisions which gave rise to the restructuring, the nature of the charge and the expected impact of the

[1] Related parties as used herein are as defined in paragraph 24 of Statement 57.

[1] See APB Opinion 30, paragraph 20.

[2] Paragraph 26 of APB Opinion 30 further provides that such items should not be reported on the income statement net of income taxes or in any manner that implies that they are similar to extraordinary items.

restructuring on future results of operations, liquidity and sources and uses of capital resources.

4. Disclosures

Beginning with the period in which the exit plan is initiated, Statement 146 requires disclosure, in *all* periods, *including interim* periods, until the exit plan is completed, of the following:

a. A description of the exit or disposal activity, including the facts and circumstances leading to the expected activity and the expected completion date

b. For each major type of cost associated with the activity (for example, one-time termination benefits, contract termination costs, and other associated costs):

(1) The total amount expected to be incurred in connection with the activity, the amount incurred in the period, and the cumulative amount incurred to date

(2) A reconciliation of the beginning and ending liability balances showing separately the changes during the period attributable to costs incurred and charged to expense, costs paid or otherwise settled, and any adjustments to the liability with an explanation of the reason(s) therefor

c. The line item(s) in the income statement or the statement of activities in which the costs in (b) above are aggregated

d. For each reportable segment, the total amount of costs expected to be incurred in connection with the activity, the amount incurred in the period, and the cumulative amount incurred to date, net of any adjustments to the liability with an explanation of the reason(s) therefor

e. If a liability for a cost associated with the activity is not recognized because fair value cannot be reasonably estimated, that fact and the reasons therefor.

Question: What specific disclosures about restructuring charges has the staff requested to fulfill the disclosure requirements of Statement 146 and MD&A?

Interpretive Response: The staff often has requested greater disaggregation and more precise labeling when exit and involuntary termination costs are grouped in a note or income statement line item with items unrelated to the exit plan. For the reader's understanding, the staff has requested that discretionary, or decision-dependent, costs of a period, such as exit costs, be disclosed and explained in MD&A separately. Also to improve transparency, the staff has requested disclosure of the nature and amounts of additional types of exit costs and other types of restructuring charges [1] that appear quantitatively or qualitatively material, and requested that losses relating to asset impairments be identified separately from charges based on estimates of future cash expenditures.

The staff frequently reminds registrants that in periods subsequent to the initiation date that material changes and activity in the liability balances of each significant type of exit cost and involuntary employee termination benefits [2] (either as a result of expenditures or changes in/reversals of estimates or the fair value of the liability) should be disclosed in the footnotes to the interim and annual financial statements and discussed in MD&A. In the event a company recognized liabilities for exit costs and involuntary employee termination benefits relating to multiple exit plans, the staff believes presentation of separate information for each individual exit plan that has a material effect on the balance sheet, results of operations or cash flows generally is appropriate.

For material exit or involuntary employee termination costs related to an acquired business, the staff has requested disclosure in either MD&A or the financial statements of:

a. When the registrant began formulating exit plans for which accrual may be necessary,

b. The types and amounts of liabilities recognized for exit costs and involuntary employee termination benefits and included in the acquisition cost allocation, and

c. Any unresolved contingencies or purchase price allocation issues and the types of additional liabilities that may result in an adjustment of the acquisition cost allocation.

The staff has noted that the economic or other events that cause a registrant to consider and/or adopt an exit plan or that impair the carrying amount of assets, generally occur over time. Accordingly, the staff believes that as those events and the resulting trends and uncertainties evolve, they often will meet the requirement for disclosure pursuant to the Commission's MD&A rules prior to the period in which the exit costs and liabilities are recorded pursuant to GAAP. Whether or not currently recognizable in the financial statements, material exit or involuntary termination costs that affect a known trend, demand, commitment, event, or uncertainty to management, should be disclosed in MD&A. The staff believes that MD&A should include discussion of the events and decisions which gave rise to the exit costs and exit plan, and the likely effects of management's plans on financial position, future operating results and liquidity unless it is determined that a material effect is not reasonably likely to occur. Registrants should identify the periods in which material cash outlays are anticipated and the expected source of their funding. Registrants should also discuss material revisions to exit plans, exit costs, or the timing of the plan's execution, including the nature and reasons for the revisions.

The staff believes that the expected effects on future earnings and cash flows resulting from the exit plan (for example, reduced depreciation, reduced employee expense, etc.) should be quantified and disclosed, along with the initial period in which those effects are expected to be realized. This includes whether the cost savings are expected to be offset by anticipated increases in other expenses or reduced revenues. This discussion should clearly identify the income statement line items to be impacted (for example, cost of sales; marketing; selling, general and administrative expenses; etc.). In later periods if actual savings anticipated by the exit plan are not achieved as expected or are achieved in periods other than as expected, MD&A should discuss that outcome, its reasons, and its likely effects on future operating results and liquidity.

The staff often finds that, because of the discretionary nature of exit plans and the components thereof, presenting and analyzing material exit and involuntary termination charges in tabular form, with the related liability balances and activity (*e.g.*, beginning balance, new charges, cash payments, other adjustments with explanations, and ending balances) from balance sheet date to balance sheet date, is necessary to explain fully the components and effects of significant restructuring charges. The staff believes that such a tabular analysis aids a financial statement user's ability to disaggregate the restructuring charge by income statement line item in which the costs would have otherwise been recognized, absent the restructuring plan, (for

[1] Examples of common components of exit costs and other types of restructuring charges which should be considered for separate disclosure include, but are not limited to, involuntary employee terminations and related costs, changes in valuation of current assets such as inventory writedowns, long term asset disposals, adjustments for warranties and product returns, leasehold termination payments, and other facility exit costs, among others.

[2] The staff would expect similar disclosures for employee termination benefits whether those costs have been recognized pursuant to Statement 88, 112, or 146.

example, cost of sales; selling, general, and administrative; etc.).

Q. Increasing Rate Preferred Stock

Facts: A registrant issues Class A and Class B nonredeemable preferred stock [1] on 1/1/X1. Class A, by its terms, will pay no dividends during the years 20X1 through 20X3. Class B, by its terms, will pay dividends at annual rates of $2, $4 and $6 per share in the years 20X1, 20X2 and 20X3, respectively. Beginning in the year 20X4 and thereafter as long as they remain outstanding, each instrument will pay dividends at an annual rate of $8 per share. In all periods, the scheduled dividends are cumulative.

At the time of issuance, eight percent per annum was considered to be a market rate for dividend yield on Class A, given its characteristics other than scheduled cash dividend entitlements (voting rights, liquidation preference, etc.), as well as the registrant's financial condition and future economic prospects. Thus, the registrant could have expected to receive proceeds of approximately $100 per share for Class A if the dividend rate of $8 per share (the "perpetual dividend") had been in effect at date of issuance. In consideration of the dividend payment terms, however, Class A was issued for proceeds of $79 3/8 per share. The difference, $20 5/8, approximated the value of the absence of $8 per share dividends annually for three years, discounted at 8%.

The issuance price of Class B shares was determined by a similar approach, based on the terms and characteristics of the Class B shares.

Question 1: How should preferred stocks of this general type (referred to as "increasing rate preferred stocks") be reported in the balance sheet?

Interpretive Response: As is normally the case with other types of securities, increasing rate preferred stock should be recorded initially at its fair value on date of issuance. Thereafter, the carrying amount should be increased periodically as discussed in the Interpretive Response to Question 2.

Question 2: Is it acceptable to recognize the dividend costs of increasing rate preferred stocks according to their stated dividend schedules?

Interpretive Response: No. The staff believes that when consideration received for preferred stocks reflects expectations of future dividend streams, as is normally the case with cumulative preferred stocks, any discount due to an absence of dividends (as with Class A) or gradually increasing dividends (as with Class B) for an initial period represents prepaid, unstated dividend cost.[2] Recognizing the dividend cost of these instruments according to their stated dividend schedules would report Class A as being cost-free, and would report the cost of Class B at less than its effective cost, from the standpoint of common stock interests (*i.e.*, for purposes of computing income applicable to common stock and earnings per common share) during the years 20X1 through 20X3.

Accordingly, the staff believes that discounts on increasing rate preferred stock should be amortized over the period(s) preceding commencement of the perpetual dividend, by charging imputed dividend cost against retained earnings and increasing the carrying amount of the preferred stock by a corresponding amount. The discount at time of issuance should be computed as the present value of the difference between (a) dividends that will be payable, if any, in the period(s) preceding commencement of the perpetual dividend; and (b) the perpetual dividend amount for a corresponding number of periods; discounted at a market rate for dividend yield on preferred stocks that are comparable (other than with respect to dividend payment schedules) from an investment standpoint. The amortization in each period should be the amount which, together with any stated dividend for the period (ignoring fluctuations in stated dividend amounts that might result from variable rates,[3] results in a constant rate of effective cost vis-a-vis the carrying amount of the preferred stock (the market rate that was used to compute the discount).

Simplified (ignoring quarterly calculations) application of this accounting to the Class A preferred stock described in the "Facts" section of this bulletin would produce the following results on a per share basis:

CARRYING AMOUNT OF PREFERRED STOCK

	Beginning of Year (BOY)	Imputed Dividend (8% of Carrying Amount at BOY)	End of year
Year 20X1	$79.38	6.35	85.73
Year 20X2	85.73	6.86	92.59
Year 20X3	92.59	7.41	100.00

During 20X4 and thereafter, the stated dividend of $8 measured against the carrying amount of $100 [4] would reflect dividend cost of 8%, the market rate at time of issuance.

The staff believes that existing authoritative literature, while not explicitly addressing increasing rate preferred stocks, implicitly calls for the accounting described in this bulletin.

The pervasive, fundamental principle of accrual accounting would, in the staff's view, preclude registrants from recognizing the dividend cost on the basis of whatever cash payment schedule might be arranged. Furthermore, recognition of the effective cost of unstated rights and privileges is well-established in accounting, and is specifically called for by APB Opinion 21 and Topic 3.C of this codification for unstated interest costs of debt capital and unstated dividend costs of redeemable preferred stock capital,

[1] "Nonredeemable" preferred stock, as used in this SAB, refers to preferred stocks which are not redeemable or are redeemable only at the option of the issuer.

[2] As described in the "Facts" section of the issue, a registrant would receive less in proceeds for a preferred stock, if the stock were to pay less than its perpetual dividend for some initial period(s), than if it were to pay perpetual dividend from date of issuance. The staff views the discount on increasing rate preferred stock as equivalent to a prepayment of dividends by the issuer, as though the issuer had concurrently (a) issued the stock with the perpetual dividened being payable from date of issuance, and (b) returned to the investor a portion of the proceeds representing the present value of certain future dividend entitlements which the investor agreed to forgo.

[3] See Question 3 regarding variable increasing rate preferred stocks.

[4] It should be noted that the $100 per share amount used in this issue is for illustrative purposes, and is not intended to imply that application of this issue will necessarily result in the carrying amount of nonredeemable preferred stock being accreted to its par value, stated value, voluntary redemption value or involuntary liquidation value.

respectively. The staff believes that the requirement to recognize the effective periodic cost of capital applies also to nonredeemable preferred stocks because, for that purpose, the distinction between debt capital and preferred equity capital (whether redeemable [5] or nonredeemable) is irrelevant from the standpoint of common stock interests.

Question 3: Would the accounting for discounts on increasing rate preferred stock be affected by variable stated dividend rates?

Interpretive Response: No. If stated dividends on an increasing rate preferred stock are variable, computations of initial discount and subsequent amortization should be based on the value of the applicable index at date of issuance and should not be affected by subsequent changes in the index.

For example, assume that a preferred stock issued 1/1/X1 is scheduled to pay dividends at annual rates, applied to the stock's par value, equal to 20% of the actual (fluctuating) market yield on a particular Treasury security in 20X1 and 20X2, and 90% of the fluctuating market yield in 20X3 and thereafter. The discount would be computed as the present value of a two-year dividend stream equal to 70% (90% less 20%) of the 1/1/X1 Treasury security yield, annually, on the stock's par value. The discount would be amortized in years 20X1 and 20X2 so that, together with 20% of the 1/1/X1 Treasury yield on the stock's par value, a constant rate of cost vis-a-vis the stock's carrying amount would result. Changes in the Treasury security yield during 20X1 and 20X2 would, of course, cause the rate of total reported preferred dividend cost (amortization of discount plus cash dividends) in those years to be more or less than the rate indicated by discount amortization plus 20% of the 1/1/X1 Treasury security yield. However, the fluctuations would be due solely to the impact of changes in the index on the stated dividends for those periods.

Question 4: Will the staff expect retroactive changes by registrants to comply with the accounting described in this bulletin?

Interpretive Response: All registrants will be expected to follow the accounting described in this bulletin for increasing rate preferred stocks issued after December 4, 1986.[6] Registrants that have not followed this accounting for increasing rate preferred stocks issued before that date were encouraged to retroactively change their accounting for those preferred stocks in the financial statements next filed with the Commission. The staff did not object if registrants did not make retroactive changes for those preferred stocks, provided that all presentations of and discussions regarding income applicable to common stock and earnings per share in future filings and shareholders' reports are accompanied by equally prominent supplemental disclosures (on the face of the income statement, in presentations of selected financial data, in MD&A, etc.) of the impact of not changing their accounting and an explanation of such impact (*e.g.*, that dividend cost has been recognized on a cash basis).

R. Deleted by SAB 103

S. Quasi-Reorganization

Facts: As a consequence of significant operating losses and/or recent write-downs of property, plant and equipment, a company's financial statements reflect an accumulated deficit. The company desires to eliminate the deficit by reclassifying amounts from paid-in-capital. In addition, the company anticipates adopting a discretionary change in accounting principles [1] that will be recorded as a cumulative-effect type of accounting change. The recording of the cumulative effect will have the result of increasing the company's retained earnings.

Question 1: May the company reclassify its capital accounts to eliminate the accumulated deficit without satisfying all of the conditions enumerated in Section 210 [2] of the Codification of Financial Reporting Policies for a quasi-reorganization?

Interpretive Response: No. The staff believes a deficit reclassification of any nature is considered to be a quasi-reorganization. As such, a company may not reclassify or eliminate a deficit in retained earnings unless all requisite conditions set forth in Section 210 [3] for a quasi-reorganization are satisfied.[4]

Question 2: Must the company implement the discretionary change in accounting principle simultaneously with the quasi-reorganization or may it adopt the change after the quasi-reorganization has been effected?

Interpretive Response: The staff has taken the position that the company should adopt the anticipated accounting change prior to or as an integral part of the quasi-reorganization. Any such accounting change should be effected by following GAAP with respect to the change.[5]

Chapter 7A of ARB 43 indicates that, following a quasi-reorganization, a "company's accounting should be substantially similar to that appropriate for a new company." The staff believes that implicit in this "fresh-start" concept is the need for the company's accounting principles in place at the time of the quasi-reorganization to be those planned to be used following the reorganization to avoid a misstatement of earnings and retained earnings after the reorganization.[6] Chapter 7A of ARB 43 states, in part, "* * * in general, assets should be carried forward as of the date of the readjustment at fair and

[5] Application of the interest method with respect to redeemable preferred stocks pursuant to Topic 3.C results in accounting consistent with the provisions of this bulletin irrespective of whether the redeemable preferred stocks have constant or increasing stated dividend rates. The interest method, as described in APB Opinion 21, producers a constant effective periodic rate of cost that is comprised of amortization of discount as well as the stated cost of each period.

[6] The staff first publicly expressed its view as to the appropriate accounting at the December 3–4, 1986 meeting of the EITF.

[1] Discretionary accounting changes require the filing of a preferability letter by the registrant's independent accountant pursuant to Item 601 of Regulation S–K and Rule 10–01(b)(6) of Regulation S–X, respectively.

[2] ASR 25.

[3] Section 210 (ASR 25) indicates the following conditions under which a quasi-reorganization can be effected without the creation of a new corporate entity and without the intervention of formal court proceedings:

1. Earned surplus, as of the date selected, is exhausted;

2. Upon consummation of the quasi-reorganization, no deficit exists in any surplus account;

3. The entire procedure is made known to all persons entitled to vote on matters of general corporate policy and the appropriate consents to the particular transactions are obtained in advance in accordance with the applicable laws and charter provisions;

4. The procedure accomplishes, with respect to the accounts, substantially what might be accomplished in a reorganization by legal proceedings—namely, the restatement of assets in terms of present considerations as well as appropriate modifications of capital and capital surplus, in order to obviate, so far as possible, the necessity of future reorganization of like nature.

[4] In addition, ARB 43, Chapter 7A, outlines procedures that must be followed in connection with and after a quasi-reorganization.

[5] Opinion 20 provides accounting principles to be followed when adopting accounting changes. In addition, many newly-issued accounting pronouncements provide specific guidance to be followed when adopting the accounting specified in such pronouncements.

[6] Certain newly-issued accounting standards do not require adoption until some future date. The staff believes, however, that if the registrant intends or is required to adopt those standards within 12 months following the quasi-reorganization, the registrant should adopt those standards prior to or as an integral part of the quasi-reorganization. Further, registrants should consider early adoption of standards with effective dates more than 12 months subsequent to a quasi-reorganization.

not unduly conservative amounts, **determined with due regard for the accounting to be employed by the Company thereafter."** (emphasis added)

In addition, the staff believes that adopting a discretionary change in accounting principle that will be reflected in the financial statements within 12 months following the consummation of a quasi-reorganization leads to a presumption that the accounting change was contemplated at the time of the quasi-reorganization.[7]

Question 3: In connection with a quasi-reorganization, may there be a write-up of net assets?

Interpretive Response: No. The staff believes that increases in the recorded values of specific assets (or reductions in liabilities) to fair value are appropriate providing such adjustments are factually supportable, however, the amount of such increases are limited to offsetting adjustments to reflect decreases in other assets (or increases in liabilities) to reflect their new fair value. In other words, a quasi-reorganization should not result in a write-up of net assets of the registrant.

Question 4: The interpretive response to question 1 indicates that the staff believes that a deficit reclassification of any nature is considered to be a quasi-reorganization, and accordingly, must satisfy all the conditions of Section 210.[8] Assume a company has satisfied all the requisite conditions of Section 210, and has eliminated a deficit in retained earnings by a concurrent reduction in paid-in capital, but did not need to restate assets and liabilities by a charge to capital because assets and liabilities were already stated at fair values. How should the company reflect the tax benefits of operating loss or tax credit carryforwards for financial reporting purposes that existed as of the date of the quasi-reorganization when such tax benefits are subsequently recognized for financial reporting purposes?

Interpretive Response: The staff believes Statement 109 requires that any subsequently recognized tax benefits of operating loss or tax credit carryforwards that existed as of the date of a quasi-reorganization be reported as a direct addition to paid-in capital. The staff believes that this position is consistent with the "new company" or "fresh-start" concept embodied in Section 210,[9] and in existing accounting literature regarding quasi-reorganizations, and with the FASB staff's justification for such a position when they stated that a "new enterprise would not have tax benefits attributable to operating losses or tax credits that arose prior to its organization date.[10]

The FASB recognized that a practice existed of recording deficit elimination type quasi-reorganizations without evaluating the concurrent need to restate assets and liabilities to fair values, and provided guidance on accounting for the tax benefits of carryforward items subsequent to such an event.[11] This practice and accounting is not permitted by Section 210, and accordingly, is not appropriate for registrants. The staff believes that all registrants that comply with the requirements of Section 210 in effecting a quasi-reorganization should apply the accounting required by the first sentence of paragraph 39 of Statement 109 for the tax benefits of tax carryforward items.[12] Therefore, even though the only effect of a quasi-reorganization is the elimination of a deficit in retained earnings because assets and liabilities are already stated at fair values and the revaluation of assets and liabilities is unnecessary (or a write-up of net assets is prohibited as indicated in the interpretive response to question 3 above), subsequently recognized tax benefits of operating loss or tax credit carryforward items should be recorded as a direct addition to paid-in capital.

Question 5: If a company had previously recorded a quasi-reorganization that only resulted in the elimination of a deficit in retained earnings, may the company reverse such entry and "undo" its quasi-reorganization?

Interpretive Response: No. The staff believes Opinion 20 would preclude such a change in accounting. It states: "a method of accounting that was previously adopted for a type of transaction or event which is being terminated **or which was a single, nonrecurring event in the past should not be changed.**" (emphasis added)[13]

T. Accounting for Expenses or Liabilities Paid by Principal Stockholder(s)

Facts: Company X was a defendant in litigation for which the company had not recorded a liability in accordance with Statement 5. A principal stockholder of the company transfers a portion of his shares to the plaintiff to settle such litigation. If the company had settled the litigation directly, the company would have recorded the settlement as an expense.

Question: Must the settlement be reflected as an expense in the company's financial statements, and if so, how?

Interpretive Response: Yes. The value of the shares transferred should be reflected as an expense in the company's financial statements with a corresponding credit to contributed (paid-in) capital.

The staff believes that such a transaction is similar to those described in AICPA Interpretation 1 to Opinion 25 in which a principal stockholder[1]

[7] Certain accounting changes require restatement of prior financial statements. The staff believes that if a quasi-reorganization had been recorded in a restated period, the effects of the accounting change on quasi-reorganization adjustments should also be restated to properly reflect the quasi-reorganization in the restated financial statements.

[8] See footnote 3.

[9] Section 210 (ASR 25) discusses the "conditions under which a quasi-reorganization has come to be applied in accounting to the corporate procedures in the course of which a company, without creation of new corporate entity and without intervention of formal court proceedings, is enabled to eliminate a deficit whether resulting from operations or recognition of other losses or both and to establish a new earned surplus account for the accumulation of earnings subsequent to the date selected as the effective date of the quasi-reorganization." It further indicates that "it is implicit in a procedure of this kind that it is not to be employed recurrently, **but only under circumstances which would justify an actual reorganization or formation of a new corporation**, particularly if the sole purpose of the quasi-reorganization is the elimination of a deficit in earned surplus resulting from operating losses." (emphasis added)

[10] FASB Special Report: A Guide to Implementation of Statement 109 on Accounting for Income Taxes: Questions and Answers answer 9 states in part: "ARB 43, Chapter 7, 'Capital Accounts,' states that after a quasi-reorganization, the enterprise's accounting should be substantially similar to that appropriate for a new enterprise. As such, any subsequently recognized tax benefit of an operating loss or tax credit carryforward that existed at the date of a quasi-reorganization should not be included in the determination of income of the "new" enterprise, regardless of whether losses that gave rise to an operating loss carryforward were charged to income prior to the quasi-reorganization or directly to contributed capital as part of the quasi-reorganization. A new enterprise would not have tax benefits attributable to operating losses or tax credits that arose prior to its organization date."

[11] Statement 109, paragraph 39, states, in part: "The only exception is for enterprises that have previously both adopted Statement 96 and effected a quasi reorganization that involves only the elimination of a deficit in retained earnings by a concurrent reduction in contributed capital prior to adopting this Statement. For those enterprises, subsequent recognition of the tax benefit of prior deductible temporary differences and carryforwards is included in income and reported as required by paragraph 37 * * * and then reclassified from retained earnings to contributed capital." Also, see Footnote 10.

[12] The first sentence of paragraph 39 of Statement 109 states: "[t]he tax benefit of deductible temporary differences and carryforwards as of the date of a quasi reorganization as defined and contemplated in ARB 43, Chapter 7, ordinarily are reported as a direct addition to contributed capital if the tax benefits are recognized in subsequent years."

[13] Opinion 20, paragraph 16.

[1] Statement 57, paragraph 24e, defines principal owners as "owners of record or known beneficial owners of more than 10 percent of the voting interests of the enterprise."

establishes or finances a stock option, purchase or award plan for one or more employees of the company. Interpretation 1 states that "if a principal stockholder's intention is to enhance or maintain the value of his investment by entering into such an arrangement, the corporation is implicitly benefiting from the plan by retention of, and possibly improved performance by, the employee. In this case, the benefits to a principal stockholder and to the corporation are generally impossible to separate. Similarly, it is virtually impossible to separate a principal stockholder's personal satisfaction from the benefit to the corporation." As a result, Interpretation 1 requires the company to account for such a transaction as if it were a compensatory plan adopted by the company, with an offsetting contribution to capital, unless: (1) The stockholder's relationship to the employee would normally result in generosity, (2) the stockholder has an obligation to the employee which is unrelated to employment, or (3) the company clearly does not benefit from the transaction.

The staff believes that the problem of separating the benefit to the principal stockholder from the benefit to the company cited in Interpretation 1 is not limited to transactions involving stock compensation. Therefore, similar accounting is required in this and other[2] transactions where a principal stockholder pays an expense for the company, unless the stockholder's action is caused by a relationship or obligation completely unrelated to his position as a stockholder or such action clearly does not benefit the company.

Some registrants and their accountants have taken the position that since Statement 57 applies to these transactions and requires only the disclosure of material related party transactions, the staff should not require the accounting called for by Interpretation 1 for transactions other than those specifically covered by it. The staff notes, however, that Statement 57 does not address the measurement of related party transactions and that, as a result, such transactions are generally recorded at the amounts indicated by their terms.[3] However, the staff believes that transactions of the type described above differ from the typical related party transactions.

The transactions for which Statement 57 requires disclosure generally are those in which a company receives goods or services directly from, or provides goods or services directly to, a related party, and the form and terms of such transactions may be structured to produce either a direct or indirect benefit to the related party. The participation of a related party in such a transaction negates the presumption that transactions reflected in the financial statements have been consummated at arm's length. Disclosure is therefore required to compensate for the fact that, due to the related party's involvement, the terms of the transaction may produce an accounting measurement for which a more faithful measurement may not be determinable.

However, transactions of the type discussed in the facts given do not have such problems of measurement and appear to be transacted to provide a benefit to the stockholder through the enhancement or maintenance of the value of the stockholder's investment. The staff believes that the substance of such transactions is the payment of an expense of the company through contributions by the stockholder. Therefore, the staff determined that it was inappropriate to permit accounting according to the form of the transaction.

U. Gain Recognition on the Sale of A Business or Operating Assets to A Highly Leveraged Entity

Facts: A registrant has sold a subsidiary, division or operating assets to a newly formed, thinly capitalized, highly leveraged entity (NEWCO) for cash or a combination of cash and securities, which may include subordinated debt, preferred stock, warrants, options or other instruments issued by NEWCO. In some of these transactions, registrants may guarantee debt or enter into other agreements (sometimes referred to as make-well agreements) that may require the registrant to infuse cash into NEWCO under certain circumstances. Securities received in the transaction are not actively traded and are subordinate to substantially all of NEWCO's other debt. The value of the consideration received appears to exceed the cost basis of the net assets sold.

Question 1: Assuming the transaction may be properly accounted for as a divestiture,[1] does the staff believe it is appropriate for the registrant to recognize a gain?

Interpretive Response: The staff believes there often exist significant uncertainties about the seller's ability to realize non-cash proceeds received in transactions in which the purchaser is a thinly capitalized, highly leveraged entity, particularly when its assets consist principally of those purchased from the seller. The staff believes that such uncertainties raise doubt as to whether immediate gain recognition is appropriate. Factors that may lead the staff to question gain recognition in such transactions include:

1. Situations in which the assets or operations sold have historically not produced cash flows from operations[2] that will be sufficient to fund future debt service and full dividend requirements on a current basis.[3] Often the servicing of debt and preferred dividend requirements is dependent upon future events that cannot be assured, such as sales of assets or improvements in earnings.

2. The lack of any substantial amount of equity capital in NEWCO other than that provided by the registrant; and/or

3. The existence of contingent liabilities of the registrant, such as debt guarantees or agreements that require

[2] For example, SAB Topic 1.B indicates that the separate financial statements of a subsidiary should reflect any costs of its operations which are incurred by the parent on its behalf. Additionally, the staff notes that AICPA Technical Practice Aids § 4160 also indicates that the payment by principal stockholders of a company's debt should be accounted for as a capital contribution.

[3] However, in some circumstances it is necessary to reflect, either in the historical financial statements or a pro forma presentation (depending on the circumstances), related party transactions at amounts other than those indicated by their terms. Two such circumstances are addressed in Staff Accounting Bulletin Topic 1.B.1, Questions 3 and 4. Another example is where the terms of a material contract with a related party are expected to change upon the completion of an offering (*i.e.*, the principal shareholder requires payment for services which had previously been contributed by the shareholder to the company)

[1] Transactions such as these require careful evaluation to determine whether, in substance, a divestiture has occurred. SAB Topic 5.E provides the staff's views on circumstances that may exist that would lead the staff to conclude that the risks of the business have not been transferred to the new owners and that a divestiture has not occurred. Topic 5.E indicates that factors to consider in determining whether a transaction should be accounted for as a divestiture include:

- Continuing involvement by the seller in the business;
- Absence of a significant financial investment in the business by the buyer;
- Repayment of debt, which constitutes the principal consideration in the transaction, is dependent on future successful operations; or
- The continued necessity for debt or contract performance guarantees on behalf of the business by the seller.

Further, the seller should consider whether it is required to consolidate the entity by way of its variable interests held in the NEWCO pursuant to the provisions of FASB Interpretation 46.

[2] As defined in paragraphs 21–24 of Statement 95.

[3] The ability of NEWCO to fund the debt service and the dividend requirement(s) should be evaluated on a full accrual basis—*i.e.*, irrespective of the purchaser's ability to satisfy those requirements through deferral (contractually or otherwise) of any required cash payments or the issuance of additional securities to satisfy such requirements.

the registrant to infuse cash into NEWCO under certain circumstances.

The staff also believes that even where the registrant receives solely cash proceeds, the recognition of any gain would be impacted by the existence of any guarantees or other agreements that may require the registrant to infuse cash into NEWCO, particularly when the first two factors listed above exist.

Question 2: If immediate recognition of all or a portion of the apparent gain is not appropriate due to the existence of facts and circumstances similar to the above, at what future date should the gain be recognized and how should the deferred gain be disclosed in the financial statements?

Interpretive Response: Generally, the staff believes that the deferred gain[4] should not be recognized until such time as cash flows from operating activities are sufficient to fund debt service and dividend requirements (on a full accrual basis)[5] or the registrant's investment in NEWCO has been or could be readily converted to cash (*e.g.*, active trading market develops in NEWCO securities and the registrant is not restricted from selling such securities, the registrant sells the securities received on a nonrecourse basis, etc.) and the registrant has no further obligations under any debt guarantees or other agreements that would require it to make additional investments in NEWCO.

The staff believes that the amount of any deferred gain (including deferral of interest or dividend income on securities received) should be disclosed on the face of the balance sheet as a deduction from the related asset account (*i.e.*, investment in NEWCO). The footnotes to the financial statements should include a complete description of the transaction, including the existence of any commitments and contingencies, the terms of the securities received, and the accounting treatment of amounts due thereon.

V. Certain Transfers of Nonperforming Assets

Facts: A financial institution desires to reduce its nonaccrual or reduced rate loans and other nonearning assets, including foreclosed real estate (collectively, "nonperforming assets"). Some or all of such nonperforming assets are transferred to a newly-formed entity (the "new entity"). The financial institution, as consideration for transferring the nonperforming assets, may receive (a) the cash proceeds of debt issued by the new entity to third parties, (b) a note or other redeemable instrument issued by the new entity, or (c) a combination of (a) and (b). The residual equity interests in the new entity, which carry voting rights, initially owned by the financial institution, are transferred to outsiders (for example, via distribution to the financial institution's shareholders or sale or contribution to an unrelated third party).

The financial institution typically will manage the assets for a fee, providing necessary services to liquidate the assets, but otherwise does not have the right to appoint directors or legally control the operations of the new entity.

Statement 140 provides guidance for determining when a transfer of financial assets can be recognized as a sale. The interpretive guidance provided in response to Questions 1 and 2 of this SAB does not apply to transfers of financial assets falling within the scope of Statement 140. Because Statement 140 does not apply to distributions of financial assets to shareholders or a contribution of such assets to unrelated third parties, the interpretive guidance provided in response to Questions 1 and 2 of this SAB would apply to such conveyances.

Further, registrants should consider the guidance contained in FASB Interpretation 46 in determining whether it should consolidate the newly-formed entity.

Question 1: What factors should be considered in determining whether such transfer of nonperforming assets can be accounted for as a disposition by the financial institution?

Interpretive Response: The staff believes that determining whether nonperforming assets have been disposed of in substance requires an assessment as to whether the risks and rewards of ownership have been transferred. SAB Topic 5.E[1] discusses some factors that the staff believes should be considered in determining whether the risks of a business have been transferred. Consistent with the factors discussed in SAB Topic 5.E, the staff believes that the transfer described should not be accounted for as a sale or disposition if (a) the transfer of nonperforming assets to the new entity provides for recourse by the new entity to the transferor financial institution, (b) the financial institution directly or indirectly guarantees debt of the new entity in whole or in part, (c) the financial institution retains a participation in the rewards of ownership of the transferred assets, for example through a higher than normal incentive or other management fee arrangement,[2] or (d) the fair value of any material non-cash consideration received by the financial institution (for example, a note or other redeemable instrument) cannot be reasonably estimated. Additionally, the staff believes that the accounting for the transfer as a sale or disposition generally is not appropriate where the financial institution retains rewards of ownership through the holding of significant residual equity interests or where third party holders of such interests do not have a significant amount of capital at risk.

Where accounting for the transfer as a sale or disposition is not appropriate, the nonperforming assets should remain on the financial institution's balance sheet and should continue to be disclosed as nonaccrual, past due, restructured or foreclosed, as appropriate, and the debt of the new entity should be recorded by the financial institution.

Question 2: If the transaction is accounted for as a sale to an unconsolidated party, at what value should the transfer be recorded by the financial institution?

Interpretive Response: The staff believes that the transfer should be recorded by the financial institution at the fair value of assets transferred (or, if more clearly evident. the fair value of assets received) and a loss recognized by the financial institution for any excess of the net carrying value[3] over the fair value.[4] Fair value is the amount that

[4] In situations in which the gain is deferred following the guidance in this SAB, the staff believes that the seller generally should not recognize any income from the securities received in such transactions (including accretion of securities to their face or redemption value) until realization is more fully assured.

[5] *See* note 4.

[1] SAB Topic 5.E addresses the accounting for the transfer of certain operations whereby there is a continuing involvement by the seller or other evidence that incidents of ownership remain with the seller.

[2] The staff recognizes that the determination of whether the financial institution retains a participation in the rewards of ownership will require an analysis of the facts and circumstances of each individual transaction. Generally, the staff believes that, in order to conclude that the financial institution has disposed of the assets in substance, the management fee arrangement should not enable the financial institution to participate to any significant extent in the potential increases in cash flows or value of the assets, and the terms of the arrangement, including provisions for discontinuance of services, must be substantially similar to management arrangements with third parties.

[3] The carrying value should be reduced by any allocable allowance for credit losses or other valuation allowances. The staff believes that the loss recognized for the excess of the net carrying value over the fair value should be considered a credit loss and this should not be included by the financial institution as loss on disposition.

[4] The staff notes that the EITF reached a consensus at its November 17, 1988 meeting on

Continued

would be realizable in an outright sale to an unrelated third party for cash.[5] The same concepts should be applied in determining fair value of the transferred assets, *i.e.*, if an active market exists for the assets transferred, then fair value is equal to the market value. If no active market exists, but one exists for similar assets, the selling prices in that market may be helpful in estimating the fair value. If no such market price is available, a forecast of expected cash flows, discounted at a rate commensurate with the risks involved, may be used to aid in estimating the fair value. In situations where discounted cash flows are used to estimate fair value of nonperforming assets, the staff would expect that the interest rate used in such computations will be substantially higher than the cost of funds of the financial institution and appropriately reflect the risk of holding these nonperforming assets. Therefore, the fair value determined in such a way will be lower than the amount at which the assets would have been carried by the financial institution had the transfer not occurred, unless the financial institution had been required under GAAP to carry such assets at market value or the lower of cost or market value.

Question 3: Where the transaction may appropriately be accounted for as a sale to an unconsolidated party and the financial institution receives a note receivable or other redeemable instrument from the new entity, how should such asset be disclosed pursuant to Item III C, "Risk Elements," of Industry Guide 3? What factors should be considered related to the subsequent accounting for such instruments received?

Interpretive Response: The staff believes that the financial institution may exclude the note receivable or other asset from its Risk Elements disclosures under Guide 3 provided that: (a) the receivable itself does not constitute a nonaccrual, past due, restructured, or potential problem loan that would require disclosure under Guide 3, and (b) the underlying collateral is described in sufficient detail to enable investors to understand the nature of the note receivable or other asset, if material, including the extent of any over-collateralization. The description of the collateral normally would include material information similar to that which would be provided if such assets were owned by the financial institution, including pertinent Risk Element disclosures.

The staff notes that, in situations in which the transaction is accounted for as a sale to an unconsolidated party and a portion of the consideration received by the registrant is debt or another redeemable instrument, careful consideration must be given to the appropriateness of recording profits on the management fee arrangements or interest or dividends on the instrument received, including consideration of whether it is necessary to defer such amounts or to treat such payments on a cost recovery basis. Further, if the new entity incurs losses to the point that its permanent equity based on GAAP is eliminated, it would ordinarily be necessary for the financial institution, at a minimum, to record further operating losses as its best estimate of the loss in realizable value of its investment.[6]

W. Contingency Disclosures Regarding Property-Casualty Insurance Reserves for Unpaid Claim Costs

Facts: A property-casualty insurance company (the "Company") has established reserves in accordance with Statement 60 for unpaid claim costs, including estimates of costs relating to claims incurred but not reported ("IBNR").[1] The reserve estimate for IBNR claims was based on past loss experience and current trends except that the estimate has been adjusted for recent significant unfavorable claims experience that the Company considers to be nonrecurring and abnormal. The Company attributes the abnormal claims experience to a recent acquisition and accelerated claims processing; however, actuarial studies have been inconclusive and subject to varying interpretations. Although the reserve is deemed adequate to cover all probable claims, there is a reasonable possibility that the abnormal claims experience could continue, resulting in a material understatement of claim reserves.

Statement 5 requires, among other things, disclosure of loss contingencies.[2] However, paragraph 2 of that Statement notes that "[n]ot all uncertainties inherent in the accounting process give rise to contingencies as that term is used in [Statement 5]."

SOP–94–6[3] also provides disclosure guidance regarding certain significant estimates.

Question 1: In the staff's view, do Statement 5 and SOP 94–6 disclosure requirements apply to property-casualty insurance reserves for unpaid claim costs? If so, how?

Interpretive Response: Yes. The staff believes that specific uncertainties (conditions, situations and/or sets of circumstances) not considered to be normal and recurring because of their significance and/or nature can result in loss contingencies[4] for purposes of applying Statement 5 and SOP 94–6 disclosure requirements. General uncertainties, such as the amount and timing of claims, that are normal, recurring, and inherent to estimations of property-casualty insurance reserves are not considered subject to the disclosure requirements of Statements 5. Some specific uncertainties that may result in loss contingencies pursuant to Statement 5, depending on significance and/or nature, include insufficiently understood trends in claims activity; judgmental adjustments to historical experience for purposes of estimating future claim costs (other than for normal recurring general uncertainties); significant risks to an individual claim or group of related claims; or catastrophe losses. The requirements of SOP 94–6 apply when "[i]t is at least reasonably possible that the estimate of

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Issue 88–25 that the newly created "liquidating bank" should continue to report its assets and liabilities at fair values at the date of the financial statements.

[5] The EITF reached a consensus on issue 11 of Issue 01–02 that an enterprise that distributes loans to its owners should report such distribution at fair value.

[6] Typically, the financial institution's claim on the new entity is subordinate to other debt instruments and thus the financial institution will incur any losses beyond those incurred by the permanent equity holders.

[1] Paragraph 18 of Statement 60 prescribes that "[t]he liability for unpaid claims shall be based on the estimated ultimate cost of settling the claims (including the effects of inflation and other societal and economic factors), using past experience adjusted for current trends, and any other factors that would modify past experience." [Footnote reference omitted]

[2] Paragraph 10 of Statement 5 specified that "[i]f no accrual is made for a loss contingency because one or both of the conditions in paragraph 8 are not met, or if an exposure to loss exists in excess of the amount accrued pursuant to the provisions of paragraph 8, disclosure of the contingency shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred. The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." [Footnote reference omitted and emphasis added.]

[3] SOP 94–6 provides that disclosures regarding certain significant estimates should be made when the following criteria are met. The SOP provides that:

The disclosure should indicate the nature of the uncertainty and include an indication that it is at least reasonably possible that a change in the estimate will occur in the near term. If the estimate involves a loss contingency covered by [Statement]. 5, the disclosure also should include an estimate of the possible loss or range of loss, or state that such an estimate cannot be made. Disclosure of the factors that cause the estimate to be sensitive to change is encouraged but not required. (footnote references omitted)

SOP 94–6 requires disclosures regarding current vulnerability due to certain concentrations which my be applicable as well.

[4] The loss contingency referred to in this document is the potential for a material understatement of reserves for unpaid claims.

the effect on the financial statements of a condition, situation, or set of circumstances that existed at the date of the financial statements will change in the near term due to one or more future confirming events * * * [and] the effect of the change would be material to the financial statements."

Question 2: Do the facts presented above describe an uncertainty that requires disclosures under Statement 5 and SOP 94–6?

Interpretive Response: Yes. The staff believes the judgmental adjustments to historical experience for insufficiently understood claims activity noted above results in a loss contingency within the scope of Statement 5 and SOP 94–6. Based on the facts presented above, at a minimum the Company's financial statements should disclose that for purposes of estimating IBNR claim reserves, past experience was adjusted for what management believes to be abnormal claims experience related to the recent acquisition of Company A and accelerated claims processing. It should also be disclosed that there is a reasonable possibility that the claims experience could be the indication of an unfavorable trend which would require additional IBNR claim reserves in the approximate range of $XX–$XX million (alternatively, if Company management is unable to estimate the possible loss or range of loss, a statement to that effect should be disclosed).

Additionally, the staff also expects companies to disclose the nature of the loss contingency and the potential impact on trends in their loss reserve development discussions provided pursuant to Property-Casualty Industry Guides 4 and 6. Consideration should also be given to the need to provide disclosure in MD&A.

Question 3: Does the staff have an example in which specific uncertainties involving an individual claim or group of related claims result in a loss contingency the staff believes requires disclosure?

Interpretive Response: Yes. A property-casualty insurance company (the "Company") underwrites product liability insurance for an insured manufacturer which has produced and sold millions of units of a particular product which has been used effectively and without problems for many years. Users of the product have recently begun to report serious health problems that they attribute to long term use of the product and have asserted claims under the insurance policy underwritten and retained by the Company. To date, the number of users reporting such problems is relatively small, and there is presently no conclusive evidence that demonstrates a causal link between long term use of the product and the health problems experienced by the claimants. However, the evidence generated to date indicates that there is at least a reasonable possibility that the product is responsible for the problems and the assertion of additional claims is considered probable, and therefore the potential exposure of the Company is material. While an accrual may not be warranted since the loss exposure may not be both probable and estimable, in view of the reasonable possibility of material future claim payments, the staff believes that disclosures made in accordance with Statement 5 and SOP 94–6 would be required under these circumstances.

The disclosure concepts expressed in this example would also apply to an individual claim or group of claims that are related to a single catastrophic event or multiple events having a similar effect.

X. Deleted by SAB 103

Y. Accounting and Disclosures Relating to Loss Contingencies

Facts: A registrant believes it may be obligated to pay material amounts as a result of product or environmental remediation liability. These amounts may relate to, for example, damages attributed to the registrant's products or processes, clean-up of hazardous wastes, reclamation costs, fines, and litigation costs. The registrant may seek to recover a portion or all of these amounts by filing a claim against an insurance carrier or other third parties.

Question 1: Assuming that the registrant's estimate of an environmental remediation or product liability meets the conditions set forth in paragraph 132 of SOP 96–1 for recognition on a discounted basis, what discount rate should be applied and what, if any, special disclosures are required in the notes to the financial statements?

Interpretive Response: The rate used to discount the cash payments should be the rate that will produce an amount at which the environmental or product liability could be settled in an arm's-length transaction with a third party. SOP 96–1 further states that the discount rate used to discount the cash payments should not exceed the interest rate on monetary assets that are essentially risk free [1] and have maturities comparable to that of the environmental or product liability.

If the liability is recognized on a discounted basis to reflect the time value of money, the notes to the financial statements should, at a minimum, include disclosures of the discount rate used, the expected aggregate undiscounted amount, expected payments for each of the five succeeding years and the aggregate amount thereafter, and a reconciliation of the expected aggregate undiscounted amount to amounts recognized in the statements of financial position. Material changes in the expected aggregate amount since the prior balance sheet date, other than those resulting from pay-down of the obligation, should be explained.

Question 2: What financial statement disclosures should be furnished with respect to recorded and unrecorded product or environmental remediation liabilities?

Interpretive Response: Paragraphs 9 and 10 of Statement 5 identify disclosures regarding loss contingencies that generally are furnished in notes to financial statements. SOP 96–1 identifies disclosures that are required and recommended regarding both recorded and unrecorded environmental remediation liabilities. The staff believes that product and environmental remediation liabilities typically are of such significance that detailed disclosures regarding the judgments and assumptions underlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading and to inform readers fully regarding the range of reasonably possible outcomes that could have a material effect on the registrant's financial condition, results of operations, or liquidity. In addition to the disclosures required by Statement 5 and SOP 96–1, examples of disclosures that may be necessary include:

- Circumstances affecting the reliability and precision of loss estimates.
- The extent to which unasserted claims are reflected in any accrual or may affect the magnitude of the contingency.
- Uncertainties with respect to joint and several liability that may affect the magnitude of the contingency, including disclosure of the aggregate expected cost to remediate particular sites that are individually material if the likelihood of contribution by the other significant parties has not been established.
- Disclosure of the nature and terms of cost-sharing arrangements with other potentially responsible parties.
- The extent to which disclosed but unrecognized contingent losses are expected to be recoverable through insurance, indemnification arrangements, or other sources, with

[1] As described in Concepts Statement 7.

disclosure of any material limitations of that recovery.

- Uncertainties regarding the legal sufficiency of insurance claims or solvency of insurance carriers.[2]
- The time frame over which the accrued or presently unrecognized amounts may be paid out.
- Material components of the accruals and significant assumptions underlying estimates.

Registrants are cautioned that a statement that the contingency is not expected to be material does not satisfy the requirements of Statement 5 if there is at least a reasonable possibility that a loss exceeding amounts already recognized may have been incurred and the amount of that additional loss would be material to a decision to buy or sell the registrant's securities. In that case, the registrant must either (a) disclose the estimated additional loss, or range of loss, that is reasonably possible, or (b) state that such an estimate cannot be made.

Question 3: What disclosures regarding loss contingencies may be necessary outside the financial statements?

Interpretive Response: Registrants should consider the requirements of Items 101 (Description of Business), 103 (Legal Proceedings), and 303 (MD&A) of Regulations S–K and S–B. The Commission has issued interpretive releases that provide additional guidance with respect to these items.[3] In a 1989 interpretive release, the Commission noted that the availability of insurance, indemnification, or contribution may be relevant in determining whether the criteria for disclosure have been met with respect to a contingency.[4] The registrant's assessment in this regard should include consideration of facts such as the periods in which claims for recovery may be realized, the likelihood that the claims may be contested, and the financial condition of third parties from which recovery is expected.

Disclosures made pursuant to the guidance identified in the preceding paragraph should be sufficiently specific to enable a reader to understand the scope of the contingencies affecting the registrant. For example, a registrant's discussion of historical and anticipated environmental expenditures should, to the extent material, describe separately (a) recurring costs associated with managing hazardous substances and pollution in on-going operations, (b) capital expenditures to limit or monitor hazardous substances or pollutants, (c) mandated expenditures to remediate previously contaminated sites, and (d) other infrequent or non-recurring clean-up expenditures that can be anticipated but which are not required in the present circumstances. Disaggregated disclosure that describes accrued and reasonably likely losses with respect to particular environmental sites that are individually material may be necessary for a full understanding of these contingencies. Also, if management's investigation of potential liability and remediation cost is at different stages with respect to individual sites, the consequences of this with respect to amounts accrued and disclosed should be discussed.

Examples of specific disclosures typically relevant to an understanding of historical and anticipated product liability costs include the nature of personal injury or property damages alleged by claimants, aggregate settlement costs by type of claim, and related costs of administering and litigating claims. Disaggregated disclosure that describes accrued and reasonably likely losses with respect to particular claims may be necessary if they are individually material. If the contingency involves a large number of relatively small individual claims of a similar type, such as personal injury from exposure to asbestos, disclosure of the number of claims pending at each balance sheet date, the number of claims filed for each period presented, the number of claims dismissed, settled, or otherwise resolved for each period, and the average settlement amount per claim may be necessary. Disclosures should address historical and expected trends in these amounts and their reasonably likely effects on operating results and liquidity.

Question 4: What disclosures should be furnished with respect to site restoration costs or other environmental remediation costs?[5]

Interpretive Response: The staff believes that material liabilities for site restoration, post-closure, and monitoring commitments, or other exit costs that may occur on the sale, disposal, or abandonment of a property as a result of unanticipated contamination of the asset should be disclosed in the notes to the financial statements. Appropriate disclosures generally would include the nature of the costs involved, the total anticipated cost, the total costs accrued to date, the balance sheet classification of accrued amounts, and the range or amount of reasonably possible additional losses. If an asset held for sale or development will require remediation to be performed by the registrant prior to development, sale, or as a condition of sale, a note to the financial statements should describe how the necessary expenditures are considered in the assessment of the asset's value and the possible need to reflect an impairment loss. Additionally, if the registrant may be liable for remediation of environmental damage relating to assets or businesses previously disposed, disclosure should be made in the financial statements unless the likelihood of a material unfavorable outcome of that contingency is remote.[6] The registrant's accounting policy with respect to such costs should be disclosed in accordance with Opinion 22.

Z. Accounting and Disclosure Regarding Discontinued Operations

1. Deleted by SAB 103

2. Deleted by SAB 103

3. Deleted by SAB 103

4. Disposal of Operation With Significant Interest Retained

Facts: A Company disposes of its controlling interest in a component of an entity as defined by Statement 144. The Company retains a minority voting interest directly in the component or it holds a minority voting interest in the buyer of the component. Controlling interest includes those controlling interests established through other means, such as variable interests. Because the Company's voting interest enables it to exert significant influence over the operating and financial policies of the investee, the Company is required by Opinion 18 to account for its residual investment using the equity method.[1]

Question: May the historical operating results of the component and the gain or

[2] The staff believes there is a rebuttable presumpiton that no asset should be recognized for a claim for recovery from a party that is asserting that it is not liable to indemnify the registrant. Registrants that overcome that presumpiton should disclose the amount of recorded recoveries that are being contested and discuss the reasons for concluding that the amounts are probable of recovery.

[3] See Securities Act Release No. 6130, FR 36, Securities Act Release No. 33–8040, Securities Act Release No. 33–8039, and Securities Act Release 33–8176.

[4] See, for example, footnote 30 of FR 36 (footnote 17 of Section 501.02 of the Codification of Financial Reporting Policies).

[5] Registrants are reminded that Statement 143 provides guidance for accounting and reporting for costs associated with asset retirement obligations.

[6] If the company has a guarantee as defined by Interpretation 45, the entity is required to provide the disclosures and recognize the fair value of the guarantee in the company's financial statements even if the "contingent" aspect of the guarantee is deemed to be remote.

[1] In some circumstances, the seller's continuing interest may be so great that divestiture accounting is inappropriate. See SAB Topic 5.E.

loss on the sale of the majority interest in the component be classified in the Company's statement of operations as "discontinued operations" pursuant to Statement 144?

Interpretive Response: No. A condition necessary for discontinued operations reporting, as indicated in paragraph 42 of Statement 144 is that an entity "not have any significant continuing involvement in the operations of the component after the disposal transaction." In these circumstances, the transaction should be accounted for as the disposal of a group of assets that is not a component of an entity and classified within continuing operations pursuant to Statement 144.[2]

5. Classification and Disclosure of Contingencies Relating to Discontinued Operations

Facts: A company disposed of a component of an entity in a previous accounting period. The Company received debt and/or equity securities of the buyer of the component or of the disposed component as consideration in the sale, but this financial interest is not sufficient to enable the Company to apply the equity method with respect to its investment in the buyer. The Company made certain warranties to the buyer with respect to the discontinued business, or remains liable under environmental or other laws with respect to certain facilities or operations transferred to the buyer. The disposition satisfied the criteria of Statement 144 for presentation as "discontinued operations." The Company estimated the fair value of the securities received in the transaction for purposes of calculating the gain or loss on disposal that was recognized in its financial statements. The results of discontinued operations prior to the date of disposal or classification as held for sale included provisions for the Company's existing obligations under environmental laws, product warranties, or other contingencies. The calculation of gain or loss on disposal included estimates of the Company's obligations arising as a direct result of its decision to dispose of the component, under its warranties to the buyer, and under environmental or other laws. In a period subsequent to the disposal date, the Company records a charge to income with respect to the securities because their fair value declined materially and the Company determined that the decline was other than temporary. The Company also records adjustments of its previously estimated liabilities arising under the warranties and under environmental or other laws.

Question 1: Should the writedown of the carrying value of the securities and the adjustments of the contingent liabilities be classified in the current period's statement of operations within continuing operations or as an element of discontinued operations?

Interpretive Response: Adjustments of estimates of contingent liabilities or contingent assets that remain after disposal of a component of an entity or that arose pursuant to the terms of the disposal generally should be classified within discontinued operations.[1] However, the staff believes that changes in the carrying value of assets received as consideration in the disposal or of residual interests in the business should be classified within continuing operations.

Paragraph 44 of Statement 144 requires that "adjustments to amounts previously reported in discontinued operations that are directly related to the disposal of a component of an entity in a prior period shall be classified separately in the current period in discontinued operations." The staff believes that the provisions of paragraph 44 apply only to adjustments that are necessary to reflect new information about events that have occurred that becomes available prior to disposal of the component of the entity, to reflect the actual timing and terms of the disposal when it is consummated, and to reflect the resolution of contingencies associated with that component, such as warranties and environmental liabilities retained by the seller.

Developments subsequent to the disposal date that are not directly related to the disposal of the component or the operations of the component prior to disposal are not "directly related to the disposal" as contemplated by paragraph 44 of Statement 144. Subsequent changes in the carrying value of assets received upon disposition of a component do not affect the determination of gain or loss at the disposal date, but represent the consequences of management's subsequent decisions to hold or sell those assets. Gains and losses, dividend and interest income, and portfolio management expenses associated with assets received as consideration for discontinued operations should be reported within continuing operations.

Question 2: What disclosures would the staff expect regarding discontinued operations prior to the disposal date and with respect to risks retained subsequent to the disposal date?

Interpretive Response: MD&A[12] should include disclosure of known trends, events, and uncertainties involving discontinued operations that may materially affect the Company's liquidity, financial condition, and results of operations (including net income) between the date when a component of an entity is classified as discontinued and the date when the risks of those operations will be transferred or otherwise terminated. Disclosure should include discussion of the impact on the Company's liquidity, financial condition, and results of operations of changes in the plan of disposal or changes in circumstances related to the plan. Material contingent liabilities,[3] such as product or environmental liabilities or litigation, that may remain with the Company notwithstanding disposal of the underlying business should be identified in notes to the financial statements and any reasonably likely range of possible loss should be disclosed pursuant to Statement 5. MD&A should include discussion of the reasonably likely effects of these contingencies on reported results and liquidity. If the Company retains a financial interest in the discontinued component or in the buyer of that component that is material to the Company, MD&A should include discussion of known trends, events, and uncertainties, such as the financial condition and operating results of the issuer of the security, that may be reasonably expected to affect the amounts ultimately realized on the investments.

6. Deleted by SAB 103

7. Accounting for the Spin-off of a Subsidiary

Facts: A Company disposes of a business through the distribution of a subsidiary's stock to the Company's shareholders on a pro rata basis in a transaction that is referred to as a spin-off.

Question: May the Company elect to characterize the spin-off transaction as resulting in a change in the reporting entity and restate its historical financial statements as if the Company never had

[2] However, a plan of disposal that contemplates the transfer of assets to a limited-life entity created for the single purpose of liquidating the assets of a component of an entity would not necessitate classification within continuing operations solely because the registrant retains control or significant influence over the liquidating entity.

[1] Registrants are reminded that Interpretation 45 requires recognition and disclosure of certain guarantees which may impose accounting and disclosure requirements in addition to those discussed in this SAB Topic.

[12] Item 303 of Regulation S–K.

[3] Registrants also should consider the disclosure requirements of Interpretation 45.

an investment in the subsidiary, in the manner specified by paragraph 34 of APB Opinion 20?

Interpretive Response: Not ordinarily. If the Company was required to file periodic reports under the Exchange Act within one year prior to the spin-off, the staff believes the Company should reflect the disposition in conformity with Statement 144. This presentation most fairly and completely depicts for investors the effects of the previous and current organization of the Company. However, in limited circumstances involving the initial registration of a company under the Exchange Act or Securities Act, the staff has not objected to financial statements that retroactively reflect the reorganization of the business as a change in the reporting entity if the spin-off transaction occurs prior to effectiveness of the registration statement. This presentation may be acceptable in an initial registration if the Company and the subsidiary are in dissimilar businesses, have been managed and financed historically as if they were autonomous, have no more than incidental common facilities and costs, will be operated and financed autonomously after the spin-off, and will not have material financial commitments, guarantees, or contingent liabilities to each other after the spin-off. This exception to the prohibition against retroactive omission of the subsidiary is intended for companies that have not distributed widely financial statements that include the spun-off subsidiary. Also, dissimilarity contemplates substantially greater differences in the nature of the businesses than those that would ordinarily distinguish reportable segments as defined by Statement 131.

AA. Deleted by SAB 103

BB. Inventory Valuation Allowances

Facts: ARB 43, Chapter 4, Statement 5, specifies that: "[a] departure from the cost basis of pricing the inventory is required when the utility of the goods is no longer as great as its cost. Where there is evidence that the utility of goods, in their disposal in the ordinary course of business, will be less than cost, whether due to physical obsolescence, changes in price levels, or other causes, the difference should be recognized as a loss of the current period. This is generally accomplished by stating such goods at a lower level commonly designated as market."

Footnote 2 to that same chapter indicates that "[i]n the case of goods which have been written down below cost at the close of a fiscal period, such reduced amount is to be considered the cost for subsequent accounting purposes."

Lastly, Opinion 20 provides "inventory obsolescence" as one of the items subject to estimation and changes in estimates under the guidance in paragraphs 10–11 and 31–33 of that Opinion.

Question: Does the write-down of inventory to the lower of cost or market, as required by ARB 43, create a new cost basis for the inventory or may a subsequent change in facts and circumstances allow for restoration of inventory value, not to exceed original historical cost?

Interpretive Response: Based on ARB 43, footnote 2, the staff believes that a write-down of inventory to the lower of cost or market at the close of a fiscal period creates a new cost basis that subsequently cannot be marked up based on changes in underlying facts and circumstances.[1]

CC. Impairments

Standards for recognizing and measuring impairment of the carrying amount of long-lived assets including certain identifiable intangibles to be held and used in operations are found in Statement 144. Standards for recognizing and measuring impairment of the carrying amount of goodwill and identifiable intangible assets that are not currently being amortized are found in Statement 142.

Facts: Company X has mainframe computers that are to be abandoned in six to nine months as replacement computers are put in place. The mainframe computers were placed in service in January 20X0 and were being depreciated on a straight-line basis over seven years. No salvage value had been projected at the end of seven years and the original cost of the computers was $8,400. The board of directors, with the appropriate authority, approved the abandonment of the computers in March 20X3 when the computers had a remaining carrying value of $4,600. No proceeds are expected upon abandonment. Abandonment cannot occur prior to the receipt and installation of replacement computers, which is expected prior to the end of 20X3. Management had begun reevaluating its mainframe computer capabilities in January 20X2 and had included in its 20X3 capital expenditures budget an estimated amount for new mainframe computers. The 20X3 capital expenditures budget had been prepared by management in August 20X2, had been discussed with the company's board of directors in September 20X2 and was formally approved by the board of directors in March 20X3. Management had also begun soliciting bids for new mainframe computers beginning in the fall of 20X2. The mainframe computers, when grouped with assets at the lowest level of identifiable cash flows, were not impaired on a "held and used" basis throughout this time period. Management had not adjusted the original estimated useful life of the computers (seven years) since 20X0.

Question 1: Company X proposes to recognize an impairment charge under Statement 144 for the carrying value of the mainframe computers of $4,600 in March 20X3. Does Company X meet the requirements in Statement 144 to classify the mainframe computer assets as "to be abandoned?"

Interpretive Response: No. Statement 144, paragraph 28, provides that "a long-lived asset to be abandoned is disposed of when it ceases to be used. If an entity commits to a plan to abandon a long-lived asset before the end of its previously estimated useful life, depreciation estimates shall be revised in accordance with Opinion 20 to reflect the use of the asset over its shortened useful life."

Question 2: Would the staff accept an adjustment to write down the carrying value of the computers to reflect a "normalized depreciation" rate for the period from March 20X3 through actual abandonment (*e.g.*, December 20X3)? Normalized depreciation would represent the amount of depreciation otherwise expected to be recognized during that period without adjustment of the asset's useful life, or $1,000 ($100/month for ten months) in the example fact pattern.

Interpretive Response: No. The mainframe computers would be viewed as "held and used" at March 20X3 under the fact pattern described. There is no basis under Statement 144 to write down an asset to an amount that would subsequently result in a "normalized depreciation" charge through the disposal date, whether disposal is to be by sale, abandonment, or other means. For an asset that meets the requirements to be classified as "held for sale" under Statement 144, paragraph 34 of that standard requires the asset to be valued at the lower of carrying amount or fair value less cost to sell. For assets that are classified as "held and used" under Statement 144, an assessment must first be made as to whether the asset (asset group) is impaired. Paragraph 7 of Statement 144 indicates that an impairment loss shall be recognized only if the carrying amount of a long-

[1] See also disclosure requirement for inventory balances in Rule 5–02(6) of Regulation S–X.

lived asset (asset group) is not recoverable and exceeds its fair value. The carrying amount of a long-lived asset (asset group) is not recoverable if it exceeds the sum of the undiscounted cash flows expected to result from the use and eventual disposition of the asset (asset group). The staff would object to a write down of long-lived assets to a "normalized depreciation" value as representing an acceptable alternative to the approaches required in Statement 144.

The staff also believes that registrants must continually evaluate the appropriateness of useful lives assigned to long-lived assets, including identifiable intangible assets and goodwill. In the above fact pattern, management had contemplated removal of the mainframe computers beginning in January 20X2 and, more formally, in August 20X2 as part of compiling the 20X3 capital expenditures budget. At those times, at a minimum, management should have reevaluated the original useful life assigned to the computers to determine whether a seven year amortization period remained appropriate given the company's current facts and circumstances, including ongoing technological changes in the market place. This reevaluation process should have continued at the time of the September 20X2 board of directors' meeting to discuss capital expenditure plans and, further, as the company pursued mainframe computer bids. Given the contemporaneous evidence that management's best estimate during much of 20X2 was that the current mainframe computers would be removed from service in 20X3, the depreciable life of the computers should have been adjusted prior to 20X3 to reflect this new estimate. The staff does not view the recognition of an impairment charge to be an acceptable substitute for choosing the appropriate initial amortization or depreciation period or subsequently adjusting this period as company or industry conditions change. The staff's view applies also to selection of, and changes to, estimated residual values. Consequently, the staff may challenge impairment charges for which the timely evaluation of useful life and residual value cannot be demonstrated.

Question 3: Has the staff expressed any views with respect to company-determined estimates of cash flows used for assessing and measuring impairment of assets under Statement 144?

Interpretive Response: In providing guidance on the development of cash flows for purposes of applying the provisions of Statement 144, paragraph 17 of that Statement indicates that "estimates of future cash flows used to test the recoverability of a long-lived asset (asset group) shall incorporate the entity's own assumptions about its use of the asset (asset group) and shall consider all available evidence. The assumptions used in developing those estimates shall be reasonable in relation to the assumptions used in developing other information used by the entity for comparable periods, such as internal budgets and projections, accruals related to incentive compensation plans, or information communicated to others."

The staff recognizes that various factors, including management's judgments and assumptions about the business plans and strategies, affect the development of future cash flow projections for purposes of applying Statement 144. The staff, however, cautions registrants that the judgments and assumptions made for purposes of applying Statement 144 must be consistent with other financial statement calculations and disclosures and disclosures in MD&A. The staff also expects that forecasts made for purposes of applying Statement 144 be consistent with other forward-looking information prepared by the company, such as that used for internal budgets, incentive compensation plans, discussions with lenders or third parties, and/or reporting to management or the board of directors.

For example, the staff has reviewed a fact pattern where a registrant developed cash flow projections for purposes of applying the provisions of Statement 144 using one set of assumptions and utilized a second, more conservative set of assumptions for purposes of determining whether deferred tax valuation allowances were necessary when applying the provisions of Statement 109. In this case, the staff objected to the use of inconsistent assumptions.

In addition to disclosure of key assumptions used in the development of cash flow projections, the staff also has required discussion in MD&A of the implications of assumptions. For example, do the projections indicate that a company is likely to violate debt covenants in the future? What are the ramifications to the cash flow projections used in the impairment analysis? If growth rates used in the impairment analysis are lower than those used by outside analysts, has the company had discussions with the analysts regarding their overly optimistic projections? Has the company appropriately informed the market and its shareholders of its reduced expectations for the future that are sufficient to cause an impairment charge? The staff believes that cash flow projections used in the impairment analysis must be both internally consistent with the company's other projections and externally consistent with financial statement and other public disclosures.

Topic 6: Interpretations of Accounting Series Releases and Financial Reporting Releases

A.1. Deleted by SAB 103

B. Accounting Series Release 280—General Revision of Regulation S–X: Income or Loss Applicable to Common Stock

Facts: A registrant has various classes of preferred stock. Dividends on those preferred stocks and accretions of their carrying amounts cause income applicable to common stock to be less than reported net income.

Question: In ASR 280, the Commission stated that although it had determined not to mandate presentation of income or loss applicable to common stock in all cases, it believes that disclosure of that amount is of value in certain situations. In what situations should the amount be reported, where should it be reported, and how should it be computed?

Interpretive Response: Income or loss applicable to common stock should be reported on the face of the income statement [1] when it is materially different in quantitative terms from reported net income or loss [2] or when it is indicative of significant trends or other qualitative considerations. The amount to be reported should be computed for each period as net income or loss less: (a) Dividends on preferred stock, including undeclared or unpaid dividends if cumulative; and (b) periodic increases in the carrying amounts of instruments reported as redeemable preferred stock (as discussed in Topic 3.C) or increasing rate preferred stock (as discussed in Topic 5.Q).

[1] If a registrant elects to follow the encouraged disclosure discussed in paragraph 23 of Statement 130, and displays the components of other comprehensive income and the total for comprehensive income using a one-statement approach, the registrant must continue to follow the guidance set forth in the SAB Topic. One approach may be to provide a separate reconciliation of net income to income available to common stock below comprehensive income reported on a statement of income and comprehensive income.

[2] The assessment of materiality is the responsibility of each registrant. However, absent concerns about trends or other qualitative considerations, the staff generally will not insist on the reporting of income or loss applicable to common stock if the amount differs from net income or loss by less than ten percent.

C. Accounting Series Release 180—Institution of Staff Accounting Bulletins (SABs)—Applicability of Guidance Contained in SABs

Facts: The series of SABs was instituted to achieve wide dissemination of administrative interpretations and practices of the Commission's staff. In illustration of certain interpretations and practices, SABs may be written narrowly to describe the circumstances of particular matters which resulted in expression of the staff's views on those particular matters.

Question: How does the staff intend SABs to be applied in circumstances analogous to those addressed in SABs?

Interpretive Response: The staff's purpose in issuing SABs is to disseminate guidance for application not only in the narrowly described circumstances, but also, unless authoritative accounting literature calls for different treatment, in other circumstances where events and transactions have similar accounting and/or disclosure implications.

Registrants and independent accountants are encouraged to consult with the staff if they believe that particular circumstances call for accounting and/or disclosure different from that which would result from application of a SAB addressing those same or analogous circumstances.

D. Redesignated as Topic 12.A by SAB 47

E. Redesignated as Topic 12.B by SAB 47

F. Deleted by SAB 103

G. Accounting Series Releases 177 and 286—Relating to Amendments To Form 10–Q, Regulation S–K, and Regulation S–X Regarding Interim Financial Reporting

General Facts: Disclosure requirements for quarterly data on Form 10–Q were amended in ASR 177 and 286 to include condensed interim financial statements, a narrative analysis of financial condition and results of operations, a letter from the registrant's independent public accountant commenting on any accounting change, and a signature by the registrant's chief financial officer or chief accounting officer.[1] In addition, certain selected quarterly data is required to be disclosed by virtually all registrants (see Item 302(a)(5) of Regulation S–K).

[1] These requirements have been further revised to require the company's CEO and CFO to certify to the information contained in the company's periodic filing.

1. Selected Quarterly Financial Data (Item 302(A) of Regulation S–K)

a. Disclosure of Selected Quarterly Financial Data

Facts: Item 302(a)(1) of Regulation S–K requires disclosure of net sales, gross profit, income before extraordinary items and cumulative effect of a change in accounting, per share data based upon such income, and net income for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included. Item 302(a)(3) requires the registrant to describe the effect of any disposals of components of an entity [1] and extraordinary, unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter. Furthermore, Item 302(a)(2) requires a reconciliation of amounts previously reported on Form 10–Q to the quarterly data presented if the amounts differ.

Question 1: Are these disclosure requirements applicable to supplemental financial statements included in a filing with the SEC for unconsolidated subsidiaries and 50% or less owned persons?

Interpretive Response: The summarized quarterly financial data required by Item 302(a)(1) need not be included in supplemental financial statements for unconsolidated subsidiaries and 50% or less owned persons unless the financial statements are for a subsidiary or affiliate that is itself a registrant which meets the criteria set forth in Item 302(a)(5).

Question 2: If a company is in a specialized industry where "gross profit" generally is not computed (*e.g.*, banks, insurance companies and finance companies), what disclosure should be made to comply with the requirements of Item 302(a)(1)?

Interpretive Response: Companies in specialized industries should present summarized quarterly financial data which are most meaningful in their particular circumstances. For example, a bank might present interest income, interest expense, provision for loan losses, security gains or losses and net income. Similarly, an insurance company might present net premiums earned, underwriting costs and expenses, investment income, security gains or losses and net income.

Question 3: If a company wishes to make its quarterly and annual disclosures on the same basis, would disclosure of costs and expenses associated directly with or allocated to products sold or services rendered, or other appropriate data to enable users to compute "gross profit," satisfy the requirements of Item 302(a)(1)?

Interpretive Response: Yes.

Question 4: What is meant by "per-share data based upon such income" as used in Item 302(a)(1)?

Interpretive Response: Item 302(a)(1) only requires disclosure of per share amounts for income before extraordinary items and cumulative effect of a change in accounting. It is expected that when per share data is calculated for each full quarter based upon such income, the per share amounts would be both basic and diluted. Although it is not required by the rule, there are many instances where it would be desirable to disclose other per share figures such as net earnings per share and the per share effect of extraordinary items also. Where such disclosure is made, per share data should be both basic and diluted.

Question 5: What is intended by the requirement set forth in Item 302(a)(3) that registrants "describe the effect of" disposals of segments of a business, etc.?

Interpretive Response: The rule uses the language of segments of a business that was previously found in the authoritative literature. Consistent with the terminology used in Statement 144, as used here, segments of a business is intended to mean components of an entity. The rule is intended to require registrants to "disclose the amount" of such unusual transactions and events included in the results reported for each quarter. Such disclosure would be made in narrative form. However, it would not require that matters covered by MD&A be repeated. In this situation, registrants should disclose the nature and amount of the unusual transaction or event and refer to MD&A for further discussion of the matter.

Question 6: What is intended by the requirement of Item 302(a)(3) to disclose "the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter"?

Interpretive Response: This language is taken directly from paragraph 31 of APB Opinion 28 which relates to disclosures required for the fourth quarter of the year. The Opinion indicates that earlier quarters should not be restated to reflect a change in accounting estimate recorded at year end. However, changes in an accounting estimate made in an interim period that materially affect the quarter in which the change occurred are required to be

[1] See question 5 for a discussion of the meaning of components of an entity as used in Item 302(a)(2).

disclosed in order to avoid misleading comparisons. In making such disclosure, registrants may wish to identify (but not restate) the prior periods in which transactions were recorded which relate to the change in the quarter.

Question 7: If company has filed a Form 10–Q/A amending a previously filed Form 10–Q, is a reconciliation of quarterly data in annual financial statements with the amounts originally reported on Form 10–Q required?

Interpretive Response: Yes. However, if the company publishes quarterly reports to shareholders and has previously made detailed disclosure to shareholders in such reports of the change reported on the Form 10–Q/A, no reconciliation would be required.

b. Financial Statements Presented on Other Than a Quarterly Basis

Facts: Item 302(a)(1) requires disclosure of quarterly financial data for each full quarter of the last two fiscal years and in any subsequent interim period for which an income statement is presented.

Question: If a company reports at interim dates on other than a calendar-quarter basis (*e.g.*, 12–12–16–12 week basis), will it be precluded from reporting on such basis in the future?

Interpretive Response: No, as long as it discloses the basis of interim fiscal period reporting and the interim fiscal periods on which it reports are consistently determined from year to year (or, if not, the lack of comparability is disclosed).

c. Deleted by SAB 103

2. Amendments to Form 10–Q

a. Form of Condensed Financial Statements

Facts: Rules 10–01(a)(2) and (3) of Regulation S–X provide that interim balance sheets and statements of income shall include only major captions (*i.e.*, numbered captions) set forth in Regulation S–X, with the exception of inventories where data as to raw materials, work in process and finished goods shall be included, if applicable, either on the face of the balance sheet or in notes thereto. Where any major balance sheet caption is less than 10% of total assets and the amount in the caption has not increased or decreased by more than 25% since the end of the preceding fiscal year, the caption may be combined with others. When any major income statement caption is less than 15% of average net income for the most recent three fiscal years and the amount in the caption has not increased or decreased by more than 20% as compared to the corresponding interim period of the preceding fiscal year, the caption may be combined with others. Similarly, the statement of cash flows may be abbreviated, starting with a single figure of cash flows provided by operations and showing other changes individually only when they exceed 10% of the average of cash flows provided by operations for the most recent three years.

Question 1: If a company previously combined captions in a Form 10–Q but is required to present such captions separately in the Form 10–Q for the current quarter, must it retroactively reclassify amounts included in the prior-year financial statements presented for comparative purposes to conform with the captions presented for the current-year quarter?

Interpretive Response: Yes.

Question 2: In determining whether or not major income statement captions may be combined, does average "net income" for the last three years (using the company's last year end as the starting point) mean "net income" or income before extraordinary items and changes in accounting principles?

Interpretive Response: It means "net income."

Question 3: If a company uses the gross profit method or some other method to determine cost of goods sold for interim periods, will it be acceptable to state only that it is not practicable to determine components of inventory at interim periods?

Interpretive Response: The staff believes disclosure of inventory components is important to investors. In reaching this decision the staff recognizes that registrants may not take inventories during interim periods and that managements, therefore, will have to estimate the inventory components. However, the staff believes that management will be able to make reasonable estimates of inventory components based upon their knowledge of the company's production cycle, the costs (labor and overhead) associated with this cycle as well as the relative sales and purchasing volume of the company.

Question 4: If a company has years during which operations resulted in a net outflow of cash and cash equivalents, should it exclude such years from the computation of cash and cash equivalents provided by operations for the three most recent years in determining what sources and applications must be shown separately?

Interpretive Response: Yes. Similar to the determination of average net income, if operations resulted in a net outflow of cash and cash equivalents during any year, such amount should be excluded in making the computation of cash flow provided by operations for the three most recent years unless operations resulted in a net outflow of cash and cash equivalents in all three years, in which case the average of the net outflow of cash and cash equivalents should be used for the test.

A. Reporting Requirements for accounting Changes

1. Preferability

Facts: Rule 10–01(b)(6) of Regulation S–X requires that a registrant who makes a material change in its method of accounting shall indicate the date of and the reason for the change. The registrant also must include as an exhibit in the first Form 10–Q filed subsequent to the date of an accounting change, a letter from the registrant's independent accountants indicating whether or not the change is to an alternative principle which in his judgment is preferable under the circumstances. A letter from the independent accountant is not required when the change is made in response to a standard adopted by the Financial Accounting Standards Board which requires such a change.

Question 1: For some alternative accounting principles, authoritative bodies have specified when one alternative is preferable to another. However, for other alternative accounting principles, no authoritative body has specified criteria for determining the preferability of one alternative over another. In such situations, how should preferability be determined?

Interpretive Response: In such cases, where objective criteria for determining the preferability among alternative accounting principles have not been established by authoritative bodies, the determination of preferability should be based on the particular circumstances described by and discussed with the registrant. In addition, the independent accountant should consider other significant information of which he is aware.[1]

Question 2: Management may offer, as justification for a change in accounting principle, circumstances such as: Their expectation as to the effect of general economic trends on their business (*e.g.*, the impact of inflation), their

[1] Registrants also are reminded that paragraph 17 of APB Opinion 20 requires that companies disclose the nature of and justification for the change as well as the effects of the change on net income for the period in which the change is made. Furthermore, the justification for the change should explain clearly why the newly adopted principle is preferable to the previously-applied principle.

expectation regarding expanding consumer demand for the company's products, or plans for change in marketing methods. Are these circumstances which enter into the determination of preferability?

Interpretive Response: Yes. Those circumstances are examples of business judgment and planning and should be evaluated in determining preferability. In the case of changes for which objective criteria for determining preferability have not been established by authoritative bodies, business judgment and business planning often are major considerations in determining that the change is to a preferable method because the change results in improved financial reporting.

Question 3: What responsibility does the independent accountant have for evaluating the business judgment and business planning of the registrant?

Interpretive Response: Business judgment and business planning are within the province of the registrant. Thus, the independent accountant may accept the registrant's business judgment and business planning and express reliance thereon in his letter. However, if either the plans or judgment appear to be unreasonable to the independent accountant, he should not accept them as justification. For example, an independent accountant should not accept a registrant's plans for a major expansion if he believes the registrant does not have the means of obtaining the funds necessary for the expansion program.

Question 4: If a registrant, who has changed to an accounting method which was preferable under the circumstances, later finds that it must abandon its business plans or change its business judgment because of economic or other factors, is the registrant's justification nullified?

Interpretive Response: No. A registrant must in good faith justify a change in its method of accounting under the circumstances which exist at the time of the change. The existence of different circumstances at a later time does not nullify the previous justification for the change.

Question 5: If a registrant justified a change in accounting method as preferable under the circumstances, and the circumstances change, may the registrant revert to the method of accounting used before the change?

Interpretive Response: Any time a registrant makes a change in accounting method, the change must be justified as preferable under the circumstances. Thus, a registrant may not change back to a principle previously used unless it can justify that the previously used principle is preferable in the circumstances as they currently exist.

Question 6: If one client of an independent accounting firm changes its method of accounting and the accountant submits the required letter stating his view of the preferability of the principle in the circumstances, does this mean that all clients of that firm are constrained from making the converse change in accounting (*e.g.*, if one client changes from FIFO to LIFO, can no other client change from LIFO to FIFO)?

Interpretive Response: No. Each registrant must justify a change in accounting method on the basis that the method is preferable under the circumstances of that registrant. In addition, a registrant must furnish a letter from its independent accountant stating that in the judgment of the independent accountant the change in method is preferable under the circumstances of that registrant. If registrants in apparently similar circumstances make changes in opposite directions, the staff has a responsibility to inquire as to the factors which were considered in arriving at the determination by each registrant and its independent accountant that the change was preferable under the circumstances because it resulted in improved financial reporting. The staff recognizes the importance, in many circumstances, of the judgments and plans of management and recognizes that such management judgments may, in good faith, differ. As indicated above, the concern relates to registrants in apparently similar circumstances, no matter who their independent accountants may be.

Question 7: If a registrant changes its accounting to one of two methods specifically approved by the FASB in a Statement of Financial Accounting Standards, need the independent accountant express his view as to the preferability of the method selected?

Interpretive Response: If a registrant was formerly using a method of accounting no longer deemed acceptable, a change to either method approved by the FASB may be presumed to be a change to a preferable method and no letter will be required from the independent accountant. If, however, the registrant was formerly using one of the methods approved by the FASB for current use and wishes to change to an alternative approved method, then the registrant must justify its change as being one to a preferable method in the circumstances and the independent accountant must submit a letter stating that in his view the change is to a principle that is preferable in the circumstances.

2. Filing of a Letter From the Accountants

Facts: The registrant makes an accounting change in the fourth quarter of its fiscal year. Rule 10–01(b)(6) of Regulation S–X requires that the registrant file a letter from its independent accountants stating whether or not the change is preferable in the circumstances in the next Form 10–Q. Item 601(b)(18) of Regulation S–K provides that the independent accountant's preferability letter be filed as an exhibit to reports on Forms 10–K or 10–Q.

Question: When the independent accountant's letter is filed with the Form 10–K, must another letter also be filed with the first quarter's Form 10–Q in the following year?

Interpretive Response: No. A letter is not required to be filed with Form 10–Q if it has been previously filed as an exhibit to the Form 10–K.

H. Accounting Series Release 148—Disclosure Of Compensating Balances And Short-Term Borrowing Arrangements (Adopted November 13, 1973 As Modified By ASR 172 Adopted On June 13, 1975 And ASR 280 Adopted On September 2, 1980)

Facts: ASR 148 (as modified) amends Regulation S–X to include:

1. Disclosure of compensating balance arrangements.

2. Segregation of cash for compensating balance arrangements that are legal restrictions on the availability of cash.

1. Applicability

a. Arrangements With Other Lending Institutions

Question: In addition to banks, is ASR 148 applicable to arrangements with factors, commercial finance companies or other lending entities?

Interpretive Response: Yes.

b. Bank Holding Companies and Brokerage Firms

Question: Do the provisions of ASR 148 apply to bank holding companies and to brokerage firms filing under Rule 17a–5?

Interpretive Response: Yes; however, brokerage firms are not expected to meet these requirements when filing Form X–17a–5.

c. Financial Statements of Parent Company and Unconsolidated Subsidiaries

Question: Are the provisions of ASR 148 applicable to parent company financial statements in addition to consolidated financial statements? To

financial statements of unconsolidated subsidiaries?

Interpretive Response: ASR 148 data for consolidated financial statements only will generally be sufficient when a filing includes consolidated and parent company financial statements. Such data are required for each unconsolidated subsidiary or other entity when a filing is required to include complete financial statements of those entities. When the filing includes summarized financial data in a footnote about such entities, the disclosures under ASR 148 relating to the consolidated financial statements will be sufficient.

d. Foreign Lenders

Question: Are ASR 148 disclosure requirements applicable to arrangements with foreign lenders?

Interpretive Response: Yes.

2. Classification of Short-Term Obligations—Debt Related to Long-Term Projects

Facts: Companies engaging in significant long-term construction programs frequently arrange for revolving cover loans which extend until the completion of long-term construction projects. Such revolving cover loans are typically arranged with substantial financial institutions and typically have the following characteristics:

1. A firm long-term mortgage commitment is obtained for each project.
2. Interest rates and terms are in line with the company's normal borrowing arrangements.
3. Amounts are equal to the expected full mortgage amount of all projects.
4. The company may draw down funds at its option up to the maximum amount of the agreement.
5. The company uses short-term interim construction financing (commercial paper, bank loans, etc.) against the revolving cover loan. Such indebtedness is rolled over or drawn down on the revolving cover loan at the company's option. The company typically has regular bank lines of credit, but these generally are not legally enforceable.

Question: Under Statement 6, will the classification of loans such as described above as long-term be acceptable?

Interpretive Response: Where such conditions exist providing for a firm commitment throughout the construction program as well as a firm commitment for permanent mortgage financing, and where there are no contingencies other than the completion of construction, the guideline criteria are met and the borrowing under such a program should be classified as long-term with appropriate disclosure.

3. Compensating Balances

a. Compensating Balances for Future Credit Availability

Facts: Rule 5–02.1 of Regulation S–X requires disclosure of compensating balances in order to avoid undisclosed commingling of such balances with other funds having different liquidity characteristics and bearing no determinable relationship to borrowing arrangements. It also requires footnote disclosure distinguishing the amounts of such balances maintained under a formal agreement to assure future credit availability.

Question: In disclosing compensating balances maintained to assure future credit availability, is it necessary to segregate compensating balances for an unused portion of a regular line of credit when a total compensating balance amount covering both used and unused amounts of a line of credit is disclosed?

Interpretive Response: No.

b. Changes in Compensating Balances

Facts: ASR 148 guidelines indicate the need for additional disclosures where compensating balances were materially greater during the period than at the end of the period.

Question: Does this disclosure relate to changes in the arrangement (*e.g.*, the required compensating balance percentage) or changes in borrowing levels?

Interpretive Response: Both.

c. Float

Facts: ASR 148 states that "compensating balance arrangements * * * are normally expressed in terms of collected bank ledger balances but the financial statements are presented on the basis of the company's books. In order to make the disclosure of compensating balance amounts * * * consistent with the cash amounts reflected in the financial statements, the balance figure agreed upon by the bank and the company should be adjusted if possible by the estimated float."

Question: In determining the amount of "float" as suggested by ASR 148 guidelines, frequently an adjustment to the bank balance is required for "uncollected funds." On what basis should this adjustment be estimated?

Interpretive Response: The adjustment should be estimated based upon the method used by the bank or a reasonable approximation of that method. The following is a sample computation of the amount of compensating balances to be disclosed where uncollected funds are involved.

Assumptions: The company has agreed to maintain compensating balances equal to 20% of short-term borrowings.

Short-term borrowings	$10,000,000
Compensating balances per bank balances	2,000,000
Estimated float (approximates the excess of outstanding checks over deposits in transit)	480,000
Estimated uncollected funds	320,000
Computation:	
Compensating balances per bank balances	2,000,000
Estimated uncollected funds	320,000
Estimated float	(480,000)
Compensating balances stated in terms of a book cash balance and to be disclosed	1,840,000

4. Miscellaneous

a. Periods Required

Question: For what periods are ASR 148 disclosures required?

Interpretive Response: Disclosure of compensating balance arrangements and other disclosures called for in ASR 148 are required for the latest fiscal year but are generally not required for any later interim period unless a material change has occurred since year end.

b. 10–Q Disclosures

Question: Are ASR 148 disclosures required in 10–Q's?

Interpretive Response: In general, ASR 148 disclosures are not required in Form 10–Q. However, in some instances material changes in borrowing arrangements or borrowing levels may give rise to the need for disclosure either in Form 10–Q or Form 8–K.

I. Accounting Series Release 149—Improved Disclosure of Income Tax Expense (Adopted November 28, 1973 And Modified by ASR 280 Adopted on September 2, 1980)

Facts: ASR 149 and 280 amend Regulation S–X to include:

1. Disclosure of tax effect of timing differences comprising deferred income tax expense.
2. Disclosure of the components of income tax expense, including currently payable and the net tax effects of timing differences.
3. Disclosure of the components of income [loss] before income tax expense [benefit] as either domestic or foreign.
4. Reconciliation between the statutory Federal income tax rate and the effective tax rate.

1. Tax Rate

Question 1: In reconciling to the effective tax rate should the rate used be a combination of state and Federal income tax rates?

Interpretive Response: No, the reconciliation should be made to the Federal income tax rate only.

Question 2: What is the "applicable statutory Federal income tax rate'?

Interpretive Response: The applicable statutory Federal income tax rate is the normal rate applicable to the reporting entity. Hence, the statutory rate for a U.S. partnership is zero. If, for example, the statutory rate for U.S. corporations is 22% on the first $25,000 of taxable income and 46% on the excess over $25,000, the "normalized rate" for corporations would fluctuate in the range between 22% and 46% depending on the amount of pretax accounting income a corporation has.

2. Taxes of Investee Company

Question: If a registrant records its share of earnings or losses of a 50% or less owned person on the equity basis and such person has an effective tax rate which differs by more than 5% from the applicable statutory Federal income tax rate, is a reconciliation as required by Rule 4–08(g) necessary?

Interpretive Response: Whenever the tax components are known and material to the investor's (registrant's) financial position or results of operations, appropriate disclosure should be made. In some instances where 50% or less owned persons are accounted for by the equity method of accounting in the financial statements of the registrant, the registrant may not know the rate at which the various components of income are taxed and it may not be practicable to provide disclosure concerning such components.

It should also be noted that it is generally necessary to disclose the aggregate dollar and per-share effect of situations where temporary tax exemptions or "tax holidays" exist, and that such disclosures are also applicable to 50% or less owned persons. Such disclosures should include a brief description of the factual circumstances and give the date on which the special tax status will terminate. See Topic 11.C.

3. Net of Tax Presentation

Question: What disclosure is required when an item is reported on a net of tax basis (*e.g.*, extraordinary items, discontinued operations, or cumulative adjustment related to accounting change)?

Interpretive Response: When an item is reported on a net of tax basis, additional disclosure of the nature of the tax component should be provided by reconciling the tax component associated with the item to the applicable statutory Federal income tax rate or rates.

4. Loss Years

Question: Is a reconciliation of a tax recovery in a loss year required?

Interpretive Response: Yes, in loss years the actual book tax benefit of the loss should be reconciled to expected normal book tax benefit based on the applicable statutory Federal income tax rate.

5. Foreign Registrants

Question 1: Occasionally, reporting foreign persons may not operate under a normal income tax base rate such as the current U.S. Federal corporate income tax rate. What form of disclosure is acceptable in these circumstances?

Interpretive Response: In such instances, reconciliations between year-to-year effective rates or between a weighted average effective rate and the current effective rate of total tax expense may be appropriate in meeting the requirements of Rule 4–08(h)(2). A brief description of how such a rate was determined would be required in addition to other required disclosures. Such an approach would not be acceptable for a U.S. registrant with foreign operations. Foreign registrants with unusual tax situations may find that these guidelines are not fully responsive to their needs. In such instances, registrants should discuss the matter with the staff.

Question 2: Where there are significant reconciling items that relate in significant part to foreign operations as well as domestic operations, is it necessary to disclose the separate amounts of the tax component by geographical area, *e.g.*, statutory depletion allowances provided for by U.S. and by other foreign jurisdictions?

Interpretive Response: It is not practicable to give an all-encompassing answer to this question. However, in many cases such disclosure would seem appropriate.

6. Securities Gains and Losses

Question: If the tax on the securities gains and losses of banks and insurance companies varies by more than 5% from the applicable statutory Federal income tax rate, should a reconciliation to the statutory rate be provided?

Interpretive Response: Yes.

7. Tax Expense Components v. "Overall" Presentation

Facts: Rule 4–08(h) requires that the various components of income tax expense be disclosed, *e.g.*, currently payable domestic taxes, deferred foreign taxes, etc. Frequently income tax expense will be included in more than one caption in the financial statements. For example, income taxes may be allocated to continuing operations, discontinued operations, extraordinary items, cumulative effects of an accounting change and direct charges and credits to shareholders' equity.

Question: In instances where income tax expense is allocated to more than one caption in the financial statements, must the components of income tax expense included in each caption be disclosed or will an "overall" presentation such as the following be acceptable?

The components of income tax expense are:

Currently payable (per tax return):	
Federal	$350,000
Foreign	150,000
State	50,000
Deferred:	
Federal	125,000
Foreign	75,000
State	50,000
	800,000

Income tax expense is included in the financial statements as follows:

Continuing operations	$600,000
Discontinued operations	(200,000)
Extraordinary income	300,000
Cumulative effect of change in accounting principle	100,000
	800,000

Interpretive Response: An overall presentation of the nature described will be acceptable.

J. Deleted by SAB 47

K. Accounting Series Release 302—Separate Financial Statements Required By Regulation S–X

1. Deleted by SAB 103

2. Parent Company Financial Information

a. Computation of Restricted Net Assets of Subsidiaries

Facts: The revised rules for parent company disclosures adopted in ASR 302 require, in certain circumstances, (1) footnote disclosure in the consolidated financial statements about the nature and amount of significant restrictions on the ability of subsidiaries

to transfer funds to the parent through intercompany loans, advances or cash dividends [Rule 4–08(e)(3)], and (2) the presentation of condensed parent company financial information and other data in a schedule (Rule 12–04). To determine which disclosures, if any, are required, a registrant must compute its proportionate share of the net assets of its consolidated and unconsolidated subsidiary companies as of the end of the most recent fiscal year which are restricted as to transfer to the parent company because the consent of a third party (a lender, regulatory agency, foreign government, etc.) is required. If the registrant's proportionate share of the restricted net assets of consolidated subsidiaries exceeds 25% of the registrant's consolidated net assets, both the footnote and schedule information are required. If the amount of such restrictions is less than 25%, but the sum of these restrictions plus the amount of the registrant's proportionate share of restricted net assets of unconsolidated subsidiaries plus the registrant's equity in the undistributed earnings of 50% or less owned persons (investees) accounted for by the equity method exceed 25% of consolidated net assets, the footnote disclosure is required.

Question 1: How are restricted net assets of subsidiaries computed?

Interpretative Response: The calculation of restricted net assets requires an evaluation of each subsidiary to identify any circumstances where third parties may limit the subsidiary's ability to loan, advance or dividend funds to the parent. This evaluation normally comprises a review of loan agreements, statutory and regulatory requirements, etc., to determine the dollar amount of each subsidiary's restrictions. The related amount of the subsidiary's net assets designated as restricted, however, should not exceed the amount of the subsidiary's net assets included in consolidated net assets, since parent company disclosures are triggered when a significant amount of consolidated net assets are restricted. The amount of each subsidiary's net assets included in consolidated net assets is determined by allocating (pushing down) to each subsidiary any related consolidation adjustments such as intercompany balances, intercompany profits, and differences between fair value and historical cost arising from a business combination accounted for as a purchase. This amount is referred to as the subsidiary's adjusted net assets. If the subsidiary's adjusted net assets are less than the amount of its restrictions because the push down of consolidating adjustments reduced its net assets, the subsidiary's adjusted net assets is the amount of the subsidiary's restricted net assets used in the tests.

Registrants with numerous subsidiaries and investees may wish to develop approaches to facilitate the determination of its parent company disclosure requirements. For example, if the parent company's adjusted net assets (excluding any interest in its subsidiaries) exceed 75% of consolidated net assets, or if the total of all of the registrant's consolidated and unconsolidated subsidiaries' restrictions and its equity in investees' earnings is less than 25% of consolidated net assets, then the allocation of consolidating adjustments to the subsidiaries to determine the amount of their adjusted net assets would not be necessary since no parent company disclosures would be required.

Question 2: If a registrant makes a decision that it will permanently reinvest the undistributed earnings of a subsidiary, and thus does not provide for income taxes thereon because it meets the criteria set forth in APB Opinion 23, is there considered to be a restriction for purposes of the test?

Interpretive Response: No. The rules require that only third party restrictions be considered. Restrictions on subsidiary net assets imposed by management are not included.

b. Application of Tests for Parent Company Disclosures

Facts: The balance sheet of the registrant's 100%-owned subsidiary at the most recent fiscal year-end is summarized as follows:

Current assets	$120	Current liabilities	$30
Noncurrent assets	45	Long-term debt	60
			90
		Common stock	25
		Retained earnings	50
			75
	$165		$165

Net assets of the subsidiary are $75. Assume there are no consolidating adjustments to be allocated to the subsidiary. Restrictive covenants of the subsidiary's debt agreements provide that:

- Net assets, excluding intercompany loans, cannot be less than $35
- 60% of accumulated earnings must be maintained

Question 1: What is the amount of the subsidiary's restricted net assets?

Interpretive Response:

Restriction	Computed restrictions
Net assets: currently $75, cannot be less than $35; therefore	$35
Dividends: 60% of accumulated earnings ($50) cannot be paid out; therefore	30

Restricted net assets for purposes of the test are $35. The maximum amount that can be loaned or advanced to the parent without violating the net asset covenant is $40 ($75–35). Alternatively, the subsidiary could pay a dividend of up to $20 ($50–30) without violating the dividend covenant, and loan or advance up to $20, without violating the net asset provision.

Facts: The registrant has one 100%-owned subsidiary. The balance sheet of the subsidiary at the latest fiscal year-end is summarized as follows:

Current assets	$ 75	Current liabilities	$ 23
Noncurrent assets	90	Long-term debt	57
		Redeemable preferred stock	10
		Common stock	30
		Retained earnings	45
			75
	$165		$165

Assume that the registrant's consolidated net assets are $130 and there are no consolidating adjustments to be allocated to the subsidiary. The subsidiary's net assets are $75. The subsidiary's noncurrent assets are comprised of $40 in operating plant and equipment used in the subsidiary's business and a $50 investment in a 30% investee. The subsidiary's equity in this investee's undistributed earnings is $18. Restrictive covenants of the subsidiary's debt agreements are as follows:

1. Net assets, excluding intercompany balances, cannot be less than $20.
2. 80% of accumulated earnings must be reinvested in the subsidiary.
3. Current ratio of 2:1 must be maintained.

Question 2: Are parent company footnote or schedule disclosures required?

Interpretive Response: Only the parent company footnote disclosures are required. The subsidiary's restricted net assets are computed as follows:

Restriction	Computed restriction
Net assets: currently $75, cannot be less than $20; therefore	$20
Dividends: 80% of accumulated earnings ($45) cannot be paid; therefore	36
Current ratio: must be at least 2:1 ($46 current assets must be maintained since current liabilities are $23 at fiscal year-end); therefore	46

Restricted net assets for purposes of the test are $20. The amount computed from the dividend restriction ($36) and the current ratio requirement ($46) are not used because net assets may be transferred by the subsidiary up to the limitation imposed by the requirement to maintain net assets of at least $20, without violating the other restrictions. For example, a transfer to the parent of up to $55 of net assets could be accomplished by a combination of dividends of current assets of $9 ($45–36), and loans or advances of current assets of up to $20 and noncurrent assets of up to $26.

Parent company footnote disclosures are required in this example since the restricted net assets of the subsidiary and the registrant's equity in the earnings of its 100%-owned subsidiary's investee exceed 25% of consolidated net assets [($20 + 18)/$130 = 29%]. The parent company schedule information is not required since the restricted net assets of the subsidiary are only 15% of consolidated net assets ($20/$130 = 15%).

Although the subsidiary's noncurrent assets are not in a form which is readily transferable to the parent company, the illiquid nature of the assets is not relevant for purposes of the parent company tests. The objective of the tests is to require parent company disclosures when the parent company does not have control of its subsidiaries' funds because it does not have unrestricted access to their net assets. The tests trigger parent company disclosures only when there are significant third party restrictions on transfers by subsidiaries of net assets and the subsidiaries' net assets comprise a significant portion of consolidated net assets. Practical limitations, other than third party restrictions on transferability at the measurement date (most recent fiscal year-end), such as subsidiary illiquidity, are not considered in computing restricted net assets. However, the potential effect of any limitations other than those imposed by third parties should be considered for inclusion in Management's Discussion and Analysis of liquidity.

Facts:

	Net assets
Subsidiary A	$(500)
Subsidiary B	2,000
Consolidated	3,700

Subsidiaries A and B are 100% owned by the registrant. Assume there are no consolidating adjustments to be allocated to the subsidiaries. Subsidiary A has restrictions amounting to $200. Subsidiary B's restrictions are $1,000.

Question 3: What parent company disclosures are required for the registrant?

Interpretive Response: Since subsidiary A has an excess of liabilities over assets, it has no restricted net assets for purposes of the test. However, both parent company footnote and schedule disclosures are required, since the restricted net assets of subsidiary B exceed 25% of consolidated net assets ($1,000/3,700 = 27%).

Facts:

	Net assets
Subsidiary A	$850
Subsidiary B	300
Consolidated	3,700

The registrant owns 80% of subsidiary A. Subsidiary A owns 100% of subsidiary B. Assume there are no consolidating adjustments to be allocated to the subsidiaries. A may not pay any dividends or make any affiliate loans or advances. B has no restrictions. A's net assets of $850 do not include its investment in B.

Question 4: Are parent company footnote or schedule disclosures required for this registrant?

Interpretive Response: No. All of the registrant's share of subsidiary A's net assets ($680) are restricted. Although B may pay dividends and loan or advance funds to A, the parent's access to B's funds through A is restricted. However, since there are no limitations on B's ability to loan or advance funds to the parent, none of the parent's share of B's net assets are restricted. Since A's restricted net assets are less than 25% of consolidated net assets ($680/3700 = 18%), no parent company disclosures are required.

Facts: The consolidating balance sheet of the registrant at the latest fiscal year-end is summarized as follows:

	Registrant	Subsidiary	Consolidating adjustments	Consolidated
Current assets	$ 800	$ 700	$ 0	$1,500
30% investment in affiliate	175	0	0	175
Investment in subsidiary	350	0	(350)	0
Other noncurrent assets	625	300	(100)	825
	$1,950	$1,000	$ (450)	$2,500
Current liabilities	$ 600	$ 400	$ 0	$1,000
Concurrent liabilities	375	150	0	525
Redeemable preferred stock	275	0	0	275
Common stock	110	1	(1)	110
Paid-in capital	290	49	(49)	290
Retained earnings	300	400	(400)	300
	700	450	(450)	700
	$1,950	$1,000	$ (450)	$2,500

The acquisition of the 100%-owned subsidiary was consummated on the last day of the most recent fiscal year. Immediately preceding the acquisition, the registrant had net assets of $700, which included its equity in the undisputed earnings of its 30% investee of $75. Immediately after acquiring the subsidiary's net assets, which had an historical cost of $450 and a fair value of $350, the registrant's net assets were still $700 since debt and preferred stock totaling $350 were issued in the purchase. The subsidiary has debt covenants which permit dividends, loans or advances, to the extent, if any, that net assets exceed an amount which is determined by the sum of $100 plus 75% of the subsidiary's accumulated earnings.

Question 5: What is the amount of the subsidiary's restricted net assets? Are parent company footnote or schedule disclosures required?

Interpretive Response: Restricted net assets for purposes of the test are $350, and both the parent company footnote and schedule disclosures are required.

The amount of the subsidiary's restrictions at year-end is $400 [$100 + (75% × $400)]. The subsidiary's adjusted net assets after the push down of the consolidation entry to the subsidiary to record the noncurrent assets acquired at their fair value is $350 ($450 − $100). Since the subsidiary's adjusted net assets ($350) are less than the amount of its restrictions ($400), restricted net assets are $350. The computed percentages applicable to each of the disclosure tests is in excess of 25%. Therefore, both parent company footnote and schedule information are required. The percentage applicable to the footnote disclosure test is 61% [($75 + $350)/$700]. The computed percentage for the schedule disclosure is 50% ($350/$700).

3. Undistributed Earnings of 50% or Less Owned Persons

Facts: Rule 4–08(e)(2) of Regulation SX requires footnote disclosures of the amount of consolidated retained earnings which represents undistributed earnings of 50% or less owned persons (investee) accounted for by the equity method. The test adopted in ASR 302 to trigger disclosures about the registrant's restricted net assets (Rule 4–08(e)(3)) includes the parent's equity in the undistributed earnings of investees.

Question: Is the amount required for footnote disclosure the same as the amount included in the test to determine disclosures about restrictions?

Interpretive Response: Yes. The amount used in the test in Rule 4–08(e)(3) should be the same as the amount required to be disclosed by Rule 4–08(e)(2). This is the portion of the registrant's consolidated retained earnings which represents the undistributed earnings of an investee since the date(s) of acquisition. It is computed by determining the registrant's cumulative equity in the investee's earnings, adjusted by any dividends received, related goodwill amortized, and any related income taxes provided.

4. Application of Significant Subsidiary Test to Investees and Unconsolidated Subsidiaries

a. Separate Financial Statement Requirements

Facts: Rule 3–09 of Regulation SX requires the presentation of separate financial statements of unconsolidated subsidiaries and of 50% or less owned persons (investee) accounted for by the equity method either by the registrant or by a subsidiary of the registrant in filings with the Commission if any of the tests of a significant subsidiary are met at a 20% level.

Question 1: Are the requirements for separate financial statements also applicable to an investee accounted for by the equity method by an investee of the registrant?

Interpretive Response: Yes. Rule 3–09 is intended to apply to all investees which are material to the financial position or results of operations of the registrant, regardless of whether the investee is held by the registrant, a subsidiary or another investee. Separate financial statements should be provided for any lower tier investee where such an entity is significant to the registrant's consolidated financial statements.

Question 2: How is the significant subsidiary test applied to the lower tier investee in the situation described in Question 1?

Interpretive Response: Since the disclosures provided by separate financial statements of an investee are considered necessary to evaluate the overall financial condition of the registrant, the significant subsidiary test is computed based on the materiality of the lower tier investee to the registrant consolidated. An example of the application of the assets test of the significant subsidiary rules to such an investee situation will illustrate the materiality measurement. A registrant with total consolidated assets of $5,000 owns 50% of Investee A, whose total assets are $3,800. Investee A has a 45% investment in Investee B, whose total assets are $4,800. There are no intercompany eliminations. Separate financial statements are required for Investee A, and they are required for Investee B because the registrant's share of B's total assets exceeds 20% of consolidated assets [(50% × 45% × $4800)/$5000 = 22%].

b. Summarized Financial Statement Requirements

Facts: Rule 4–08(g) of Regulation S–X requires summarized financial information about unconsolidated subsidiaries and 50% or less owned persons (investee) to be included in the footnotes to the financial statements if,

in the aggregate, they meet the tests of a significant subsidiary set forth in Rule 1–02(w).

Question 1: Must a registrant which includes separate financial statements or condensed financial statements for unconsolidated subsidiaries or investees in its annual report to shareholders also include in such report the summarized financial information for these entities pursuant to Rule 4–08(g)?

Interpretive Response: No. The purpose of the summarized information is to provide minimum standards of disclosure when the impact of such entities on the consolidated financial statements is significant. If the registrant furnishes more information in the annual report than is required by these minimum disclosure standards, such as condensed financial information or separate audited financial statements, the summarized data can be excluded. The Commission's rules are not intended to conflict with the provisions of APB Opinion 18, par 20(c) and (d), which provide that either separate financial statements of investees be presented with the financial statements of the reporting entity or that summarized information be included in the reporting entity's financial statement footnotes.

Question 2: Can summarized information be omitted for individual entities as long as the aggregate information for the omitted entity(s) does not exceed 10% under any of the significance tests of Rule 1–02(w)?

Interpretive Response: The 10% measurement level of the significant subsidiary rule was not intended to establish a materiality criteria for omission, and the arbitrary exclusion of summarized information for selected entities up to a 10% level is not appropriate. Rule 4–08(g) requires that the summarized information be included for all unconsolidated subsidiaries and investees. However, the staff recognizes that exclusion of the summarized information for certain entities is appropriate in some circumstances where it is impracticable to accumulate such information and the summarized information to be excluded is *de minimis.*

L. Financial Reporting Release 28—Accounting For Loan Losses By Registrants Engaged in Lending Activities

1. Accounting for Loan Losses

General: GAAP for recognition of loan losses is provided by Statements 5 and 114.[1] An estimated loss from a loss contingency, such as the collectibility of receivables, should be accrued when, based on information available prior to the issuance of the financial statements, it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements and the amount of the loss can be reasonably estimated.[2] Statement 114 provides more specific guidance on measurement of loan impairment and related disclosures but does not change the fundamental recognition criteria for loan losses provided by Statement 5. Additional guidance on the recognition, measurement, and disclosure of loan losses is provided by EITF Topic D–80, Interpretation 14, and the AICPA Audit and Accounting Guide, Banks and Savings Institutions.

Further guidance for SEC registrants is provided by FRR 28, which added subsection (b), Procedural Discipline in Determining the Allowance and Provision for Loan Losses to be Reported, of Section 401.09, Accounting for Loan Losses by Registrants Engaged in Lending Activities, to the Codification of Financial Reporting Policies (hereafter referred to as FRR 28). Additionally, public companies are required to comply with the books and records provisions of the Securities Exchange Act of 1934 (Exchange Act). Under Sections 13(b)(2)–(7) of the Exchange Act, registrants must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant. Registrants also must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.

This staff interpretation applies to all registrants that are creditors in loan transactions that, individually or in the aggregate, have a material effect on the registrant's financial statements.[3]

2. Developing and Documenting a Systematic Methodology

a. Developing a Systematic Methodology

Facts: Registrant A, or one of its consolidated subsidiaries, engages in lending activities and is developing or performing a review of its loan loss allowance methodology.

Question: What are some of the factors or elements that the staff normally would expect Registrant A to consider when developing (or subsequently performing an assessment of) its methodology for determining its loan loss allowance under GAAP?

Interpretive Response: The staff normally would expect a registrant that engages in lending activities to develop and document a systematic methodology [1] to determine its provision for loan losses and allowance for loan losses as of each financial reporting date. It is critical that loan loss allowance methodologies incorporate management's current judgments about the credit quality of the loan portfolio through a disciplined and consistently applied process. A registrant's loan loss allowance methodology is influenced by entity-specific factors, such as an entity's size, organizational structure, business environment and strategy, management style, loan portfolio characteristics, loan administration procedures, and management information systems.

However, as indicated in the AICPA Audit and Accounting Guide, Banks and Savings Institutions (Audit Guide), "[w]hile different institutions may use different methods, there are certain common elements that should be included in any [loan loss allowance] methodology for it to be effective." [2] A registrant's loan loss allowance methodology generally should: [3]

- Include a detailed analysis of the loan portfolio, performed on a regular basis;
- Consider all loans (whether on an individual or group basis);
- Identify loans to be evaluated for impairment on an individual basis under Statement 114 and segment the remainder of the portfolio into groups of loans with similar risk characteristics

[1] As amended by Statement 118.

[2] Paragraph 8 of Statement 5.

[3] For purposes of this interpretation, a loan is defined (consistent with paragraph 4 of Statement 114) as a contractual right to receive money on demand or on fixed or determinable dates that is recognized as an asset in the creditor's statement of financial position. For purposes of this interpretation, loans do not include trade accounts receivable or notes receivable with terms less than on year or debt securities subject to the provisions of Statement 115

[1] FRR 28 states that "the Commission's staff normally would expect to find that the books and records of registrants engaged in lending activities include documentation of [the]: (a) systematic methodology to be employed each period in determining the amount of the loan losses to be reported, and (b) rationale supporting each period's determination that the amounts reported were adequate."

[2] See paragraph 7.05 of the Audit Guide.

[3] *Ibid.*

for evaluation and analysis under Statement 5;

- Consider all known relevant internal and external factors that may affect loan collectibility;
- Be applied consistently but, when appropriate, be modified for new factors affecting collectibility;
- Consider the particular risks inherent in different kinds of lending;
- Consider current collateral values (less costs to sell), where applicable;
- Require that analyses, estimates, reviews and other loan loss allowance methodology functions be performed by competent and well-trained personnel;
- Be based on current and reliable data;
- Be well documented, in writing, with clear explanations of the supporting analyses and rationale (see Question 2 below for staff views on documenting a loan loss allowance methodology); and
- Include a systematic and logical method to consolidate the loss estimates and ensure the loan loss allowance balance is recorded in accordance with GAAP.

For many entities engaged in lending activities, the allowance and provision for loan losses are significant elements of the financial statements.

Therefore, the staff believes it is appropriate for an entity's management to review, on a periodic basis, its methodology for determining its allowance for loan losses.[4] Additionally, for registrants that have audit committees, the staff believes that oversight of the financial reporting and auditing of the loan loss allowance by the audit committee can strengthen the registrant's control system and process for determining its allowance for loan losses.[5]

A systematic methodology that is properly designed and implemented should result in a registrant's best estimate of its allowance for loan losses.[6] Accordingly, the staff normally would expect registrants to adjust their loan loss allowance balance, either upward or downward, in each period for differences between the results of the systematic determination process and the unadjusted loan loss allowance balance in the general ledger.[7]

b. Documenting a Systematic Methodology

Question 1: Assume the same facts as in Question 1. What would the staff normally expect Registrant A to include in its documentation of its loan loss allowance methodology?

Interpretive Response: In FRR 28, the Commission provided guidance for documentation of loan loss provisions and allowances for registrants engaged in lending activities. The staff believes that appropriate written supporting documentation for the loan loss provision and allowance facilitates review of the loan loss allowance process and reported amounts, builds discipline and consistency into the loan loss allowance determination process, and improves the process for estimating loan losses by helping to ensure that all relevant factors are appropriately considered in the allowance analysis.

The staff, therefore, normally would expect a registrant to document the relationship between the findings of its detailed review of the loan portfolio and the amount of the loan loss allowance and the provision for loan losses reported in each period.[8]

The staff normally would expect to find that registrants maintain written supporting documentation for the following decisions, strategies, and processes:[9]

- Policies and procedures:
- Over the systems and controls that maintain an appropriate loan loss allowance, and
- Over the loan loss allowance methodology;
- Loan grading system or process;
- Summary or consolidation of the loan loss allowance balance;
- Validation of the loan loss allowance methodology; and
- Periodic adjustments to the loan loss allowance process.

Question 2: The Interpretive Response to Question 2 indicates that the staff normally would expect to find that registrants maintain written supporting documentation for their loan loss allowance policies and procedures. In the staff's view, what aspects of a registrant's loan loss allowance internal accounting control systems and processes would appropriately be addressed in its written policies and procedures?

Interpretive Response: The staff is aware that registrants utilize a wide range of policies, procedures, and control systems in their loan loss allowance processes, and these policies, procedures, and systems are tailored to the size and complexity of the registrant and its loan portfolio. However, the staff believes that, in order for a registrant's loan loss allowance methodology to be effective, the registrant's written policies and procedures for the systems and controls that maintain an appropriate loan loss allowance would likely address the following:

- The roles and responsibilities of the registrant's departments and personnel (including the lending function, credit review, financial reporting, internal audit, senior management, audit committee, board of directors, and others, as applicable) who determine or review, as applicable, the loan loss

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[4] For federally insured depository institutions, the December 21, 1993 "Interagency Policy Statement on the Allowance for Loan and Lease Losses (ALLL)" (the 1993 Interagency Policy Statement) indicates that boards of directors and management have certain responsibilities for the ALLL process and amounts reported. For example, as indicated on page 4 of that statement, "the board of directors and management are expected to: Ensure that the institution has an effective loan review system and controls[;] Ensure the prompt charge-off of loans, or portions of loans, that available information confirms to be uncollectible[; and] Ensure that the institution's process for determining an adequate level for the ALLL is based on a comprehensive, adequately documented, and consistently applied analysis of the institution's loan and lease portfolio."

[5] SAS 61 (as amended by SAS 90) states, in part: "In connection with each SEC engagement the auditor should discuss with the audit committee the auditor's judgments about the quality, not just the acceptability, of the entity's accounting principles as applied in its financial reporting. The discussion should include items that have a significant impact on the representational faithfulness, verifiability, and neutrality of the accounting information included in the financial statements. [Footnote omitted.] Examples of items that may have such an impact are the following:

- Selection of new or changes to accounting policies
- Estimates, judgments, and uncertainties
- Unusual transactions
- Accounting policies relating to significant financial statement items, including the timing or transactions and the period in which they are recorded."

[6] Registrants should also refer to Interpretation 14, which provides accounting and disclosure guidance for situations in which a range of loss can be reasonably estimated but no single amount within the range appears to be a better estimate than any other amount within the range.

[7] Registrants should refer to the guidance on materiality in SAB 99 (SAB Topic 1.M).

[8] FRR 28 states: "The specific rationale upon which the [loan loss allowance and provision] amount actually reported is based—*i.e.*, the bridge between the findings of the detailed review [of the loan portfolio] and the amount actually reported in each period—would be documented to help ensure the adequacy of the reported amount, to improve auditability, and to serve as a benchmark for exercise of prudent judgment in future periods."

[9] Paragraph 7.39 in the Audit Guide outlines specific aspects of effective internal control related to the allowance for loan losses. These specific aspects include the control environment ("management communication of the need for proper reporting of the allowance"); management reports that summarize loan activity and the institution's procedures and controls ("accumulation of relevant, sufficient, and reliable data on which to base management's estimate of the allowance"); "independent loan review;" review of information and assumptions ("adequate review and approval of the allowance estimates by the individuals specified in management's written policy"); assessment of the process ("comparison of prior estimates related to the allowance with subsequent results to assess the reliability of the process used to develop the allowance"); and "consideration by management of whether the allowance is consistent with the operational plans of the institution."

allowance to be reported in the financial statements; [10]

- The registrant's accounting policies for loans and loan losses, including the policies for charge-offs and recoveries and for estimating the fair value of collateral, where applicable; [11]
- The description of the registrant's systematic methodology, which should be consistent with the registrant's accounting policies for determining its loan loss allowance (see Question 4 below for further discussion); [12] and
- The system of internal controls used to ensure that the loan loss allowance process is maintained in accordance with GAAP.[13]

The staff normally would expect an internal control system [14] for the loan loss allowance estimation process to:

- Include measures to provide assurance regarding the reliability [15] and integrity of information and compliance with laws, regulations, and internal policies and procedures; [16]
- Reasonably assure that the registrant's financial statements are prepared in accordance with GAAP; and
- Include a well-defined loan review process.[17]

A well-defined loan review process [18] typically contains:

- An effective loan grading system that is consistently applied, identifies differing risk characteristics and loan quality problems accurately and in a timely manner, and prompts appropriate administrative actions; [19]
- Sufficient internal controls to ensure that all relevant loan review information is appropriately considered in estimating losses. This includes maintaining appropriate reports, details of reviews performed, and identification of personnel involved; [20] and
- Clear formal communication and coordination between a registrant's credit administration function, financial reporting group, management, board of directors, and others who are involved in the loan loss allowance determination or review process, as applicable (*e.g.*, written policies and procedures, management reports, audit programs, and committee minutes).[21]

Question 3: The Interpretive Response to Question 3 indicates that the staff normally would expect a registrant's written loan loss allowance policies and procedures to include a description of the registrant's systematic allowance methodology, which should be consistent with its accounting policies for determining its loan loss allowance. What elements of a registrant's loan loss allowance methodology would the staff normally expect to be described in the registrant's written policies and procedures?

Interpretive Response: The staff normally would expect a registrant's written policies and procedures to describe the primary elements of its loan loss allowance methodology, including portfolio segmentation and impairment measurement. The staff normally would expect that, in order for a registrant's loan loss allowance methodology to be effective, the registrant's written policies and procedures would describe the methodology:

- For segmenting the portfolio:
- How the segmentation process is performed (*i.e.*, by loan type, industry, risk rates, etc.); [22]
- When a loan grading system is used to segment the portfolio:
- The definitions of each loan grade;
- A reconciliation of the internal loan grades to supervisory loan grades, if applicable; and
- The delineation of responsibilities for the loan grading system.
- For determining and measuring impairment under Statement 114: [23]
- The methods used to identify loans to be analyzed individually;
- For individually reviewed loans that are impaired, how the amount of any impairment is determined and measured, including:
- Procedures describing the impairment measurement techniques available; and
- Steps performed to determine which technique is most appropriate in a given situation.
- The methods used to determine whether and how loans individually evaluated under Statement 114, but not considered to be individually impaired, should be grouped with other loans that share common characteristics for impairment evaluation under Statement 5.[24]
- For determining and measuring impairment under Statement 5: [25]
- How loans with similar characteristics are grouped to be evaluated for loan collectibility (such as loan type, past-due status, and risk);
- How loss rates are determined (*e.g.*, historical loss rates adjusted for environmental factors or migration analysis) and what factors are considered when establishing appropriate time frames over which to evaluate loss experience; and
- Descriptions of qualitative factors (*e.g.*, industry, geographical, economic,

[10] Paragraph 7.39 of the Audit Guide discusses "management communication of the need for proper reporting of the allowance." As indicated in that paragraph, the "control environment strongly influences the effectiveness of the system of controls and reflects the overall attitude, awareness, and action of the board of directors and management concerning the importance of control."

[11] Paragraph 7.33 of the Audit Guide refers to the documentation, for disclosure purposes, that an entity should include in the notes to the financial statements describing the accounting policies the entity used to estimate its allowance and related provision for loan losses.

[12] *Ibid.* As indicated in paragraph 7.33, "[s]uch a description should identify the factors that influenced management's judgment (for example, historical losses and existing economic conditions) and may also include discussion of risk elements relevant to particular categories of financial instruments."

[13] *See* also paragraph 7.39 in the Audit Guide which provides information about specific aspects of effective internal control related to the allowance for loan losses.

[14] *Ibid.* Public companies are required to comply with the books and records provisions of the Exchange act. Under Sections 13(b)(2)–(7) of the Exchange Act, registrants must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the registrant. Registrants also must maintain internal accounting controls that are sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP.

[15] Concepts Statement 2 provides guidance on "reliability" as a primary quality of accounting information.

[16] Section 13(b)(2)–(7) of the Exchange Act.

[17] As indicated in paragraph 7.05, item a, in the Audit Guide, a loan loss allowance methodology should "include a detailed and regular analysis of the loan portfolio." Paragraphs 7.06 to 7.13 provide additional information on how creditors traditionally identify and review loans on an individual basis and review or analyze loans on a group or pool basis.

[18] *Ibid.* Additionally, paragraph 7.39 in the Audit Guide provides guidance on the loan review process. As stated in that paragraph, "[m]anagement reports summarizing loan activity, renewals, and delinquencies are vital to the timely identification of problem loans." The paragraph further states: "Loan reviews should be conducted by institution personnel who are independent of the underwriting, supervision, and collections functions. The specific lines of reporting depend on the complexity of the institution's organizational structure, but the loan reviewers should report to a high level of management that is independent from the lending process in the institution."

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] Paragraph 7.07 in the Audit Guide states that "creditors have traditionally identified loans that are to be evaluated for collectibility by dividing the loan portfolio into different segments. Each segment should contain loans with similar characteristics, such as risk classification, past-due status, and type of loan." Paragraph 7.08 provides additional guidance on classifying individual loans and paragraph 7.13 indicates considerations for groups or pools of loans.

[23] *See* Statement 114, paragraphs 8 through 10 on recognition of impairment and paragraphs 11 through 16 on measurement of impairment. *See* also the guidance in EITF Topic D–80.

[24] *See* EITF Topic D–80, Exhibit D–80A, Question #10.

[25] *See* Statement 5, paragraphs 8(a) and 8(b) on accrual of loss contingencies and paragraphs 22 and 23 on collectibility of receivables. See also the guidance in EITF Topic D–80.

and political factors) that may affect loss rates or other loss measurements.

3. Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under Statement 114

a. Measuring and Documenting Loan Losses Under Statement 114—General

Facts: Approximately one-third of Registrant B's commercial loan portfolio consists of large balance, non-homogeneous loans. Due to their large individual balances, these loans meet the criteria under Registrant B's policies and procedures for individual review for impairment under Statement 114.

Upon review of the large balance loans, Registrant B determines that certain of the loans are impaired as defined by Statement 114.[1]

Question: of the commercial loans reviewed under Statement 114 that are individually impaired, how would the staff normally expect Registrant B to measure and document the impairment on those loans? Can it use an impairment measurement method other than the methods allowed by Statement 114?

Interpretive Response: For those loans that are reviewed individually under Statement 114 and considered individually impaired, Registrant B must use one of the methods for measuring impairment that is specified by Statement 114 (that is, the present value of expected future cash flows, the loan's observable market price, or the fair value of collateral).[2] Accordingly, in the circumstances described above, for the loans considered individually impaired under Statement 114, it would not be appropriate for Registrant B to choose a measurement method not prescribed by Statement 114. For example, it would not be appropriate to measure loan impairment by applying a loss rate to each loan based on the average historical loss percentage for all of its commercial loans for the past five years.

The staff normally would expect Registrant B to maintain as sufficient, objective evidence [3] written documentation to support its measurement of loan impairment under Statement 114.[4] If Registrant B uses the present value of expected future cash flows to measure impairment of a loan, it should document the amount and timing of cash flows, the effective interest rate used to discount the cash flows, and the basis for the determination of cash flows, including consideration of current environmental factors [5] and other information reflecting past events and current conditions. If Registrant B uses the fair value of collateral to measure impairment, the staff normally would expect to find that Registrant B had documented how it determined the fair value, including the use of appraisals, valuation assumptions and calculations, the supporting rationale for adjustments to appraised values, if any, and the determination of costs to sell, if applicable, appraisal quality, and the expertise and independence of the appraiser.[6] Similarly, the staff normally would expect to find that Registrant B had documented the amount, source, and date of the observable market price of a loan, if that method of measuring loan impairment is used.

b. Measuring and Documenting Loan Losses Under Statement 114 for a Collateral Dependent Loan

Facts: Registrant C has a $10 million loan outstanding to Company X that is secured by real estate, which Registrant C individually evaluates under Statement 114 due to the loan's size. Company X is delinquent in its loan payments under the terms of the loan agreement. Accordingly, Registrant C determines that its loan to Company X is impaired, as defined by Statement 114. Because the loan is collateral dependent, Registrant C measures impairment of the loan based on the fair value of the collateral. Registrant C determines that the most recent valuation of the collateral was performed by an appraiser eighteen months ago and, at that time, the estimated value of the collateral (fair value less costs to sell) was $12 million.

Registrant C believes that certain of the assumptions that were used to value the collateral eighteen months ago do not reflect current market conditions and, therefore, the appraiser's valuation does not approximate current fair value of the collateral.

Several buildings, which are comparable to the real estate collateral, were recently completed in the area, increasing vacancy rates, decreasing lease rates, and attracting several tenants away from the borrower. Accordingly, credit review personnel at Registrant C adjust certain of the valuation assumptions to better reflect the current market conditions as they relate to the loan's collateral.[7] After adjusting the collateral valuation assumptions, the credit review department determines that the current estimated fair value of the collateral, less costs to sell, is $8 million.[8] Given that the recorded investment in the loan is $10 million, Registrant C concludes that the loan is impaired by $2 million and records an allowance for loan losses of $2 million.

Question: What documentation would the staff normally expect Registrant C to maintain to support its determination of the allowance for loan losses of $2 million for the loan to Company X?

Interpretive Response: The staff normally would expect Registrant C to document that it measured impairment of the loan to Company X by using the fair value of the loan's collateral, less costs to sell, which it estimated to be $8 million.[9] This documentation [10] should include the registrant's rationale and basis for the $8 million valuation, including the revised valuation assumptions it used, the valuation calculation, and the determination of costs to sell, if applicable.

Because Registrant C arrived at the valuation of $8 million by modifying an earlier appraisal, it should document its

[1] Paragraph 8 of Statement 114 provides that a loan is impaired when, based on current information and events, it is probable that all amounts due will not be collected pursuant to the terms of the loan agreement.

[2] *See* paragraph 13 of Statement 114.

[3] Under GAAS, auditors should obtain "sufficient competent evidential matter" to support its audit opinion. See AU Section 326. The staff normally would expect registrants to maintain such evidential matter for its allowances for loan losses for use by the auditors in conducting their annual audit.

[4] Paragraph 7.45 in the Audit Guide outlines sources of information, available from management, that the independent accountant should consider in identifying loans that contain high credit risk or other significant exposures and concentrations. These sources of information would also likely include documentation of loan impairment under Statement 114 or Statement 5. Additionally, as indicated in paragraphs 7.56 to 7.68 of the Audit Guide, the independent accountant, in conducting an audit, may perform a detailed loan file review for selected loans. A registrant's loan files may contain documentation about borrowers' financial resources and cash flows (see paragraph 7.63) or about the collateral securing the loans, if applicable (see paragraph 7.65 and 7.66).

[5] Question #16 in Exhibit D–80A of EITF Topic D–80 indicates that environmental factors include existing industry, geographical, economic, and political factors.

[6] See paragraphs 7.65 and 7.66 in the Audit Guide for additional information about documentation of loan collateral.

[7] When reviewing collateral dependent loans, Registrant C may often find it more appropriate to obtain an updated appraisal to estimate the effect of current market conditions on the appraised value instead of internally estimating an adjustment.

[8] An auditor who uses the work of a specialist, such as an appraiser, in performing an audit in accordance with GAAS should refer to the guidance in SAS 73 (AU Section 336).

[9] See paragraphs 7.65 to 7.66 in the Audit Guide for further information about documentation of loan collateral and associated audit procedures that may be performed by the independent accountant.

[10] As stated in paragraph 7.14 of the Audit Guide, "[t]he institution's conclusions about the appropriate amount [of loan impairment and the allowance for loan losses] should be well documented."

rationale and basis for the changes it made to the valuation assumptions that resulted in the collateral value declining from $12 million eighteen months ago to $8 million in the current period.

c. Measuring and Documenting Loan Losses Under Statement 114—Fully Collateralized Loans

Question: In the staff's view, what is an example of an acceptable documentation practice for a registrant to adequately support its determination that no allowance for loan losses should be recorded for a group of loans because the loans are fully collateralized?

Interpretive Response: Consider the following fact pattern: Registrant D has $10 million in loans that are fully collateralized by highly rated debt securities with readily determinable market values. The loan agreement for each of these loans requires the borrower to provide qualifying collateral sufficient to maintain a loan-to-value ratio with sufficient margin to absorb volatility in the securities' market prices. Registrant D's collateral department has physical control of the debt securities through safekeeping arrangements. In addition, Registrant D perfected its security interest in the collateral when the funds were originally distributed. On a quarterly basis, Registrant D's credit administration function determines the market value of the collateral for each loan using two independent market quotes and compares the collateral value to the loan carrying value. If there are any collateral deficiencies, Registrant D notifies the borrower and requests that the borrower immediately remedy the deficiency. Due in part to its efficient operation, Registrant D has historically not incurred any material losses on these loans. Registrant D believes these loans are fully-collateralized and therefore does not maintain any loan loss allowance balance for these loans.

Registrant D's management summary of the loan loss allowance includes documentation indicating that, in accordance with its loan loss allowance policy, the collateral protection on these loans has been verified by the registrant, no probable loss has been incurred, and no loan loss allowance is necessary.

Documentation in Registrant D's loan files includes the two independent market quotes obtained each quarter for each loan's collateral amount, the documents evidencing the perfection of the security interest in the collateral, and other relevant supporting documents. Additionally, Registrant D's loan loss allowance policy includes a discussion of how to determine when a loan is considered "fully collateralized" and does not require a loan loss allowance. Registrant D's policy requires the following factors to be considered and its findings concerning these factors to be fully documented:

- Volatility of the market value of the collateral;
- Recency and reliability of the appraisal or other valuation;
- Recency of the registrant's or third party's inspection of the collateral;
- Historical losses on similar loans;
- Confidence in the registrant's lien or security position including appropriate:
- Type of security perfection (*e.g.*, physical possession of collateral or secured filing);
- Filing of security perfection (*i.e.*, correct documents and with the appropriate officials); and
- Relationship to other liens; and
- Other factors as appropriate for the loan type.

In the staff's view, Registrant D's documentation supporting its determination that certain of its loans are fully collateralized, and no loan loss allowance should be recorded for those loans, is acceptable under FRR 28.

4. Applying a Systematic Methodology—Measuring and Documenting Loan Losses Under Statement 5

a. Measuring and Documenting Loan Losses Under Statement 5—General

Question 1: In the staff's view, what are some general considerations for a registrant in applying its systematic methodology to measure and document loan losses under Statement 5?

Interpretive Response: For loans evaluated on a group basis under Statement 5, the staff believes that a registrant should segment the loan portfolio by identifying risk characteristics that are common to groups of loans.[1] Registrants typically decide how to segment their loan portfolios based on many factors, which vary with their business strategies as well as their information system capabilities. Regardless of the segmentation method used, the staff normally would expect a registrant to maintain documentation to support its conclusion that the loans in each segment have similar attributes or characteristics. As economic and other business conditions change, registrants often modify their business strategies, which may result in adjustments to the way in which they segment their loan portfolio for purposes of estimating loan losses. The staff normally would expect registrants to maintain documentation to support these segmentation adjustments.[2]

Based on the segmentation of the loan portfolio, a registrant should estimate the Statement 5 portion of its loan loss allowance. For those segments that require an allowance for loan losses,[3] the registrant should estimate the loan losses, on at least a quarterly basis, based upon its ongoing loan review process and analysis of loan performance.[4] The registrant should follow a systematic and consistently applied approach to select the most appropriate loss measurement methods and support its conclusions and rationale with written documentation.[5]

Facts: After identifying certain loans for evaluation under Statement 114, Registrant E segments its remaining loan portfolio into five pools of loans. For three of the pools, it measures loan impairment under Statement 5 by applying historical loss rates, adjusted for relevant environmental factors, to the pools' aggregate loan balances. For the remaining two pools of loans, Registrant E uses a loss estimation model that is consistent with GAAP to measure loan impairment under Statement 5.

Question 2: What documentation would the staff normally expect Registrant E to prepare to support its loan loss allowance for its pools of loans under Statement 5?

Interpretive Response: Regardless of the method used to determine loan loss measurements under Statement 5, Registrant E should demonstrate and document that the loss measurement

[1] Paragraph 7.07 of the Audit Guide indicates that "[e]ach segment [of the loan portfolio] should contain loans with similar characteristics, such as risk classification, past-due status, and type of loan."

[2] Segmentation of the loan portfolio is a standard element in a loan loss allowance methodology. As indicated in paragraph 7.05 of the Audit Guide, the loan loss allowance methodology "should be well documented, with clear explanations of the supporting analyses and rationale."

[3] An example of a loan segment that does not generally require an allowance for loan losses is a group of loans that are fully secured by deposits maintained at the lending institution.

[4] FRR 28 refers to a "systematic methodology to be employed each period" in determining provisions and allowances for loan losses. As indicated in FRR 28, the staff normally would expect that the systematic methodology would be documented "to help ensure that all matters affecting loan collectibility will consistently be identified in the detailed [loan] review process."

[5] *Ibid.* Also, as indicated in paragraph 7.05 of the Audit Guide, the loan loss allowance methodology "should be well documented, with clear explanations of the supporting analyses and rationale." Further, as indicated in paragraph 7.14 of the Audit Guide, "[t]he institution's conclusions about the appropriate amount [of the allowance] should be well documented."

methods used to estimate the loan loss allowance for each segment of its loan portfolio are determined in accordance with GAAP as of the financial statement date.[6]

As indicated for Registrant E, one method of estimating loan losses for groups of loans is through the application of loss rates to the groups' aggregate loan balances. Such loss rates typically reflect the registrant's historical loan loss experience for each group of loans, adjusted for relevant environmental factors (*e.g.*, industry, geographical, economic, and political factors) over a defined period of time. If a registrant does not have loss experience of its own, it may be appropriate to reference the loss experience of other companies in the same business, provided that the registrant demonstrates that the attributes of the loans in its portfolio segment are similar to those of the loans included in the portfolio of the registrant providing the loss experience.[7] Registrants should maintain supporting documentation for the technique used to develop their loss rates, including the period of time over which the losses were incurred. If a range of loss is determined, registrants should maintain documentation to support the identified range and the rationale used for determining which estimate is the best estimate within the range of loan losses.[8]

The staff normally would expect that, before employing a loss estimation model, a registrant would evaluate and modify, as needed, the model's assumptions to ensure that the resulting loss estimate is consistent with GAAP. In order to demonstrate consistency with GAAP, registrants that use loss estimation models should typically document the evaluation, the conclusions regarding the appropriateness of estimating loan losses with a model or other loss estimation tool, and the objective support for adjustments to the model or its results.[9]

In developing loss measurements, registrants should consider the impact of current environmental factors and then document which factors were used in the analysis and how those factors affected the loss measurements. Factors that should be considered in developing loss measurements include the following:[10]

- Levels of and trends in delinquencies and impaired loans;
- Levels of and trends in charge-offs and recoveries;
- Trends in volume and terms of loans;
- Effects of any changes in risk selection and underwriting standards, and other changes in lending policies, procedures, and practices;
- Experience, ability, and depth of lending management and other relevant staff;
- National and local economic trends and conditions;
- Industry conditions; and
- Effects of changes in credit concentrations.

For any adjustment of loss measurements for environmental factors, a registrant should maintain sufficient, objective evidence[11] (a) to support the amount of the adjustment and (b) to explain why the adjustment is necessary to reflect current information, events, circumstances, and conditions in the loss measurements.

b. Measuring and Documenting Loan Losses Under Statement 5—Adjusting Loss Rates

Facts: Registrant F's lending area includes a metropolitan area that is financially dependent upon the profitability of a number of manufacturing businesses. These businesses use highly specialized equipment and significant quantities of rare metals in the manufacturing process. Due to increased low-cost foreign competition, several of the parts suppliers servicing these manufacturing firms declared bankruptcy. The foreign suppliers have subsequently increased prices and the manufacturing firms have suffered from increased equipment maintenance costs and smaller profit margins.

Additionally, the cost of the rare metals used in the manufacturing process increased and has now stabilized at double last year's price. Due to these events, the manufacturing businesses are experiencing financial difficulties and have recently announced downsizing plans.

Although Registrant F has yet to confirm an increase in its loss experience as a result of these events, management knows that it lends to a significant number of businesses and individuals whose repayment ability depends upon the long-term viability of the manufacturing businesses. Registrant F's management has identified particular segments of its commercial and consumer customer bases that include borrowers highly dependent upon sales or salary from the manufacturing businesses. Registrant F's management performs an analysis of the affected portfolio segments to adjust its historical loss rates used to determine the loan loss allowance. In this particular case, Registrant F has experienced similar business and lending conditions in the past that it can compare to current conditions.

Question: How would the staff normally expect Registrant F to document its support for the loss rate adjustments that result from considering these manufacturing firms' financial downturns?[12]

Interpretive Response: The staff normally would expect Registrant F to document its identification of the particular segments of its commercial and consumer loan portfolio for which it is probable that the manufacturing business' financial downturn has resulted in loan losses. In addition, the staff normally would expect Registrant F to document its analysis that resulted in the adjustments to the loss rates for the affected portfolio segments.[13] The staff normally would expect that, as part of its documentation, Registrant F would maintain copies of the documents supporting the analysis, which may include relevant economic reports,

[6] Refer to paragraph 8(b) of Statement 5. Also, as indicated in Exhibit D–80A of EITF Topic D–80, "[t]he approach for determination of the allowance should be well documented and applied consistently from period to period." (See the overview section of Exhibit D–80A and Question #18.)

[7] Refer to paragraph 23 of Statement 5.

[8] Registrants should also refer to Interpretation 14, which provides guidance for situations in which a range of loss can be reasonably estimated but no single amount within the range appears to be a better estimate than any other amount within the range. Also, paragraph 7.14 of the Audit Guide notes that the use of "a method that results in a range of estimates for the allowance," except for impairment measurement under Statement 114, which is based on "a single best estimate and not a range of estimates." Paragraph 7.14 also states that "[t]he institution's conclusions about the appropriate amount should be well documented."

[9] The systematic methodology (including, if applicable, loss estimation models) used to determine loan loss provisions and allowances should be documented in accordance with FRR 28, paragraph 7.05 of the Audit Guide, and EITF Topic D–80.

[10] Refer to paragraph 7.13 in the Audit Guide.

[11] AU 326 describes the "sufficient competent evidential matter" that auditors must consider in accordance with GAAS.

[12] This question and response would also apply to other registrant fact patterns in which the registrant adjusts loss rates for environmental factors.

[13] Paragraph 7.33 of the Audit Guide refers to the documentation, for disclosure purposes, that an entity should include in the notes to the financial statements describing the accounting policies and methodology the entity used to estimate its allowance and related provision for loan losses. As indicated in paragraph 7.33, "[s]uch a description should identify the factors that influenced management's judgment (for example, historical losses and existing economic conditions) and may also include discussion of risk elements relevant to particular categories of financial instruments."

economic data, and information from individual borrowers.

Because in this case Registrant F has experienced similar business and lending conditions in the past, it should consider including in its supporting documentation an analysis of how the current conditions compare to its previous loss experiences in similar circumstances. The staff normally would expect that, as part of Registrant F's effective loan loss allowance methodology, it would create a summary of the amount and rationale for the adjustment factor for review by management prior to the issuance of the financial statements.[14]

c. Measuring and Documenting Loan Losses Under Statement 5—Estimating Losses on Loans Individually Reviewed for Impairment but not Considered Individually Impaired

Facts: Registrant G has outstanding loans of $2 million to Company Y and $1 million to Company Z, both of which are paying as agreed upon in the loan documents. The registrant's loan loss allowance policy specifies that all loans greater than $750,000 must be individually reviewed for impairment under Statement 114. Company Y's financial statements reflect a strong net worth, good profits, and ongoing ability to meet debt service requirements. In contrast, recent information indicates Company Z's profitability is declining and its cash flow is tight. Accordingly, this loan is rated substandard under the registrant's loan grading system. Despite its concern, management believes Company Z will resolve its problems and determines that neither loan is individually impaired as defined by Statement 114.

Registrant G segments its loan portfolio to estimate loan losses under Statement 5. Two of its loan portfolio segments are Segment 1 and Segment 2. The loan to Company Y has risk characteristics similar to the loans included in Segment 1 and the loan to Company Z has risk characteristics similar to the loans included in Segment 2.[15]

In its determination of its loan loss allowance under Statement 5, Registrant G includes its loans to Company Y and Company Z in the groups of loans with similar characteristics (*i.e.*, Segment 1 for Company Y's loan and Segment 2 for Company Z's loan).[16] Management's analyses of Segment 1 and Segment 2 indicate that it is probable that each segment includes some losses, even though the losses cannot be identified to one or more specific loans. Management estimates that the use of its historical loss rates for these two segments, with adjustments for changes in environmental factors, provides a reasonable estimate of the registrant's probable loan losses in these segments.

Question: How would the staff normally expect Registrant G to adequately document a loan loss allowance under Statement 5 for these loans that were individually reviewed for impairment but are not considered individually impaired?

Interpretive Response: The staff normally would expect that, as part of Registrant G's effective loan loss allowance methodology, it would document its decision to include its loans to Company Y and Company Z in its determination of its loan loss allowance under Statement 5.[17] The staff also normally would expect that Registrant G would document the specific characteristics of the loans that were the basis for grouping these loans with other loans in Segment 1 and Segment 2, respectively.[18] Additionally, the staff normally would expect Registrant G to maintain documentation to support its method of estimating loan losses for Segment 1 and Segment 2, which typically would include the average loss rate used, the analysis of historical losses by loan type and by internal risk rating, and support for any adjustments to its historical loss rates.[19] The registrant would typically maintain copies of the economic and other reports that provided source data.

When measuring and documenting loan losses, Registrant G should take steps to prevent layering loan loss allowances. Layering is the inappropriate practice of recording in the allowance more than one amount for the same probable loan loss. Layering can happen when a registrant includes a loan in one segment, determines its best estimate of loss for that loan either individually or on a group basis (after taking into account all appropriate environmental factors, conditions, and events), and then includes the loan in another group, which receives an additional loan loss allowance amount.

5. Documenting the Results of a Systematic Methodology

a. Documenting the Results of a Systematic Methodology—General

Facts: Registrant H has completed its estimation of its loan loss allowance for the current reporting period, in accordance with GAAP, using its established systematic methodology.

Question: What summary documentation would the staff normally expect Registrant H to prepare to support the amount of its loan loss allowance to be reported in its financial statements?

Interpretive Response: The staff normally would expect that, to verify that loan loss allowance balances are presented fairly in accordance with GAAP and are auditable, management would prepare a document that summarizes the amount to be reported in the financial statements for the loan loss allowance.[1] Common elements that the staff normally would expect to find documented in loan loss allowance summaries include:[2]

- The estimate of the probable loss or range of loss incurred for each category evaluated (*e.g.*, individually evaluated impaired loans, homogeneous pools, and other groups of loans that are collectively evaluated for impairment);
- The aggregate probable loss estimated using the registrant's methodology;
- A summary of the current loan loss allowance balance;
- The amount, if any, by which the loan loss allowance balance is to be adjusted; [3] and

[14] Paragraph 7.39 in the Audit Guide indicates that effective internal control related to the allowance for loan losses should include "accumulation of relevant, sufficient, and reliable data on which to base management's estimate of the allowance."

[15] These groups of loans do not include any loans that have been individually reviewed for impairment under Statement 114 and determined to be impaired as defined by Statement 114.

[16] Question #10 in Exhibit D–80A of EITF Topic D–80 states that if a creditor concludes that an individual loan specifically identified for evaluation is not impaired under Statement 114, that loan may be included in the assessment of the allowance for loan losses under Statement 5, but only if specific characteristics of the loan indicate that it is probable that there would be an incurred loss in a group of loans with those characteristics.

[17] Paragraph 7.05 in the Audit Guide indicates that an entity's method of estimating credit losses should "include a detailed and regular analysis of the loan portfolio," "consider all loans (whether on an individual or pool-of-loans basis)," "be based on current and reliable data," and "be well documented, with clear explanations of the supporting analyses and rationale." Question #10 in Exhibit D–80A of EITF Topic D–80 provides guidance as to the analysis to be performed when determining whether a loan that is not individually impaired under Statement 114 should be included in the assessment of the loan loss allowance under Statement 5.

[18] *Ibid.*

[19] *Ibid.*

[1] FRR 28 states: "[t]he specific rationale upon which the [loan loss allowance and provision] amount actually reported is based—i.e., the bridge between the bridge between the findings of the detailed review [of the loan portfolio] and the amount actually reported in each period—would be documented to help ensure the adequacy of the reported amount, to improve auditability, and to serve as a benchmark for exercise of prudent judgment in future periods."

[2] *See* also paragraph 7.14 of the Audit guide.

[3] Subsequent to adjustments, the staff normally would expect that there would be no material differences between the consolidated loss estimate,

• Depending on the level of detail that supports the loan loss allowance analysis, detailed subschedules of loss estimates that reconcile to the summary schedule.

Generally, a registrant's review and approval process for the loan loss allowance relies upon the data provided in these consolidated summaries. There may be instances in which individuals or committees that review the loan loss allowance methodology and resulting allowance balance identify adjustments that need to be made to the loss estimates to provide a better estimate of loan losses. These changes may be due to information not known at the time of the initial loss estimate (*e.g.*, information that surfaces after determining and adjusting, as necessary, historical loss rates, or a recent decline in the marketability of property after conducting a Statement 114 valuation based upon the fair value of collateral). It is important that these adjustments are consistent with GAAP and are reviewed and approved by appropriate personnel.[4] Additionally, it would typically be appropriate for the summary to provide each subsequent reviewer with an understanding of the support behind these adjustments. Therefore, the staff normally would expect management to document the nature of any adjustments and the underlying rationale for making the changes.[5]

The staff also normally would expect this documentation to be provided to those among management making the final determination of the loan loss allowance amount.[6]

b. Documenting the Results of a Systematic Methodology—Allowance Adjustments

Facts: Registrant I determines its loan loss allowance using an established systematic process. At the end of each reporting period, the accounting department prepares a summary schedule that includes the amount of each of the components of the loan loss allowance, as well as the total loan loss allowance amount, for review by senior management, including the Credit Committee. Members of senior management meet to discuss the loan loss allowance. During these discussions, they identify changes that are required by GAAP to be made to certain of the loan loss allowance estimates. As a result of the adjustments made by senior management, the total amount of the loan loss allowance changes. However, senior management (or its designee) does not update the loan loss allowance summary schedule to reflect the adjustments or reasons for the adjustments. When performing their audit of the financial statements, the independent accountants are provided with the original loan loss allowance summary schedule reviewed by senior management, as well as a verbal explanation of the changes made by senior management when they met to discuss the loan loss allowance.

Question: In the staff's view, are Registrant I's documentation practices related to the balance of its loan loss allowance in compliance with existing documentation guidance in this area?

Interpretive Response: No. A registrant should maintain supporting documentation for the loan loss allowance amount reported in its financial statements.[7] As illustrated above, there may be instances in which loan loss allowance reviewers identify adjustments that need to be made to the loan loss estimates. The staff normally would expect the nature of the adjustments, how they were measured or determined, and the underlying rationale for making the changes to the loan loss allowance balance to be documented.[8] The staff also normally would expect appropriate documentation of the adjustments to be provided to management for review of the final loan loss allowance amount to be reported in the financial statements. This documentation should also be made available to the independent accountants. If changes frequently occur during management or credit committee reviews of the loan loss allowance, management may find it appropriate to analyze the reasons for the frequent changes and to reassess the methodology the registrant uses.[9]

6. Validating a Systematic Methodology

Question: What is the staff's guidance to a registrant on validating, and documenting the validation of, its systematic methodology used to estimate loan loss allowances?

Interpretive Response: The staff believes that a registrant's loan loss allowance methodology is considered valid when it accurately estimates the amount of loss contained in the portfolio. Thus, the staff normally would expect the registrant's methodology to include procedures that adjust loan loss estimation methods to reduce differences between estimated losses and actual subsequent charge-offs, as necessary. To verify that the loan loss allowance methodology is valid and conforms to GAAP, the staff believes it is appropriate for management to establish internal control policies,[1] appropriate for the size of the registrant and the type and complexity of its loan products.

These policies may include procedures for a review, by a party who is independent of the allowance for loan losses estimation process, of the allowance for loan losses methodology and its application in order to confirm its effectiveness.

In practice, registrants employ numerous procedures when validating the reasonableness of their loan loss allowance methodology and determining whether there may be deficiencies in their overall methodology or loan grading process. Examples are:

• A review of trends in loan volume, delinquencies, restructurings, and concentrations.

• A review of previous charge-off and recovery history, including an evaluation of the timeliness of the entries to record both the charge-offs and the recoveries.

• A review by a party that is independent of the loan loss allowance estimation process. This often involves the independent party reviewing, on a test basis, source documents and underlying assumptions to determine that the established methodology develops reasonable loss estimates.

• An evaluation of the appraisal process of the underlying collateral. This may be accomplished by periodically comparing the appraised value to the actual sales price on selected properties sold.

It is the staff's understanding that, in practice, management usually supports the validation process with the

as determined by the methodology, and the final loan loss allowance balance reported in the financial statements. Registrants should refeer to SAB 99 and SAS 89 and its amendments to AU Section 310.

[4] Paragraph 7.39 in the Audit guide indicates that effective internal control related to the allowance for loan losses should include "adequate review and approval of the allowance estimates by the individuals specified in management's written policy."

[5] *See* the guidance in paragraph 7.14 of the Audit Guide ("the institution's conclusions about the appropriate amount shoudl be well documented") and in FRR 28 ("the specific rationale upon which the amount actually reported in each individual period is based would be documented").

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] As outlined in paragraph 7.39 of the Audit Guide, effective internal controls related to the allowance for loan losses should include adequate review and approval of allowance estimates, including review of soruces of relevant information, review of development of assumptions, review of reasonableness of assumptions and resulting estimates, and consideration of changes in previously established methods to arrive at the allowance.

[1] *Ibid.*

workpapers from the loan loss allowance review function. Additional documentation often includes the summary findings of the independent reviewer. The staff normally would expect that, if the methodology is changed based upon the findings of the validation process, documentation that describes and supports the changes would be maintained.[2]

Topic 7: Real Estate Companies

A. Deleted by SAB 103

B. Deleted by SAB 103

C. Schedules of Real Estate and Accumulated Depreciation, and of Mortgage Loans on Real Estate

Facts: Whenever investments in real estate or mortgage loans on real estate are significant, the schedules of such items (see Rules 12–28 and 12–29 of Regulation S–X) are required in a prospectus.

Question: Is such information also required in annual reports to shareholders?

Interpretive Response: Although Rules 14a–3 and 14c–3 permit the omission of financial statement schedules from annual reports to shareholders, the staff is of the view that the information required by these schedules is of such significance within the real estate industry that the information should be included in the financial statements in the annual report to shareholders.

D. Income Before Depreciation

Facts: Occasionally an income statement format will contain a subtitle or caption titled "Income before depreciation and depletion."

Question: Is this caption appropriate?

Interpretive Response: The staff objects to this presentation because in the staff's view the presentation may suggest to the reader that the amount so captioned represents cash flow for the period, which is rarely the case (see ASR 142).

Topic 8: Retail Companies

A. Sales of Leased or Licensed Departments

Facts: At times, department stores and other retailers have included the sales of leased or licensed departments in the amount reported as "total revenues."

Question: Does the staff have any objection to this practice?

Interpretive Response: In November 1975 the staff issued SAB 1 that addressed this issue. In that SAB the staff did not object to retailers presenting sales of leased or licensed departments in the amount reported as "total revenues" because of industry practice. Subsequently, in November 1976 the FASB issued Statement 13. In June 1995, the AICPA staff amended its Technical Practice Aid (TPA) section 5100.16 based upon an interpretation of Statement 13 that leases of departments within a retail establishment are leases of tangible assets within the scope of Statement 13.[1] Consistent with the interpretation in TPA section 5100.16, the staff believes that Statement 13 requires department stores and other retailers that lease or license store space to account for rental income from leased departments in accordance with Statement 13. Accordingly, it would be inappropriate for a department store or other retailer to include in its revenue the sales of the leased or licensed departments. Rather, the department store or other retailer should include the rental income as part of its gross revenue. The staff would not object to disclosure in the footnotes to the financial statements of the amount of the lessee's sales from leased departments. If the arrangement is not a lease but rather a service arrangement that provides for payment of a fee or commission, the retailer should recognize the fee or commission as revenue when earned. If the retailer assumes the risk of bad debts associated with the lessee's merchandise sales, the retailer generally should present bad debt expense in accordance with Rule 5–03(b)(5) of Regulation S–X.

B. Finance Charges

Facts: Department stores and other retailers impose finance charges on credit sales.

Question: How should such charges be disclosed?

Interpretive Response: As a minimum, the staff requests that the amount of gross revenue from such charges be stated in a footnote and that the income statement classification which includes such revenue be identified. The following are examples of acceptable disclosure:

Example 1

Consumer Credit Operations:

The results of the Consumer Credit Operations which are included in the Statement of Earnings as a separate line item are as follows for the fiscal year ended January 31, 20x0:

Service charges	$167,000,000
Operating expenses	
Interest	60,000,000
Payroll	35,000,000
Provision for uncollected accounts	29,000,000
All other credit and collection expenses	32,000,000
Provision for Federal income taxes	5,000,000
Total operating expenses	161,000,000
Consumer credit operations earnings	6,000,000

Example 2

Service charges on retail credit accounts are netted against selling, general and administrative expense. The cost of administering retail credit program continued to exceed service charges on customer receivables as follows:

(in millions)	20x2	20x1	Percent increase (decrease)
Costs:			
Regional office operations	$45	$42	9
Interest	51	44	13
Provision for doubtful accounts	21	15	34
Total	$117	$102	15
Less service charge income	96	79	22
Net cost of credit	$21	$23	(10)

[2] *See* paragraph 7.39 of the Audit Guide.

[1] Statement 13, paragraph 1 defines a lease as "the right to use property, plant, or equipment (land or depreciable assets or both) usually for a stated period of time."

(in millions)	20x2	20x1	Percent increase (decrease)
Net cost as percent of credit sales	1.4%	1.6%	

The above results do not reflect either "in store" costs related to credit operations or any allocation of corporate overhead expenses.

This SAB is not intended to change current guidance in the accounting literature. For this reason, adherence to the principles described in this SAB should not raise the costs associated with record-keeping or with audits of financial statements.

Topic 9: Finance Companies

A. Deleted by SAB 103

B. Deleted by ASR 307

Topic 10: Utility Companies

A. Financing by Electric Utility Companies Through Use of Construction Intermediaries

Facts: Some electric utility companies finance construction of a generating plant or their share of a jointly owned plant through the use of a "construction intermediary" which may be organized as a trust or a corporation. Typically the utility assigns its interest in property and other contract rights to the construction intermediary with the latter authorized to obtain funds to finance construction with term loans, bank loans, commercial paper and other sources of funds and that may be available. The intermediary's borrowings are guaranteed in part of the work in progress but more significantly, although indirectly, by the obligation of the utility to purchase the project upon completion and assume or otherwise settle the borrowings. The utility may be committed to provide any deficiency of funds which the intermediary cannot obtain and excess funds may be loaned to the utility by the intermediary. (In one case involving construction of an entire generating plant, the intermediary appointed the utility as its agent to complete construction.) On the occurrence of an event such as commencement of the testing period for the plant or placing the plant in commercial service (but not later than a specified date) the interest in the plant reverts to the utility and concurrently the utility must either assume the obligations issued by the intermediary or purchase them from the holders. The intermediary also may be authorized to borrow amounts for accrued interest when due and those amounts are added to the balance of the outstanding indebtedness. Interest is thus capitalized during the construction period at rates being charged by the lenders; however, it is deductible by the utility for tax purposes in the year of accrual.

Question: How should construction work in progress and related liabilities and interest expense being financed through a construction intermediary be reflected in an electric utility's financial statements?

Interpretive Response: The balance sheet of an electric utility company using a construction intermediary to finance construction should include the intermediary's work in progress in the appropriate caption under utility plant. The related debt should be included in long-term liabilities and disclosed either on the balance sheet or in a note.

The amount of interest cost incurred and the respective amounts expensed or capitalized shall be disclosed for each period for which an income statement is presented. Consequently, capitalized interest included as part of an intermediary's construction work in progress on the balance sheet should be recognized on the current income statement as interest expense with a corresponding offset to allowance for borrowed funds used during construction. Income statements for prior periods should also be restated. The amounts may be shown separately on the statement or included with interest expense and allowance for borrowed funds used during construction.

A note to the financial statements should describe briefly the organization and purpose of the intermediary and the nature of its authorization to incur debt to finance construction. The note should disclose the rate at which interest on this debt has been capitalized and the dollar amount for each period for which an income statement is presented.

B. Deleted by SAB 103

C. Jointly Owned Electric Utility Plants

Facts: Groups of electric utility companies have been building and operating utility plants under joint ownership agreements or arrangements which do not create legal entities for which separate financial statements are presented.[1] Under these arrangements, a participating utility has an undivided interest in a utility plant and is responsible for its proportionate share of the costs of construction and operation and its entitled to its proportionate share of the energy produced.

During the construction period a participating utility finances its own share of a utility plant using its own financial resources and not the combined resources of the group. Allowance for funds used during construction is provided in the same manner and at the same rates as for plants constructed to be used entirely by the participant utility.

When a joint-owned plant becomes operational, one of the participant utilities acts as operator and bills the other participants for their proportionate share of the direct expenses incurred. Each individual participant incurs other expenses related to transmission, distribution, supervision and control which cannot be related to the energy generated or received from any particular source. Many companies maintain depreciation records on a composite basis for each class of property so that neither the accumulated allowance for depreciation nor the periodic expense can be allocated to specific generating units whether jointly or wholly owned.

Question: What disclosure should be made on the financial statements or in the notes concerning interests in jointly owned utility plants?

Interpretive Response: A participating utility should include information concerning the extent of its interests in jointly owned plants in a note to its financial statements. The note should include a table showing separately for each interest in a jointly owned plant the amount of utility plant in service, the accumulated provision for depreciation (if available), the amount of plant under construction, and the proportionate share. The amounts presented for plant in service or plant under construction may be further subdivided to show amounts applicable to plant subcategories such as production, transmission, and distribution. The note should include statements that the dollar amounts represent the participating utility's share in each joint plant and that each

[1] Before considering the guidance in this SAB Topic, registrants are reminded that the arrangement should be evaluated in accordance with the provisions of Interpretation 46.

participant must provide its own financing. Information concerning two or more generating plants on the same site may be combined if appropriate.

The note should state that the participating utility's share of direct expenses of the joint plants is included in the corresponding operating expenses on its income statement (*e.g.*, fuel, maintenance of plant, other operating expense). If the share of direct expenses is charged to purchased power then the note should disclose the amount so charged and the proportionate amounts charged to specific operating expenses on the records maintained for the joint plants.

D. Long-Term Contracts for Purchase of Electric Power

Facts: Under long-term contracts with public utility districts, cooperatives or other organizations, a utility company receives a portion of the output of a production plant constructed and financed by the district or cooperative. The utility has only a nominal or no investment at all in the plant but pays a proportionate part of the plant's costs, including debt service. The contract may be in the form of a sale of a generating plant and its immediate lease back. The utility is obligated to pay certain minimum amounts which cover debt service requirements whether or not the plant is operating. At the option of other parties to the contract and in accordance with a predetermined schedule, the utility's proportionate share of the output may be reduced. Separate agreements may exist for the transmission of power to the utility's system.[1]

Question: How should the cost of power obtained under long-term purchase contracts be reflected on the financial statements and what supplemental disclosures should be made in notes to the statements?

Interpretive Response: The cost of power obtained under long-term purchase contracts, including payments required to be made when a production plant is not operating, should be included in the operating expenses section of the income statement. A note to the financial statements should present information concerning the terms and significance of such contracts to the utility company including date of contract expiration, share of plant output being purchased, estimated annual cost, annual minimum debt service payment required and amount of related long-term debt or lease obligations outstanding.

Additional disclosure should be given if the contract provides, or is expected to provide, in excess of five percent of current or estimated future system capability. This additional disclosure may be in the form of separate financial statements of the vendor entity or inclusion of the amount of the obligation under the contract as a liability on the balance sheet with a corresponding amount as an asset representing the right to purchase power under the contract.

The note to the financial statements should disclose the allocable portion of interest included in charges under such contracts.

E. Classification of Charges for Abandonments and Disallowances

Facts: A public utility company abandons the construction of a plant and, under the provisions of Statement 90, must charge a portion of the costs of the abandoned plant to expense.[1] Also, the utility determines that it is probable that certain costs of a recently completed plant will be disallowed, and charges those costs to expense as required by Statement 90.

Question: May such charges for abandonments and disallowances be reported as extraordinary items in the statement of income?

Interpretive Response: No. The staff does not believe that such charges meet the requirements of APB Opinion 30 that an item be both unusual and infrequent to be classified as an extraordinary item. Accordingly, the public utility was advised by the staff that such charges should be reported as a component of income from continuing operations, separately presented, if material.[2]

Paragraph 20 of APB Opinion 30 indicates that to be unusual, an item must "possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates." Similarly, that paragraph indicates that, to be infrequent, an event should "not reasonably be expected to recur in the foreseeable future."

Electric utilities operate under a franchise that requires them to furnish adequate supplies of electricity for their service area. That undertaking requires utilities to continually forecast the future demand for electricity, and the costs to be incurred in constructing the plants necessary to meet that demand. Abandonments and disallowances result from the failure of demand to reach projected levels and/or plant construction costs that exceed anticipated amounts. Neither event qualifies as being both unusual and infrequent in the environment in which electric utilities operate.

Accordingly, the staff believes that charges for abandonments and disallowances under Statement 90 should not be presented as extraordinary items.[3]

F. Presentation of Liabilities for Environmental Costs

Facts: A public utility company determines that it is obligated to pay material amounts as a result of an environmental liability. These amounts may relate to, for example, damages attributed to clean-up of hazardous wastes, reclamation costs, fines, and litigation costs.

Question 1: May a rate-regulated enterprise present on its balance sheet the amount of its estimated liability for environmental costs net of probable future revenue resulting from the inclusion of such costs in allowable costs for rate-making purposes?

Interpretive Response: No. Statement 71 specifies the conditions under which rate actions of a regulator can provide reasonable assurance of the existence of an asset. The staff believes that environmental costs meeting the criteria of paragraph 9[1] of Statement 71 should be presented on the balance sheet as an asset and should not be offset against the liability. Contingent recoveries

[1] Registrants are reminded that the arrangement may contain a guarantee that is within the scope of Interpretation 45. Further, registrants should consider the guidance of Interpretation 46. Also, registrants would need to consider whether the arrangement contains a derivative that should be accounted for according to Statement 133.

[1] Paragraph 3 of Statement 90 requires that costs of abandoned plants in excess of the present value of the future revenues expected to be provided to recover any allowable costs be charged to expense in the period that the abandonment becomes probable. Also, paragraph 7 of Statement 90 requires that disallowed costs for recently completed plants be charged to expense when the disallowance becomes probable and can be reasonably estimated.

[2] Additionally, the registrant was reminded that paragraph 26 of APB Opinion 30 provides that items which are not reported as extraordinary should not be reported on the income statement net of income taxes or in any manner that implies that they are similar to extraordinary items.

[3] The staff also notes that paragraphs 3 and 7 of Statement 90, in requiring that such costs be "recognized as a loss," do not specify extraordinary item treatment. The staff believes that it generally has been the FASB's practice to affirmatively require extraordinary item treatment when it believes that it is appropriate for charges or credits to income specifically required by a provision of a statement.

[1] Paragraph 9 of Statement 71 requires a rate-regulated enterprise to capitalize all or part of an incurred cost that would otherwise be charged to expense if it is probable that future revenue will be provided to recover the previously incurred cost from inclusion of the costs in allowable costs for rate-making purposes.

through rates that do not meet the criteria of paragraph 9 should not be recognized either as an asset or as a reduction of the probable liability.

Question 2: May a rate-regulated enterprise delay recognition of a probable and estimable liability for environmental costs which it has incurred at the date of the latest balance sheet until the regulator's deliberations have proceeded to a point enabling management to determine whether this cost is likely to be included in allowable costs for rate-making purposes?

Interpretive Response: No. Statement 5 states that an estimated loss from a loss contingency shall be accrued by a charge to income if it is probable that a liability has been incurred and the amount of the loss can be reasonably estimated.[2] The staff believes that actions of a regulator can affect whether an incurred cost is capitalized or expensed pursuant to Statement 71, but the regulator's actions cannot affect the timing of the recognition of the liability.

Topic 11: Miscellaneous Disclosure

A. Operating-Differential Subsidies

Facts: Company A has received an operating-differential subsidy pursuant to the Merchant Marine Act of 1936, as amended.

Question: How should such subsidies be displayed in the income statement?

Interpretive Response: Revenue representing an operating-differential subsidy under the Merchant Marine Act of 1936, as amended, must be set forth as a separate line item in the income statement either under a revenue caption or as credit in the costs and expenses section.

B. Depreciation and Depletion Excluded From Cost of Sales

Facts: Company B excludes depreciation and depletion from cost of sales in its income statement.

Question: How should this exclusion be disclosed?

Interpretive Response: If cost of sales or operating expenses exclude charges for depreciation, depletion and amortization of property, plant and equipment, the description of the line item should read somewhat as follows: "Cost of goods sold (exclusive of items shown separately below)" or "Cost of goods sold (exclusive of depreciation shown separately below)." To avoid placing undue emphasis on "cash flow," depreciation, depletion and amortization should not be positioned in the income statement in a manner which results in reporting a figure for income before depreciation.

C. Tax Holidays

Facts: Company C conducts business in a foreign jurisdiction which attracts industry by granting a "holiday" from income taxes for a specified period.

Question: Does the staff generally request disclosure of this fact?

Interpretive Response: Yes. In such event, a note must (1) disclose the aggregate dollar and per share effects of the tax holiday and (2) briefly describe the factual circumstances including the date on which the special tax status will terminate.

D. Deleted by SAB 103

E. Chronological Ordering of Data

Question: Does the staff have any preference in what order data are presented (*e.g.*, the most current data displayed first, etc.)?

Interpretive Response: The staff has no preference as to order; however, financial statements and other data presented in tabular form should read consistently from left to right in the same chronological order throughout the filing. Similarly, numerical data included in narrative sections should be consistently ordered.

F. LIFO Liquidations

Facts: Registrant on LIFO basis of accounting liquidates a substantial portion of its LIFO inventory and as a result includes a material amount of income in its income statement which would not have been recorded had the inventory liquidation not taken place.

Question: Is disclosure required of the amount of income realized as a result of the inventory liquidation?

Interpretive Response: Yes. Such disclosure would be required in order to make the financial statements not misleading. Disclosure may be made either in a footnote or parenthetically on the face of the income statement.

G. Tax Equivalent Adjustment in Financial Statements of Bank Holding Companies

Facts: Bank subsidiaries of bank holding companies frequently hold substantial amounts of state and municipal bonds, interest income from which is exempt from Federal income taxes. Because of the tax exemption the stated yield on these securities is lower than the yield on securities with similar risk and maturity characteristics whose interest is subject to Federal tax. In order to make the interest income and resultant yields on tax exempt obligations comparable to those on taxable investments and loans, a "tax equivalent adjustment" is often added to interest income when presented in analytical tables or charts. When the data presented also includes income taxes, a corresponding amount is added to income tax expense so that there is no effect on net income. Adjustment may also be made for the tax equivalent effect of exemption from state and local taxes.

Question 1: Is the concept of the tax equivalent adjustment appropriate for inclusion in financial statements and related notes?

Interpretive Response: No. The tax equivalent adjustment represents a credit to interest income which is not actually earned and realized and a corresponding charge to taxes (or other expense) which will never be paid. Consequently, it should not be reflected on the income statement or in notes to financial statements included in reports to shareholders or in a report or registration statement filed with the Commission.

Question 2: May amounts representing tax equivalent adjustments be included in the body of a statement of income provided they are designated as not being included in the totals and balances on the statement?

Interpretive Response: No. The tabular format of a statement develops information in an orderly manner which becomes confusing when additional numbers not an integral part of the statement are inserted into it.

Question 3: May revenues on a tax equivalent adjusted basis be included in selected financial data?

Interpretive Response: Revenues may be included in selected financial data on a tax equivalent basis if the respective captions state which amounts are tax equivalent adjusted and if the corresponding unadjusted amounts are also reported in the selected financial data.

Because of differences among registrants in making the tax equivalency computation, a brief note should describe the extent of recognition of exemption from Federal, state and local taxes and the combined marginal or incremental rate used. Where net operating losses exist, the note should indicate the nature of the tax equivalency adjustment made.

Question 4: May information adjusted to a tax equivalent basis be included in management's discussion and analysis of financial condition and results of operations?

Interpretive Response: One of the purposes of MD&A is to enable investors to appraise the extent that earnings have been affected by changes in business activity and accounting principles or

[2] Registrants also should apply the guidance of SOP 96–1 in determining the appropriate recognition of environmental remediation costs.

methods. Material changes in items of revenue or expense should be analyzed and explained in textual discussion and statistical tables. It may be appropriate to use amounts or to present yields on a tax equivalent basis. If appropriate, the discussion should include a comment on material changes in investment securities positions that affect tax exempt interest income. For example, there might be a comment on a change from investments in tax exempt securities because of the availability of net operating losses to offset taxable income of current and future periods, or a comment on a change in the quality level of the tax exempt investments resulting in increased interest income and risk and a corresponding increase in the tax equivalent adjustment.

Tax equivalent adjusted amounts should be clearly identified and related to the corresponding unadjusted amounts in the financial statements. A descriptive note similar to that suggested to accompany adjusted amounts included in selected financial data should be provided.

H. Disclosures by Bank Holding Companies Regarding Certain Foreign Loans

1. Deposit/Relending Arrangements

Facts: Certain foreign countries experiencing liquidity problems, by agreement with U.S. banks, have instituted arrangements whereby borrowers in the foreign country may remit local currency to the foreign country's central bank, in return for the central bank's assumption of the borrowers' non-local currency obligations to the U.S. banks. The local currency is held on deposit at the central bank, for the account of the U.S. banks, and may be subject to relending to other borrowers in the country. Ultimate repayment of the obligations to the U.S. banks, in the requisite non-local currency, may not be due until a number of years hence.

Question: What disclosures are appropriate regarding deposit/relending arrangements of this general type?

Interpretive Response: The staff emphasizes that it is the responsibility of each registrant to determine the appropriate financial statement treatment and classification of foreign outstandings. The facts and circumstances surrounding deposit/relending arrangements should be carefully analyzed to determine whether the local currency payments to the foreign central bank represent collections of outstandings for financial reporting purposes, and whether such outstandings should be classified as nonaccrual, past due or restructured loans pursuant to Item III.C.1. of Industry Guide 3, Statistical Disclosure by Bank Holding Companies ("Guide 3").

The staff believes, however, that the impact of deposit/relending arrangements covering significant amounts of outstandings to a foreign country should be disclosed pursuant to Guide 3, Item III.C.3., Instruction (6)(a).[1] The disclosures should include a general description of the arrangements and, if significant, the amounts of interest income recognized for financial reporting purposes which has not been remitted in the requisite non-local currency to the U.S. bank.

2. Accounting and Disclosures by Bank Holding Companies for a "Mexican Debt Exchange" Transaction

Facts: Inquiries have been made of the staff regarding certain accounting and disclosure issues raised by a proposed "Mexican Debt Exchange" transaction which could involve numerous bank holding companies with existing obligations of the United Mexican States ("Mexico") or other Mexican public sector entities (collectively, "Existing Obligations"). The key elements of the Mexican Debt Exchange are as follows:

Mexico will offer for sale bonds ("Bonds"), denominated in U.S. dollars, which will pay interest at a LIBOR-based floating rate and mature in twenty years. Mexico will undertake to list the Bonds on the Luxembourg Stock Exchange. The Bonds will be secured, as to their ultimate principal value only, by non-interest bearing securities of the U.S. Treasury ("Zero Coupon Treasury Securities") which will be purchased by Mexico. The Zero Coupon Treasury Securities will be pledged to holders of the Bonds and held in custody at the Federal Reserve Bank of New York and will have a maturity date and ultimate principal value which match the maturity date and principal value of the Bonds. While the Bonds will have default and acceleration provisions, the holder of a Bond will not be permitted to have access to the collateral prior to the final scheduled maturity date, at which time the proceeds of the collateral will be available to pay the full principal amount of the Bonds. As such, the holder of a Bond ultimately will be secured as to principal at maturity; however, the interest payments will not be secured. The Bonds will not be subject to future restructurings of Mexico's Existing Obligations, and Mexico has indicated that neither the Bonds nor the Existing Obligations exchanged therefor will be considered part of a base amount with respect to any future requests by Mexico for new money.

The Mexican Debt Exchange will be structured in such a way that potential purchasers of the Bonds will submit bids on a voluntary basis to the auction agent. These bids will specify the face dollar amount of existing restructured commercial bank obligations of Mexico or of other Mexican public sector entities that the potential purchaser is willing to tender and the face dollar amount of Bonds that the purchaser is willing to accept in exchange for the Existing Obligations. Following the auction date, Mexico will determine the face dollar amount of Bonds to be issued and will exchange the Bonds for Existing Obligations taking first the offer of the largest face dollar amount of Existing Obligations per face dollar amount of Bonds, and so on, until all Bonds which Mexico is willing to issue have been subscribed. It is therefore possible that a greater amount of Existing Obligations could be tendered than Mexico is willing to accept.

The lender has appropriately accounted for the transaction as a troubled debt restructuring in accordance with the provisions of Statement 15 as amended by Statement 114.

Question 1: What financial statement and other disclosure issues regarding the Mexican Debt Exchange and the Bonds received should be considered by registrants?

Interpretive Response: The staff believes that disclosure of the nature of the transaction would be necessary, including:

- Carrying value and terms of Existing Obligations exchanged;
- Face value, carrying value, market value and terms of Bonds received;
- The effect of the transaction on the allowance for loan losses and the provision for losses in the current period; and
- Annual interest income on Existing Obligations exchanged and annual interest income on Bonds received.

On an ongoing basis, the staff believes that the terms, carrying value and market value of the Bonds should be

[1] Instruction (6)(a) calls for description of the nature and impact of developments in countries experiencing liquidity problems which are expected to have a material impact on timely repayment of principal or interest. Additionally, Instruction (6)(d)(ii) to Item III.C.3. calls for disclosure of commitments to relend, or to maintain on deposit, arising in connection with certain restructurings of foreign outstanding.

disclosed, if material, due to their unique features.[1]

Question 2: What disclosure with respect to the Bonds received would be acceptable under Industry Guide 3?

Interpretive Response: Instruction (4) to Item III.C.3. of Industry Guide 3 states: "The value of any tangible, liquid collateral may also be netted against cross-border outstandings of a country if it is held and realizable by the lender outside of the borrower's country." Given the unique features of the Bonds in that the ultimate repayment of the principal amount (but not interest) at maturity is assured, the staff will not object to either of two presentations. Under the first presentation, the carrying value of the Bonds, including any accrued but unpaid interest, would be included as a "cross-border outstanding" to the extent it exceeds the current fair value of the Zero Coupon Treasury Securities which collateralize the bonds. Alternatively, under the second presentation, the carrying value of the Bond principal would be excluded from Mexican cross-border outstandings provided (a) disclosure is made of the exclusion, (b) for purposes of determining the 1% and .75% of total assets disclosure thresholds of Item III.C.3. of Industry Guide 3, such carrying values are not excluded, and (c) all the Guide 3 disclosures relating to cross-border outstandings continue to be made, as discussed further below.

For registrants that adopt the alternative disclosure approach and whose Mexican cross-border outstandings (excluding the carrying value of the Bond principal) exceed 1% of total assets, appropriate footnote disclosure of the exclusions should be made. Such footnote should indicate the face amount and carrying value of the Bonds excluded, the market value of such Bonds, and the face amount and current fair value of the Zero Coupon Treasury Securities which secure the Bonds.

If the Mexican cross-border outstandings (excluding the carrying value of the Bond principal) are less than 1% of total assets but with the addition of the carrying value of the Bond principal would exceed 1%, the carrying value of the Mexican cross-border outstandings may be excluded from the list of countries whose cross-border outstandings exceed 1% of total assets provided that a footnote discloses the amount of Mexican cross-border outstandings (excluding the carrying value of the Bond principal) along with the footnote-type disclosure concerning the Bonds discussed in the previous paragraph. This disclosure and any other material disclosure specified by Item III.C.3. of Industry Guide 3 would continue to be made as long as Mexican exposure, including the carrying value of the Bond principal, exceeded 1%.

If the Mexican cross-border outstandings (excluding the carrying value of the Bond principal) are less than .75% of total assets but with the addition of the carrying value of the Mexican Bond principal would exceed .75% but be less than 1%, cross-border outstandings disclosed pursuant to Instruction (7) to Item III.C.3. of Industry Guide 3 may exclude Mexico provided a footnote is added to the aggregate disclosure which discloses the amount of Mexican cross-border outstandings and the fact that they have not been included. The carrying value of the Bond principal may be excluded from the amount of Mexican cross-border outstandings disclosed in the footnote provided the footnote-type disclosure discussed in the second preceding paragraph is also made.

In essence, the alternative discussed herein results in a change only in the method of presenting information, not in the total information required.[12]

The appropriate disclosure would depend on the level of Mexican cross-border outstandings as follows:

A. Assuming that the remaining Mexican cross-border outstandings are in excess of 1% of total assets:

- Mexican cross-border outstandings (which excludes the total amount of the carrying value of Bond principal) would be disclosed in the table presenting all such outstandings in excess of 1%.
- Proposed footnote disclosure—

Not included in this amount is $____ million of Mexican Government Bonds maturing in 2008, with a carrying value of $____ million [if different from face value]. These Mexican Government Bonds had a market value of $____ million on [reporting date]. The principal amount of these bonds is fully secured, at maturity, by $____ million face value of U.S. zero coupon treasury securities that mature on the same date. The current fair value of these U.S. Government securities is $____ million at [reporting date]. This collateral is pledged to holders of the bonds and held in custody at the Federal Reserve Bank of New York. The details of the transaction in which these bonds were acquired was reported in the Corporation's Form (8–K, 10–Q or 10–K) for (date). Accrued interest on the bonds, which is not secured, is included in the outstandings reported [amount to be disclosed if material]. Future interest on the bonds remains a cross-border risk.

B. Assuming that remaining Mexican cross-border outstandings are less than 1% of total assets but with the addition of the carrying value of the Mexican Bond principal would exceed 1%:

- There would not be any disclosure included in any cross-border table.
- The total amount of remaining cross-border Mexican outstandings would be disclosed in a footnote to the table. Such footnote would also explain that the Mexican outstandings are excluded from the table.
- Additional footnote disclosure—(same disclosure in A above).
- The disclosure required under this paragraph (plus any other disclosure required by Item III.C.3. of Guide 3) would continue so long as Mexican exposure, including the carrying value of the Mexican Bond principal, exceeded 1%.

C. Assuming that the remaining Mexican cross-border outstandings is less than .75% of total assets but with the addition of the carrying value of the Mexican Bond principal is greater than .75% but less than 1%:

- Mexico would not be included in the list of names of countries required by Instruction 7 to Item III.C.3. of Industry Guide 3 and the amount of Mexican cross-border outstandings would not be included in the aggregate amount of outstandings attributable to all such countries.
- A footnote would be added to this disclosure of aggregate outstandings which discusses the Mexican outstandings and the Mexican Bonds. An example follows:

Not included in the above aggregate outstandings are the Corporation's cross-border outstandings to Mexico which totaled $____ million at (reporting date). This amount is less than .75% of total assets. (The remaining portion of this footnote is the same disclosure in A above.)

D. Assuming that the total of the Mexican cross-border outstanding plus the carrying value of the Bond principal is less than the .75% of total assets:

- No disclosure would be required.
- However, same disclosure as in A above would be provided if any other aspects of the financial statements are

[1] Registrants also are reminded that if the security received in the exchange constitutes a debt security within the scope of Statement 115, the disclosures required by Statement 115 also would need to be provided.

[12] The following represents proposed disclosure using the alternative method discussed above. Of course, it would be necessary to supplement this disclosure with the additional disclosures regarding foreign outstandings that are called for by Guide 3 (*e.g.*, an analysis of the changes in aggregate outstandings), and the disclosures called for by the Interpretive Responses to Question 1.

materially affected by this transaction (such as the allowance for loan losses).

Changes in aggregate outstandings to certain countries experiencing liquidity problems are required to be presented in tabular form in compliance with Instruction (6)(b) to Item III.C.3. In this table, Existing Obligations exchanged for the Bonds would generally be included in the aggregate cross-border outstandings at the beginning of the period during which the exchange occurred. For registrants using the alternative method, the amount of Existing Obligations which were exchanged would be included as a deduction in the "other changes" caption in the table. In addition, a footnote will be provided to the table as follows:

• Relates primarily to the exchange of unsecured Mexican outstandings for Mexican bonds. The principal amount of these bonds is secured at maturity by $____ face U.S. Zero Coupon Treasury Securities which mature on the same date and have a current fair value of $____. Future interest on the bonds remains a cross-border risk.]

I. Reporting of an Allocated Transfer Risk Reserve in Filings Under the Federal Securities Laws

Facts: The Comptroller of the Currency, Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation jointly issued final rules, pursuant to the International Lending Supervision Act of 1983, requiring banking institutions to establish special reserves (Allocated Transfer Risk Reserve "ATRR") against the risks presented in certain international assets when the Federal banking agencies determine that such reserves are necessary. The rules provide that the ATRR is to be accounted for separately from the General Allowances for Possible Loan Losses, and shall not be included in the banking institution's capital or surplus. The rules also provide that no ATRR provisions are required if the banking institution writes down the assets in the requisite amount.

Question: How should the ATRR be reported in filings under the Federal Securities Laws?

Interpretive Response: It is the staff's understanding that the three banking agencies believe that those bank holding companies that have not written down the designated assets by the requisite amount and, therefore, are required to establish an ATRR should disclose the amount of the ATRR. The staff believes that such disclosure should be part of the discussion of Loan Loss Experience, Item IV of Guide 3. Part A under Item IV calls for an analysis of loss experience in the form of a reconciliation of the allowance for loan losses, and the staff believes that it would be appropriate to show and discuss separately the ATRR in the context of that reconciliation.

Registrants should recognize that the amount provided as an ATRR, or the write off of the requisite amount, represents the identification of an amount which those regulatory agencies have determined should not be included as a part of the institution's capital or surplus for purposes of administration of the regulatory and supervisory functions of those agencies. In this context, the staff believes that disclosure of the ATRR, as part of the footnote required to be presented in a registrant's financial statements by Item 7(d) of Rule 9–03 of Regulation S–X, may provide a more complete explanation of charge offs and provisions for loan losses. It should be noted, however, that the ATRR amount to be excluded from the institution's capital and surplus does not address the more general issue of the adequacy of allowances for any particular bank holding company's loans. It is still the responsibility of each registrant to determine whether GAAP require an additional provision for losses in excess of the amount required to be included in an ATRR (or the requisite amount written off).

J. Deleted by SAB 103

K. Application of Article 9 and Guide 3

Facts: Article 9 of Regulation S–X specifies the form and content of and requirements for financial statements for bank holding companies filing with the Commission. Similarly, bank holding companies disclose supplemental statistical disclosures in filings, pursuant to Industry Guide 3. No specific guidance as to the form and content of financial statements or supplemental disclosures has been promulgated for registrants which are not bank holding companies but which are engaged in similar lending and deposit activities.[1]

Question: Should non-bank holding company registrants with material amounts of lending and deposit activities file financial statements and make disclosures called for by Article 9 of Regulation S–X and Industry Guide 3?

Interpretive Response: In the staff's view, Article 9 and Guide 3, while applying literally only to bank holding companies, provide useful guidance to certain other registrants, including savings and loan holding companies, on certain disclosures relevant to an understanding of the registrant's operations. Thus, to the extent particular guidance is relevant and material to the operations of an entity, the staff believes the specified information, or comparable data, should be provided.

For example, in accordance with Guide 3, bank holding companies disclose information about yields and costs of various assets and liabilities. Further, bank holding companies provide certain information about maturities and repricing characteristics of various assets and liabilities. Such companies also disclose risk elements, such as nonaccrual and past due items in the lending portfolio. The staff believes that this information and other relevant data would be material to a description of business of other registrants with material lending and deposit activities and accordingly, the specified information and/or comparable data (such as scheduled item disclosure for risk elements) should be provided.

In contrast, other requirements of Article 9 and Guide 3 may not be material or relevant to an understanding of the financial statements of some financial institutions. For example, bank holding companies present average balance sheet information, because period-end statements might not be representative of bank activity throughout the year. Some financial institutions other than bank holding companies may determine that average balance sheet disclosure does not provide significant additional information. Others may determine that assets and liabilities are subject to sufficient volatility that average balance information should be presented.

Pursuant to Article 9, the income statements of bank holding companies use a "net interest income" presentation. Similarly, bank holding companies present the aggregate market value, at the balance sheet date, of investment securities, on the face of the balance sheet. The staff believes that such disclosures and other relevant information should also be provided by other registrants with material lending and deposit activities.

L. Income Statement Presentation of Casino-Hotels

Facts: Registrants having casino-hotel operations present separately within the

[1] The Commission staff has been considering the need for more specific guidance in the area but believes that the FASB project on financial instruments may make Commission action in this area unnecessary. In the interim, this bulletin provides the staff's views with respect to filings by similar entities such as saving and loan holding companies.

income statement amounts of revenue attributable to casino, hotel and restaurant operations, respectively.

Question: What is the appropriate income statement presentation of expenses attributable to casino-hotel activities?

Interpretive Response: The staff believes that the expenses attributable to each of the separate revenue producing activities of casino, hotel and restaurant operations should be separately presented on the face of the income statement. Such a presentation is consistent with the general reporting format for income statement presentation under Regulation S–X (Rules 5–03.1 and 5–03.2) which requires presentation of amounts of revenues and related costs and expenses applicable to major revenue providing activities. This detailed presentation affords an analysis of the relative contribution to operating profits of each of the revenue producing activities of a typical casino-hotel operation.

M. Disclosure of the Impact That Recently Issued Accounting Standards Will Have on the Financial Statements of the Registrant When Adopted in a Future Period

Facts: An accounting standard has been issued [1] that does not require adoption until some future date. A registrant is required to include financial statements in filings with the Commission after the issuance of the standard but before it is adopted by the registrant.

Question 1: Does the staff believe that these filings should include disclosure of the impact that the recently issued accounting standard will have on the financial position and results of operations of the registrant when such standard is adopted in a future period?

Interpretive Response: Yes. The Commission addressed a similar issue with respect to Statement 52 and concluded that "The Commission also believes that registrants that have not yet adopted Statement 52 should discuss the potential effects of adoption in registration statements and reports filed with the Commission." [2] The staff believes that this disclosure guidance applies to all accounting standards which have been issued but not yet adopted by the registrant unless the impact on its financial position and results of operations is not expected to be material.[3] MD&A [4] requires registrants to provide information with respect to liquidity, capital resources and results of operations and such other information that the registrant believes to be necessary to understand its financial condition and results of operations. In addition, MD&A requires disclosure of presently known material changes, trends and uncertainties that have had or that the registrant reasonably expects will have a material impact on future sales, revenues or income from continuing operations. The staff believes that disclosure of impending accounting changes is necessary to inform the reader about expected impacts on financial information to be reported in the future and, therefore, should be disclosed in accordance with the existing MD&A requirements. With respect to financial statement disclosure, GAAS [5] specifically address the need for the auditor to consider the adequacy of the disclosure of impending changes in accounting principles if (a) the financial statements have been prepared on the basis of accounting principles that were acceptable at the financial statement date but that will not be acceptable in the future and (b) the financial statements will be restated in the future as a result of the change. The staff believes that recently issued accounting standards may constitute material matters and, therefore, disclosure in the financial statements should also be considered in situations where the change to the new accounting standard will be accounted for in financial statements of future periods, prospectively or with a cumulative catch-up adjustment.

Question 2: Does the staff have a view on the types of disclosure that would be meaningful and appropriate when a new accounting standard has been issued but not yet adopted by the registrant?

Interpretive Response: The staff believes that the registrant should evaluate each new accounting standard to determine the appropriate disclosure and recognizes that the level of information available to the registrant will differ with respect to various standards and from one registrant to another. The objectives of the disclosure should be to (1) notify the reader of the disclosure documents that a standard has been issued which the registrant will be required to adopt in the future and (2) assist the reader in assessing the significance of the impact that the standard will have on the financial statements of the registrant when adopted. The staff understands that the registrant will only be able to disclose information that is known.

The following disclosures should generally be considered by the registrant:

- A brief description of the new standard, the date that adoption is required and the date that the registrant plans to adopt, if earlier.
- A discussion of the methods of adoption allowed by the standard and the method expected to be utilized by the registrant, if determined.
- A discussion of the impact that adoption of the standard is expected to have on the financial statements of the registrant, unless not known or reasonably estimable. In that case, a statement to that effect may be made.
- Disclosure of the potential impact of other significant matters that the registrant believes might result from the adoption of the standard (such as technical violations of debt covenant agreements, planned or intended changes in business practices, etc.) is encouraged.

N. Disclosures of the Impact of Assistance From Federal Financial Institution Regulatory Agencies

Facts: An entity receives financial assistance from a federal regulatory agency in conjunction with either an acquisition of a troubled financial institution, transfer of nonperforming assets to a newly-formed entity, or other reorganization.

Question: What are the disclosure implications of the existence of regulatory assistance?

Interpretive Response: The staff believes that users of financial statements must be able to assess the impact of credit and other risks on a company following a regulatory assisted acquisition, transfer or other reorganization on a basis comparable to that disclosed by other institutions, *i.e.*, as if the assistance did not exist. In this regard, the staff believes that the amount of regulatory assistance should be disclosed separately and should be separately identified in the statistical information furnished pursuant to Industry Guide 3, to the extent it impacts such information.[1,2] Further,

[1] Some registrants may want to disclose the potential effects of proposed accounting standards not yet issued, (*e.g.*, exposure drafts). Such disclosures, which generally are not required because the final standard may differ from the exposure draft, are not addressed by this SAB. See also FRR 26.

[2] FRR 6, Section 2.

[3] In those instances where a recently issued standard will impact the preparation of, but not materially affect, the financial statements, the registrant is encouraged to disclose that a standard has been issued and that its adoption will not have a material effect on its financial position or results of operations.

[4] Item 303 of Regulation S–K.

[5] See AU 9410.13–18.

[1] The staff has previously expressed its views regarding acceptable methods of compliance with

Continued

the nature, extent and impact of such assistance needs to be fully discussed in Management's Discussion and Analysis.[3]

Topic 12: Oil and Gas Producing Activities

A. Accounting Series Release 257—Requirements for Financial Accounting and Reporting Practices for Oil and Gas Producing Activities

1. Estimates of Quantities of Proved Reserves

Facts: Rule 4–10 contains definitions of proved reserves, proved developed reserves, and proved undeveloped reserves to be used in determining quantities of oil and gas reserves to be reported in filings with the Commission.

Question 1: The definition of proved reserves states that reservoirs are considered proved if "economic producibility is supported by either actual production or conclusive formation test." May oil and gas reserves be considered proved if economic producibility is supported only by core analyses and/or electric or other log interpretations?

Interpretive Response: Economic producibility of estimated proved reserves can be supported to the satisfaction of the Office of Engineering if geological and engineering data demonstrate with reasonable certainty that those reserves can be recovered in future years under existing economic and operating conditions. The relative importance of the many pieces of geological and engineering data which should be evaluated when classifying reserves cannot be identified in advance. In certain instances, proved reserves may be assigned to reservoirs on the basis of a combination of electrical and other type logs and core analyses which indicate the reservoirs are analogous to similar reservoirs in the same field which are producing or have demonstrated the ability to produce on a formation test.

Question 2: In determining whether "proved undeveloped reserves" encompass acreage on which fluid injection (or other improved recovery technique) is contemplated, is it appropriate to distinguish between (i) fluid injection used for pressure maintenance during the early life of a field and (ii) fluid injection used to effect secondary recovery when a field is in the late stages of depletion? The definition in Rule 4–10(a)(4) does not make this distinction between pressure maintenance activity and fluid injection undertaken for purposes of secondary recovery.

Interpretive Response: The Office of Engineering believes that the distinction identified in the above question may be appropriate in a few limited circumstances, such as in the case of certain fields in the North Sea. The staff will review estimates of proved reserves attributable to fluid injection in the light of the strength of the evidence presented by the registrant in support of a contention that enhanced recovery will be achieved.

Question 3: What volumes of natural gas liquids should be reported as net reserves, that portion recovered in a gas processing plant and allocated to the leasehold interest or the total recovered by a plant from net interest gas?

Interpretive Response: Companies should report reserves of natural gas liquids which are net to their leasehold interests, *i.e.*, that portion recovered in a processing plant and allocated to the leasehold interest. It may be appropriate in the case of natural gas liquids not clearly attributable to leasehold interests ownership to follow instructions to Item 3 of Securities Act Industry Guide 2 and report such reserves separately and describe the nature of the ownership.

Question 4: What pressure base should be used for reporting gas and production, 14.73 psia or the pressure base specified by the state?

Interpretive Response: The reporting instructions to the Department of Energy's Form EIA–28 specify that natural gas reserves are to be reported at 14.73 psia and 60 degrees F. There is no pressure base specified in Regulation S–X or S–K. At the present time the staff will not object to natural gas reserves and production data calculated at other pressure bases, if such other pressure bases are identified in the filing.

2. Estimates of Future Net Revenues

Facts: Paragraphs 30–34 of Statement 69 require the disclosure of the standardized measure of discounted future net cash flows from production of proved oil and gas reserves, computed by applying year-end prices of oil and gas (with consideration of price changes only to the extent provided by contractual arrangements) to estimated future production as of the latest balance sheet date, less estimated future expenditures (based on current costs) of developing and producing the proved reserves, and assuming continuation of existing economic conditions.

Question 1: For purposes of determining reserves and estimated future net revenues, what price should be used for gas which will be produced after an existing contract expires or after the redetermination date in a contract?

Interpretive Response: The price to be used for gas which will be produced after a contract expires or has a redetermination is the current market price at the end of the fiscal year for that category of gas. This price may be increased thereafter only for additional fixed and determinable escalations, as appropriate, for that category of gas. A fixed and determinable escalation is one which is specified in amount and is not based on future events such as rates of inflation.

Question 2: What price should be applied to gas which at the end of a fiscal year is not yet subject to a gas sales contract?

Interpretive Response: The price to be used is the current market price for similarly situated gas at the end of the fiscal year provided the company can reasonably expect to sell the gas at the prevailing market price.

Question 3: To what extent should price increases announced by OPEC or by certain government agencies not yet effective at the date of the reserve report be considered in determining current prices?

Interpretive Response: Current prices should not reflect price increases announced but not yet effective at the date of the reserve valuation, *i.e.*, the end of the fiscal year.

3. Disclosure of Reserve Information

a. Deleted by SAB 103

b. Unproved properties

Facts: Disclosures of reserve information are based on estimated quantities of proved reserves of oil and gas. Regulation S–K prohibits disclosure of estimated quantities of probable or possible reserves of oil and gas and any estimated value thereof in any document publicly filed with the Commission.

Question: What types of disclosures will be permitted by registrants who wish to indicate that some of their properties have value other than that attributable to proved reserves?

Interpretive Response: The Office of Engineering has, for the past several years, suggested to registrants the following form of disclosure for undeveloped lease acreage:

In addition to proved reserves, the estimated (or appraised) value of leases or parts of leases to which proved reserves cannot be attributable is $xxx.

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this principle in the minutes of EITF Issue 88–19, and an announcement by the SEC Observer to the EITF at the February 23, 1989 meeting.

[2] See EITF Issue 88–19 for guidance on the appropriate period in which to record certain types of regulatory assistance.

[3] See Section 501.06.c. of the Financial Reporting Codification for further discussion of the MD&A disclosures of the effects of regulatory assistance.

The registrant should describe the basis on which the estimate was made. For example, such estimated values are often based on the market demand for leasehold acreage which, in turn, is based on a number of qualitative factors such as proximity to production. If the disclosed amount is based on an appraisal, the person making the appraisal should be named.

c. Limited partnership 10–K reports

Facts: Securities Act Industry Guide 2 contains an exemption from the requirements of the Guide to disclose certain information relating to oil and gas operations for "limited partnerships or joint ventures that conduct, operate, manage, or report upon oil and gas drilling income programs which acquire properties either for drilling and production, or for production of oil, gas, or geothermal steam." Regulation S–X does not contain a similar exemption from the supplemental disclosure requirements of Statement 69.

Limited partnership agreements often contain buy-out provisions under which the general partner agrees to purchase limited partnership interests that are offered for sale, based upon a specified valuation formula. Because of these arrangements, the requirements for disclosure of reserve value information may be of little significance to the limited partners.

Question: Must the financial statements of limited partnerships included in reports on Form 10–K contain the disclosures of estimated future net revenues, present values and changes therein, and supplemental summary of oil and gas activities specified by paragraphs 24–34 of Statement 69?

Interpretive Response: The staff will not take exception to the omission of these disclosures in a limited partnership Form 10–K if reserve value information is available to the limited partners pursuant to the partnership agreement (even though the valuations may be computed differently and may be as of a date other than year end). However, the staff will require all of the information specified by these paragraphs of Statement 69 for partnerships which are the subject of a merger or exchange offer under which various limited partnerships are to be combined into a single entity.

d. Limited partnership registration statements

Facts: The staff requires that a registration statement relating to an offering of limited partnership interests include the most recent year-end balance sheet of the general partner. This is considered necessary for purposes of assessing the financial responsibility of the general partner.

Question: What disclosures of oil and gas reserve information must accompany the balance sheet of the general partner?

Interpretive Response: Disclosures should include oil and gas reserve information that pertains to the balance sheet, *i.e.*, the estimated year-end quantities of proved oil and gas reserves and the estimated future net revenues and present values thereof specified by paragraphs 10–17 and 30–34, respectively, of Statement 69.

e. Rate regulated companies

Question: If a company has cost-of-service oil and gas producing properties, how should they be treated in the supplemental disclosures of reserve quantities and related future net revenues provided pursuant to paragraphs 30–34 of Statement 69?

Interpretive Response: Rule 4–10 provides that registrants may give effect to differences arising from the ratemaking process for cost-of-service oil and gas properties. Accordingly, in these circumstances, the staff believes that the company's supplemental reserve quantity disclosures should indicate separately the quantities associated with properties subject to cost-of-service ratemaking, and that it is appropriate to exclude those quantities from the future net revenue disclosures. The company should also disclose the nature and impact of its cost-of-service ratemaking, including the unamortized cost included in the balance sheet.

4. Deleted by SAB 103

B. Deleted by SAB 103

C. Methods of Accounting by Oil and Gas Producers

1. First-Time Registrants

Facts: In ASR 300, the Commission announced that it would allow registrants to change methods of accounting for oil and gas producing activities so long as such changes were in accordance with GAAP. Accordingly, the Commission stated that changes from the full cost method to the successful efforts method would not require a preferability letter because of the position expressed in Statement 25 that successful efforts is considered preferable by the FASB for accounting changes. Changes to full cost, however, would require justification by the company making the change and filing of a preferability letter from the company's independent accountants.

Question: How does this policy apply to a nonpublic company which changes its accounting method in connection with a forthcoming public offering or initial registration under either the 1933 Act or 1934 Act?

Interpretive Response: The Commission's policy that first time registrants may change their previous accounting methods without filing a preferability letter is applicable. Therefore, such a company may change to the full cost method without filing a preferability letter.

2. Consistent Use of Accounting Methods Within a Consolidated Entity

Facts: Rule 4–10(c) of Regulation S–X states that "a reporting entity that follows the full cost method shall apply that method to all of its operations and to the operations of its subsidiaries."

Question 1: If a parent company uses the successful efforts method of accounting for oil and gas producing activities, may a subsidiary of the parent use the full cost method?

Interpretive Response: No. The use of different methods of accounting in the consolidated financial statements by a parent company and its subsidiary would be inconsistent with the full cost requirement that a parent and its subsidiaries all use the same method of accounting.

The staff's general policy is that an enterprise should account for all its like operations in the same manner. However, Rule 4–10 of Regulation S–X provides that oil and gas companies with cost-of-service oil and gas properties may give effect to any differences resulting from the ratemaking process, including regulatory requirements that a certain accounting method be used for the cost-of-service properties.

Question 2: Must the method of accounting (full cost or successful efforts) followed by a registrant for its oil and gas producing activities also be followed by any fifty percent or less owned companies in which the registrant carries its investment on the equity method (equity investees)?

Interpretive Response: No. Conformity of accounting methods between a registrant and its equity investees, although desirable, may not be practicable and thus is not required. However, if a registrant proportionately consolidates its equity investees, it will be necessary to present them all on the same basis of accounting.

D. Application of Full Cost Method of Accounting

1. Treatment of Income Tax Effects in the Computation of the Limitation on Capitalized Costs

Facts: Item (D) of Rule 4–10(c)(4)(i) of Regulation S–X states that the income

tax effects related to the properties involved should be deducted in computing the full cost ceiling.

Question 1: What specific types of income tax effects should be considered in computing the income tax effects to be deducted from estimated future net revenues?

Interpretive Response: The rule refers to income tax effects generally. Thus, the computation should take into account (i) the tax basis of oil and gas properties, (ii) net operating loss carryforwards, (iii) foreign tax credit carryforwards, (iv) investment tax credits, (v) minimum taxes on tax preference items, and (vi) the impact of statutory (percentage) depletion.

It may often be difficult to allocate net operating loss carryforwards (NOLs) between oil and gas assets and other assets. However, to the extent that the NOLs are clearly attributable to oil and gas operations and are expected to be realized within the carryforward period, they should be added to tax basis.

Similarly, to the extent that investment tax credit (ITC) carryforwards and foreign tax credit carryforwards are attributable to oil and gas operations and are expected to be realized within the carryforward period, they should be considered as a deduction from the tax effect otherwise computed. Consideration of NOLs and ITC or foreign tax credit carryforwards should not, of course, reduce the total tax effect below zero.

Question 2: How should the tax effect be computed considering the various factors discussed above?

Interpretive Response: Theoretically, taxable income and tax could be determined on a year-by-year basis and the present value of the related tax computed. However, the "shortcut" method illustrated below is also acceptable.

Assumptions:			
Capitalized Costs of Oil and Gas Assets			$500,000
Accumulated DD&A			(100,000)
Book basis of oil and gas assets			400,000
Related deferred income taxes			35,000
Net book basis to be recovered			$365,000
NOL carryforward*			$ 20,000
Foreign tax credit carryforward*			$ 1,000
ITC—Carryforward*		$2,000	
Present value of ITC relating to future development costs		1,500	$ 3,500
Estimated preference (minimum) tax on percentage depletion in excess of cost depletion			$ 500
Tax basis of oil and gas assets			$270,000
Present value of statutory depletion attributable to future deductions			$ 10,000
Statutory tax rate (percent)			46%
Present value of future net revenues from proved oil and gas reserves			$272,000
Cost of properties not being amortized			$ 55,000
Lower of cost or estimated fair value of unproved properties included in costs being amortized			$ 49,000
CALCULATION			
Present value of future net revenue			$272,000
Cost of properties not being amortized			55,000
Lower of cost or estimated fair value of unproved properties included in costs being amortized			49,000
Tax Effects:			
Total of above items			$376,000
Less: Tax basis of properties	(270,000)		
Statutory depletion	(10,000)		
NOL carryforward	(20,000)	(300,000)	
Future taxable income		76,000	
Tax rate (percent)		× 46%	
Tax payable at statutory rate		(34,960)	
ITC		3,500	
Foreign tax credit carryforward		1,000	
Estimated preference tax		(500)	
Total tax effects			(30,960)
Cost Center Ceiling			$345,040
Less: Net book basis			365,000
REQUIRED WRITE-OFF, net of tax**			($ 19,960)

* All carryforward amounts in this example represent amounts which are available for tax purposes and which related to oil and gas operations.
** For accounting purposes, the gross write-off should be recorded to adjust both the oil and gas properties account and the related deferred income taxes.

2. Exclusion of Costs From Amortization

Facts: Rule 4–10(c)(3)(ii) indicates that the costs of acquiring and evaluating unproved properties may be excluded from capitalized costs to be amortized if the costs are unusually significant in relation to aggregate costs to be amortized. Costs of major development projects may also be incurred prior to ascertaining the quantities of proved reserves attributable to such properties.

Question: At what point should amortization of previously excluded costs commence when proved reserves

have been established or when those reserves become marketable? For instance, a determination of proved reserves may be made before completion of an extraction plant necessary to process sour crude or a pipeline necessary to market the reserves. May the costs continue to be excluded from amortization until the plant or pipeline is in service?

Interpretive Response: No. The proved reserves and the costs allocable to such reserves should be transferred into the amortization base on an ongoing (well-by-well or property-by-property) basis as the project is evaluated and proved reserves are established. Once the determination of proved reserves has been made, there is no justification for continued exclusion from the full cost pool, regardless of whether other factors prevent immediate marketing. Moreover, at the same time that the costs are transferred into the amortization base, it is also necessary in accordance with Interpretation 33 and Statement 34 to terminate capitalization of interest on such properties.

In this regard, registrants are reminded of their responsibilities not to delay recognizing reserves as proved once they have met the engineering standards.

3. Full Cost Ceiling Limitation

a. Exemptions for purchased properties

Facts: During 20x1, a registrant purchases proved oil and gas reserves in place ("the purchased reserves") in an arm's length transaction for the sum of $9.8 million. Primarily because the registrant expects oil and gas prices to escalate, it paid $1.2 million more for the purchased reserves than the "Present Value of Estimated Future Net Revenues" computed as defined in Rule 4–10(c)(4)(i)(A) of Regulation S–X. An analysis of the registrant's full cost center in which the purchased reserves are located at December 31, 20x1 is as follows:

[Amounts in 1,000]

	Total	Purchased reserves	Other proved properties	Unproved properties
Present value of estimated future net revenues	$14,100	8,600	5,500	.....
Cost, net of amortization	$16,300	9,800	5,500	1,000
Related deferred taxes	$2,300	.....	2,000	300
Income tax effects related to properties	$2,500	.....	2,500	.....

	Including purchased reserves	Excluding purchased reserves
Comparison of capitalized costs with limitation on capitalized costs at December 31, 20x1.		
Capitalized costs, net of amortization	$16,300	$6,500
Related deferred taxes	(2,300)	(2,300)
Net book cost	14,000	4,200
Present value of estimated future net revenues	14,100	5,500
Lower of cost or market of unproved properties	1,000	1,000
Income tax effects related to properties	(2,500)	(2,500)
Limitation on capitalized costs	12,600	4,000
Excess of capitalized costs over limitation on Capitalized costs, net of tax	$1,400	$200

* For accounting purposes, the gross write-off should be recorded to adjust both the oil and gas properties account and the related deferred income taxes

Question: Is it necessary for the registrant to write down the carrying value of its full cost center at December 31, 20x1 by $1,400,000?

Interpretive Response: Although the net carrying value of the full cost center exceeds the cost center's limitation on capitalized costs, the text of ASR 258 provides that a registrant may request an exemption from the rule if as a result of a major purchase of proved properties, a write down would be required even though the registrant believes the fair value of the properties in a cost center clearly exceeds the unamortized costs.

Therefore, to the extent that the excess carrying value relates to the purchased reserves, the registrant may seek a temporary waiver of the full-cost ceiling limitation from the staff of the Commission. Registrants requesting a waiver should be prepared to demonstrate that the additional value exists beyond reasonable doubt.

To the extent that the excess costs relate to properties other than the purchased reserves, however, a write-off should be recorded in the current period. In order to determine the portion of the total excess carrying value which is attributable to properties other than the purchased reserves, it is necessary to perform the ceiling computation on a "with and without" basis as shown in the example above. Thus in this case, the registrant must record a write-down of $200,000 applicable to other reserves. An additional $1,200,000 write-down would be necessary unless a waiver were obtained.

b. Use of cash flow hedges in the computation of the limitation on capitalized costs

Facts: Rule 4–10(c)(4) of Regulation S–X provides, *in pertinent part,* that

capitalized costs, net of accumulated depreciation and amortization, and deferred income taxes, should not exceed an amount equal to the sum of [components that include] the present value of estimated future net revenues computed by applying current prices of oil and gas reserves (with consideration of price changes only to the extent provided by contractual arrangements) to estimated future production of proved oil and gas reserves as of the date of the latest balance sheet presented.

As of the reported balance sheet date, capitalized costs of an oil and gas producing company exceed the full cost limitation calculated under the above described rule based on current spot market prices for oil and natural gas. However, prior to the balance sheet date, the company enters into certain hedging arrangements for a portion of its future natural gas and oil production, thereby enabling the company to receive future cash flows that are higher than the estimated future cash flows indicated by use of the spot market price as of the reported balance sheet date. These arrangements qualify as cash flow hedges under the provisions of Statement 133 as amended and interpreted, and are documented, designated, and accounted for as such under the criteria of that standard.

Question: Under these circumstances, must the company use the higher prices to be received after taking into account the hedging arrangements ("hedge-adjusted prices") in calculating the current price of the quantities of its future production of oil and gas reserves covered by the hedges as of the reported balance sheet date?

Interpretive Response: Yes. Derivative contracts that qualify as hedging instruments in a cash flow hedge and are accounted for as such pursuant to Statement 133 represent the type of contractual arrangements for which consideration of price changes should be given under the existing rule. While the SEC staff has objected to previous proposals to consider various hedging techniques as being equivalent to the contractual arrangements permitted under the existing rules, the staff's objection was based on concerns that the lack of clear, consistent guidance in the accounting literature would lead to inconsistent application in practice. For example, prior to the adoption of Statement 133, hedging activities related to foreign exchange rates were addressed in Statement 52. The use of futures contracts as hedging arrangements was previously addressed in Statement 80. The guidance provided in these Statements differed from Statement 133 in the criteria used to qualify for hedge accounting. However, the staff believes that Statement 133 and related guidance (including a more systematic approach to documentation) provides sufficient guidance so that comparable financial reporting in comparable factual circumstances should result.

This interpretive response reflects the SEC staff's view that, assuming compliance with the prerequisite accounting requirements, hedge-adjusted prices represent the best measure of estimated cash flows from future production of the affected oil and gas reserves to use in calculating the ceiling limitation. Nonetheless, the staff expects that oil and gas producing companies subject to the full cost rules will clearly indicate the effects of using cash flow hedges in calculating ceiling limitations within their financial statement footnotes. The staff further expects that disclosures will indicate the portion of future oil and gas production being hedged. The dollar amount that would have been charged to income had the effects of the cash flow hedges not been considered in calculating the ceiling limitation also should be disclosed.

The use of hedge-adjusted prices should be consistently applied in all reporting periods, including periods in which the hedge-adjusted price is less than the current spot market price. Oil and gas producers whose computation of the ceiling limitation includes hedge-adjusted prices because of the use of cash flow hedges also should consider the disclosure requirements under the SOP 94–6. Paragraph 14 of SOP 94–6 calls for disclosure when it is at least reasonably possible that the effects of cash flow hedges on capitalized costs on the reported balance sheet date will change in the near term due to one or more confirming events, such as potential future changes in commodity prices.

In addition, the use of cash flow hedges in calculating the ceiling limitation may represent a type of critical accounting policy that oil and gas producers should consider disclosing consistent with the cautionary advice provided in FR 60. Through this release, the Commission has encouraged companies to include, within their MD&A disclosures, full explanations, in plain English, of the judgments and uncertainties affecting the application of critical accounting policies, and the likelihood that materially different amounts would be reported under different conditions or using different assumptions.

The staff's guidance on this issue would apply to calculations of ceiling limitations both in interim and annual periods.

c. Effect of subsequent events on the computation of the limitation on capitalized costs

Facts: Rule 4–10(c)(4)(ii) of Regulation S–X provides that an excess of unamortized capitalized costs within a cost center over the related cost ceiling shall be charged to expense in the period the excess occurs.

Question: Assume that at the date of company's fiscal year-end, its capitalized costs of oil and gas producing properties exceed the limitation prescribed by Rule 4–10(c)(4) of Regulation S–X. Thus, a write down is indicated. Subsequent to year-end but before the date of the auditors' report on the company's financial statements, assume that one of two events occurs: (1) additional reserves are proved up on properties owned at year-end, or (2) price increases become known which were not fixed and determinable at year-end. The present value of future net revenues from the additional reserves or from the increased prices is sufficiently large that if the full cost ceiling limitation were recomputed giving effect to those factors as of year-end, the ceiling would more than cover the costs. It is necessary to record a write down?

Interpretive Response: No. In these cases, the proving up of additional reserves on properties owned at year-end or the increase in prices indicates that the capitalized costs were not in fact inpaired at year-end. However, for purposes of the revised computation of the "ceiling," the net book costs capitalized as of year-end should be increased by the amount of any additional costs incurred subsequent to year-end to prove the additional reserves or by any related costs previously excluded from amortization.

While the fact pattern described herein relates to annual periods, the guidance on the effects of subsequent events applies equally to interim period calculations of the ceiling limitation. However, the staff cautions registrants that the process of considering subsequent price changes in the determination of whether a ceiling write-down is called for should be similar to the consideration given to other subsequent events under the auditing literature. The staff expects that the date selected for the ceiling recomputation will be consistent from period to period, and bear a logical relationship to the filing date of the affected financial statements. For example, it would seem logical that an oil and gas producing company would

consistently make whatever recalculations are necessary at the date the auditors are completing their interim reviews.

The registrant's financial statements should disclose that capitalized costs exceeded the limitation thereon at year-end and should explain why the excess was not charged against earnings. In addition, the registrant's supplemental disclosures of estimated proved reserve quantities and related future net revenues and costs should not give effect to the reserves proved up or the cost incurred after year-end or to the price increases occurring after year-end. However, such quantities and amounts may be disclosed separately, with appropriate explanations.

Registrants should be aware that oil and gas reserves related to properties acquired after year-end would not justify avoiding a write-off indicated as of year-end. Similarly, the effects of cash flow hedging arrangements entered into after year-end cannot be factored into the calculation of the ceiling limitation at year-end. Such acquisitions and financial arrangements do not confirm situations existing at year-end.

E. Financial Statements of Royalty Trusts

Facts: Several oil and gas exploration and production companies have created "royalty trusts." Typically, the creating company conveys a net profits interest in certain of its oil and gas properties to the newly created trust and then distributes units in the trust to its shareholders. The trust is a passive entity which is prohibited from entering into or engaging in any business or commercial activity of any kind and from acquiring any oil and gas lease, royalty or other mineral interest. The function of the trust is to serve as an agent to distribute the income from the net profits interest. The amount to be periodically distributed to the unitholders is defined in the trust agreement and is typically determined based on the cash received from the net profits interest less expenses of the trustee. Royalty trusts have typically reported their earnings on the basis of cash distributions to unitholders. The net profits interest paid to the trust for any month is based on production from a preceding month; therefore, the method of accounting followed by the trust for the net profits interest income is different from the creating company's method of accounting for the related revenue.

Question: Will the staff accept a statement of distributable income which reflects the amounts to be distributed for the period in question under the terms of the trust agreement in lieu of a statement of income prepared under GAAP?

Interpretive Response: Yes. Although financial statements filed with the Commission are normally required to be prepared in accordance with GAAP, the Commission's rules provide that other presentations may be acceptable in unusual situations. Since the operations of a royalty trust are limited to the distribution of income from the net profits interests contributed to it, the staff believes that the item of primary importance to the reader of the financial statements of the royalty trust is the amount of the cash distributions to the unitholders for the period reported. Should there be any change in the nature of the trust's operations due to revisions in the tax laws or other factors, the staff's interpretation would be reexamined.

A note to the financial statements should disclose the method used in determining distributable income and should also describe how distributable income as reported differs from income determined on the basis of GAAP.

F. Gross Revenue Method of Amortizing Capitalized Costs

Facts: Rule 4–10(c)(3)(iii) of Regulation S–X states in part:

> Amortization shall be computed on the basis of physical units, with oil and gas converted to a common unit of measure on the basis of their approximate relative energy content, unless economic circumstances (related to the effects of regulated prices) indicate that use of units of revenue is a more appropriate basis of computing amortization. In the latter case, amortization shall be computed on the basis of current gross revenues (excluding royalty payments and net profits disbursements) from production in relation to future gross revenues based on current prices (including consideration of changes in existing prices provided only by contractual arrangements), from estimated production of proved oil and gas reserves.

Question: May entities using the full cost method of accounting for oil and gas producing activities compute amortization based on the gross revenue method described in the above rule when substantial production is not subject to pricing regulation?

Interpretive Response: Yes. Under the existing rules for cost amortization adopted in ASR 258, the use of the gross revenue method of amortization was permitted in those circumstances where, because of the effect of existing pricing regulations, the use of the units of production method would result in an amortization provision that would be inconsistent with the current prices being received. While the effect of regulation on gas prices has lessened, factors other than price regulation (such as changes in typical contract lengths and methods of marketing natural gas) have caused oil and gas prices to be disproportionate to their relative energy content. The staff therefore believes that it may be more appropriate for registrants to compute amortization based on the gross revenue method whenever oil and gas sales prices are disproportionate to their relative energy content to the extent that the use of the units of production method would result in an improper matching of the costs of oil and gas production against the related revenue received. The method should be consistently applied and appropriately disclosed within the financial statements.

G. Inclusion of Methane Gas in Proved Reserves

Facts: Because of a concern over worldwide oil and gas supplies, Congress, in 1980, provided for tax incentives (credits) for the production of oil and gas from other than conventional sources. As a consequence, significant amounts of gas are now recovered from seams of coal beds. This gas is referred to as coalbed methane. It is produced using conventional drilling methods, but for various reasons, it may be more costly to produce than oil and gas recovered from customary sources and some reserves may not be economical without the tax credits.

Rule 4–10(a)(1)(i)(A) of Regulation S–X indicates that oil and gas producing activities include the search for crude oil, including condensate and natural gas liquids, or natural gas in their natural states and original locations. Rule 4–10(a)(2)(iii)(D) of Regulation S–X states that estimates of proved reserves do not include (among other things) natural gas that can be recovered from coal.[1] In addition, the definition of proved oil and gas reserves includes a provision that the quantities of natural gas be recovered from existing reservoirs. Under these definitions, "coalbed methane" gas has generally not been included in the disclosures in Commission filings required by Statement 69. Further, coalbed methane has generally not been counted in proved oil and gas reserves for purposes of the full cost ceiling test in Rule 4–10(c)(4) since that test is based on the same definition of proved oil and gas reserves.

Question: Is it appropriate to consider coalbed methane gas within the definition of proved reserves for purposes of the disclosures relating to

[1] Similar language appears in Statements 19 and 25.

oil and gas producing activities and the full cost ceiling test?

Interpretive Response: Yes. The prohibition against the inclusion of gas derived from coal was meant to apply to the recovery of hydrocarbons from the processing of coal. The extraction of methane gas from coalbed seams using conventional methods was not contemplated at the time Rule 4–10(a) was developed. The staff believes that, since coalbed methane gas can be recovered from coal in its natural state and original location, it should be included in proved reserves, provided that it complies in all other respects with the definition of proved oil and gas reserves as specified in Rule 4–10(a)(2) including the requirement that methane production be economical at current prices, costs (net of the tax credit) and existing operating conditions.[2] Methane gas from coalbeds (like any other hydrocarbon obtained from conventional reservoirs) that cannot be produced at a profit under current economic and operating conditions, or for which there is no market or any existing method of delivery to the market, cannot be included in the category of proved reserves.

In instances where methane gas is deemed to be economically producible only as a consequence of existing Federal tax incentives, the staff believes that additional disclosure should be provided as to the specific quantities and values of reported proved reserves that are dependent on existing U.S. tax policy together with any other information necessary to inform readers of the risks attendant with any future change to existing Federal tax policy.

Topic 13: Revenue Recognition

A. Selected Revenue Recognition Issues

1. Revenue Recognition—General

The accounting literature on revenue recognition includes both broad conceptual discussions as well as certain industry-specific guidance. Examples of existing literature on revenue recognition include Statements 13, 45, 48, 49, 50, 51, and 66; Opinion 10; ARBs 43 (Chapter 1a) and 45; SOPs 81–1 and 97–2; EITF Issues 88–18, 91–9, 95–1, and 95–4; and Concepts Statement 5.[1] If a transaction is within the scope of specific authoritative literature that provides revenue recognition guidance, that literature should be applied. However, in the absence of authoritative literature addressing a specific arrangement or a specific industry, the staff will consider the existing authoritative accounting standards as well as the broad revenue recognition criteria specified in the FASB's conceptual framework that contain basic guidelines for revenue recognition.

Based on these guidelines, revenue should not be recognized until it is realized or realizable and earned.[2] Concepts Statement 5, paragraph 83(b) states that "an entity's revenue-earning activities involve delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations, and revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues' [footnote reference omitted]. Paragraph 84(a) continues "the two conditions (being realized or realizable and being earned) are usually met by the time product or merchandise is delivered or services are rendered to customers, and revenues from manufacturing and selling activities and gains and losses from sales of other assets are commonly recognized at time of sale (usually meaning delivery)" [footnote reference omitted]. In addition, paragraph 84(d) states that "If services are rendered or rights to use assets extend continuously over time (for example, interest or rent), reliable measures based on contractual prices established in advance are commonly available, and revenues may be recognized as earned as time passes."

The staff believes that revenue generally is realized or realizable and earned when all of the following criteria are met:

- Persuasive evidence of an arrangement exists,[3]
- Delivery has occurred or services have been rendered,[4]
- The seller's price to the buyer is fixed or determinable,[5] and
- Collectibility is reasonably assured.[6]

2. Persuasive Evidence of an Arrangement

Question 1

Facts: Company A has product available to ship to customers prior to the end of its current fiscal quarter. Customer Beta places an order for the product, and Company A delivers the product prior to the end of its current fiscal quarter. Company A's normal and customary business practice for this class of customer is to enter into a written sales agreement that requires the signatures of the authorized representatives of the Company and its customer to be binding. Company A prepares a written sales agreement, and its authorized representative signs the agreement before the end of the quarter. However, Customer Beta does not sign the agreement because Customer Beta is awaiting the requisite approval by its legal department. Customer Beta's purchasing department has orally agreed to the sale and stated that it is highly likely that the contract will be approved the first week of Company A's next fiscal quarter.

Question: May Company A recognize the revenue in the current fiscal quarter for the sale of the product to Customer Beta when (1) the product is delivered by the end of its current fiscal quarter and (2) the final written sales agreement is executed by Customer Beta's authorized representative within a few

[2] Proved oil and gas reserves are the estimated quantities of crude oil, natural gas, and natural gas liquids which geological and engineering data demonstrate with reasonable certainty to be recoverable in future years from known reservoirs under existing *economic* and *operating* conditions. (Emphasis added.)

[1] In February 1999, the AICPA published a booklet entitled "Audit Issues in Revenue Recognition." This booklet provides an overview of the current authoritative accounting literature and auditing procedures for revenue recognition and identifies indicators of improper revenue recognition.

[2] Concepts Statement 5, paragraphs 83–84; ARB 43, Chapter 1A, paragraph 1; Opinion 10, paragraph 12. The citations provided herein are not intended to present the complete population of citations where a particular criterion is relevant. Rather, the citations are intended to provide the reader with additional reference material.

[3] Concepts Statement 3, Qualitative Characteristics of Accounting Information, paragraph 63 states "Representational faithfulness is correspondence or agreement between a measure or description and the phenomenon it purports to represent." The staff believes that evidence of an exchange arrangement must exist to determine if the accounting treatment represents faithfully the transaction. See also SOP 97–2, paragraph 8. The use of the term "arrangement" in this SAB is meant to identify the final understanding between the parties as to the specific nature and terms of the agreed-upon transaction.

[4] Concepts Statement 5, paragraph 84(a), (b), and (d). Revenue should not be recognized until the seller has substantially accomplished what it must do pursuant to the terms of the arrangement, which usually occurs upon delivery or performance of the services.

[5] Concepts Statement 5, paragraph 83(a); Statement 48, paragraph 6(a); SOP 97–2, paragraph 8. SOP 97–2 defines a "fixed fee" as a "fee required to be paid at a set amount that is not subject to refund or adjustment. A fixed fee includes amounts designated as minimum royalties." Paragraphs 26–33 of SOP 97–2 discuss how to apply the fixed or determinable fee criterion in software transactions. The staff believes that the guidance in paragraphs 26 and 30–33 is appropriate for other sales transactions where authoritative guidance does not otherwise exist. The staff notes that paragraphs 27 through 29 specifically consider software transactions, however, the staff believes that guidance should be considered in other sales transactions in which the risk of technological obsolescence is high.

[6] ARB 43, Chapter 1A, paragraph 1 and Opinion 10, paragraph 12. See also Concepts Statement 5, paragraph 84(g) and SOP 97–2, paragraph 8.

days after the end of the current fiscal quarter?

Interpretive Response: No. Generally the staff believes that, in view of Company A's business practice of requiring a written sales agreement for this class of customer, persuasive evidence of an arrangement would require a final agreement that has been executed by the properly authorized personnel of the customer. In the staff's view, Customer Beta's execution of the sales agreement after the end of the quarter causes the transaction to be considered a transaction of the subsequent period.[1] Further, if an arrangement is subject to subsequent approval (*e.g.*, by the management committee or board of directors) or execution of another agreement, revenue recognition would be inappropriate until that subsequent approval or agreement is complete.

Customary business practices and processes for documenting sales transactions vary among companies and industries. Business practices and processes may also vary within individual companies (*e.g.*, based on the class of customer, nature of product or service, or other distinguishable factors). If a company does not have a standard or customary business practice of relying on written contracts to document a sales arrangement, it usually would be expected to have other forms of written or electronic evidence to document the transaction. For example, a company may not use written contracts but instead may rely on binding purchase orders from third parties or on-line authorizations that include the terms of the sale and that are binding on the customer. In that situation, that documentation could represent persuasive evidence of an arrangement.

The staff is aware that sometimes a customer and seller enter into "side" agreements to a master contract that effectively amend the master contract. Registrants should ensure that appropriate policies, procedures, and internal controls exist and are properly documented so as to provide reasonable assurances that sales transactions, including those affected by side agreements, are properly accounted for in accordance with GAAP and to ensure compliance with Section 13 of the Securities Exchange Act of 1934 (*i.e.*, the Foreign Corrupt Practices Act). Side agreements could include cancellation, termination, or other provisions that affect revenue recognition. The existence of a subsequently executed side agreement may be an indicator that the original agreement was not final and revenue recognition was not appropriate.

Question 2

Facts: Company Z enters into an arrangement with Customer A to deliver Company Z's products to Customer A on a consignment basis. Pursuant to the terms of the arrangement, Customer A is a consignee, and title to the products does not pass from Company Z to Customer A until Customer A consumes the products in its operations. Company Z delivers product to Customer A under the terms of their arrangement.

Question: May Company Z recognize revenue upon delivery of its product to Customer A?

Interpretive Response: No. Products delivered to a consignee pursuant to a consignment arrangement are not sales and do not qualify for revenue recognition until a sale occurs. The staff believes that revenue recognition is not appropriate because the seller retains the risks and rewards of ownership of the product and title usually does not pass to the consignee.

Other situations may exist where title to delivered products passes to a buyer, but the substance of the transaction is that of a consignment or a financing. Such arrangements require a careful analysis of the facts and circumstances of the transaction, as well as an understanding of the rights and obligations of the parties, and the seller's customary business practices in such arrangements. The staff believes that the presence of one or more of the following characteristics in a transaction precludes revenue recognition even if title to the product has passed to the buyer:

1. The buyer has the right to return the product and:

(a) The buyer does not pay the seller at the time of sale, and the buyer is not obligated to pay the seller at a specified date or dates.[2]

(b) the buyer does not pay the seller at the time of sale but rather is obligated to pay at a specified date or dates, and the buyer's obligation to pay is contractually or implicitly excused until the buyer resells the product or subsequently consumes or uses the product,[3]

(c) the buyer's obligation to the seller would be changed (*e.g.*, the seller would forgive the obligation or grant a refund) in the event of theft or physical destruction or damage of the product,[4]

(d) the buyer acquiring the product for resale does not have economic substance apart from that provided by the seller,[5] or

(e) the seller has significant obligations for future performance to directly bring about resale of the product by the buyer.[6]

2. The seller is required to repurchase the product (or a substantially identical product or processed goods of which the product is a component) at specified prices that are not subject to change except for fluctuations due to finance and holding costs,[7] and the amounts to be paid by the seller will be adjusted, as necessary, to cover substantially all fluctuations in costs incurred by the buyer in purchasing and holding the product (including interest).[8] The staff believes that indicators of the latter condition include:

(a) The seller provides interest-free or significantly below market financing to the buyer beyond the seller's customary sales terms and until the products are resold,

(b) the seller pays interest costs on behalf of the buyer under a third-party financing arrangement, or

(c) the seller has a practice of refunding (or intends to refund) a portion of the original sales price representative of interest expense for the period from when the buyer paid the seller until the buyer resells the product.

3. The transaction possesses the characteristics set forth in EITF Issue 95–1 and does not qualify for sales-type lease accounting.

4. The product is delivered for demonstration purposes.[9]

This list is not meant to be a checklist of all characteristics of a consignment or a financing arrangement, and other characteristics may exist. Accordingly, the staff believes that judgment is necessary in assessing whether the substance of a transaction is a consignment, a financing, or other arrangement for which revenue recognition is not appropriate. If title to

[1] AU Section 560.05.

[2] Statement 48, paragraphs 6(b)) and 22.

[3] Statement 48, paragraphs 6(b) and 22. The arrangement may not specify that payment is contingent upon subsequent resale or consumption. However, if the seller has an established business practice permitting customers to defer payment beyond the specified due date(s) until the products are resold or consumed, then the staff believes that the seller's right to receive cash representing the sales price is contingent.

[4] Statement 48, paragraph 6(c).

[5] Statement 48, paragraph 6(d).

[6] Statement 48, paragraph 6(e).

[7] Statement 49, paragraph 5(a). Paragraph 5(a) provides examples of circumstances that meet this requirement. As discussed further therein, this condition is present if (a) a resale price guarantee exists, (b) the seller has an option to purchase the product, the economic effect of which compels the seller to purchase the product, or (c) the buyer has an option whereby it can require the seller to purchase the product.

[8] Statement 49, paragraph 5(b).

[9] See SOP 97–2, paragraph 25.

the goods has passed but the substance of the arrangement is not a sale, the consigned inventory should be reported separately from other inventory in the consignor's financial statements as "inventory consigned to others" or another appropriate caption.

3. Delivery and Performance

Question 3

Facts: Company A receives purchase orders for products it manufactures. At the end of its fiscal quarters, customers may not yet be ready to take delivery of the products for various reasons. These reasons may include, but are not limited to, a lack of available space for inventory, having more than sufficient inventory in their distribution channel, or delays in customers' production schedules.

Question: May Company A recognize revenue for the sale of its products once it has completed manufacturing if it segregates the inventory of the products in its own warehouse from its own products?

May Company A recognize revenue for the sale if it ships the products to a third-party warehouse but (1) Company A retains title to the product and (2) payment by the customer is dependent upon ultimate delivery to a customer-specified site?

Interpretative Response: Generally, no. The staff believes that delivery generally is not considered to have occurred unless the customer has taken title and assumed the risks and rewards of ownership of the products specified in the customer's purchase order or sales agreement. Typically this occurs when a product is delivered to the customer's delivery site (if the terms of the sale are "FOB destination") or when a product is shipped to the customer (if the terms are "FOB shipping point").

The Commission has set forth criteria to be met in order to recognize revenue when delivery has not occurred.[1] These include:

1. The risks of ownership must have passed to the buyer;

2. The customer must have made a fixed commitment to purchase the goods, preferably in written documentation;

3. The buyer, not the seller, must request that the transaction be on a bill and hold basis.[2] The buyer must have a substantial business purpose for ordering the goods on a bill and hold basis;

4. There must be a fixed schedule for delivery of the goods. The date for delivery must be reasonable and must be consistent with the buyer's business purpose (*e.g.*, storage periods are customary in the industry);

5. The seller must not have retained any specific performance obligations such that the earning process is not complete;

6. The ordered goods must have been segregated from the seller's inventory and not be subject to being used to fill other orders; and

7. The equipment [product] must be complete and ready for shipment.

The above listed conditions are the important conceptual criteria which should be used in evaluating any purported bill and hold sale. This listing is not intended as a checklist. In some circumstances, a transaction may meet all factors listed above but not meet the requirements for revenue recognition. The Commission also has noted that in applying the above criteria to a purported bill and hold sale, the individuals responsible for the preparation and filing of financial statements also should consider the following factors:[3]

1. The date by which the seller expects payment, and whether the seller has modified its normal billing and credit terms for this buyer;[4]

2. The seller's past experiences with and pattern of bill and hold transactions;

3. Whether the buyer has the expected risk of loss in the event of a decline in the market value of goods;

4. Whether the seller's custodial risks are insurable and insured;

5. Whether extended procedures are necessary in order to assure that there are no exceptions to the buyer's commitment to accept and pay for the goods sold (*i.e.*, that the business reasons for the bill and hold have not introduced a contingency to the buyer's commitment).

Delivery generally is not considered to have occurred unless the product has been delivered to the customer's place of business or another site specified by the customer. If the customer specifies an intermediate site but a substantial portion of the sales price is not payable until delivery is made to a final site, then revenue should not be recognized until final delivery has occurred.[5]

After delivery of a product or performance of a service, if uncertainty exists about customer acceptance, revenue should not be recognized until acceptance occurs.[6] Customer acceptance provisions may be included in a contract, among other reasons, to enforce a customer's rights to (1) test the delivered product, (2) require the seller to perform additional services subsequent to delivery of an initial product or performance of an initial service (*e.g.*, a seller is required to install or activate delivered equipment), or (3) identify other work necessary to be done before accepting the product. The staff presumes that such contractual customer acceptance provisions are substantive, bargained-for terms of an arrangement. Accordingly, when such contractual customer acceptance provisions exist, the staff generally believes that the seller should not recognize revenue until customer acceptance occurs or the acceptance provisions lapse.

A seller should substantially complete or fulfill the terms specified in the arrangement in order for delivery or performance to have occurred.[7] When applying the substantially complete notion, the staff believes that only inconsequential or perfunctory actions may remain incomplete such that the failure to complete the actions would not result in the customer receiving a refund or rejecting the delivered products or services performed to date. In addition, the seller should have a demonstrated history of completing the remaining tasks in a timely manner and reliably estimating the remaining costs. If revenue is recognized upon substantial completion of the arrangement, all remaining costs of performance or delivery should be accrued.

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[1] See In the Matter of Stewart Parness, AAER Release 108 (August 5, 1986); *SEC* v. *Bollinger Industries, Inc., et al*, Lit. Rel 15093 (September 30, 1996); In the Matter of Laser Photonics, Inc., AAER 971 (September 30, 1997); In the Matter of Cypress Bioscience, Inc., AAER 817 (September 19, 1996). Also see Concepts Statement 5, paragraph 84(a) and SOP 97–2, paragraph 22.

[2] Such requests typically should be set forth in writing by the buyer.

[3] See Note 1, *supra*.

[4] Such individuals should consider whether Opinoin 21 pertaining to the need for discounting the related receivable, is applicable. Opinion 21, paragraph 3(a), indicates that the requirements of that Opinion to record receivables at a discounted value are not intended to apply to "receivables and payables arising from transactions with customers or suppliers in the normal course of business which are due in customary trade terms not exceeding approximately one year" (emphasis added).

[5] SOP 97–2, paragraph 22.

[6] SOP 97–2 paragraph 20. Also, Concepts Statement 5, paragraph 83(b) states "revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues." If an arrangement expressly requires customer acceptance, the staff generally believes that customer acceptance should occur before the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues, especially when the seller is obligated to perform additional steps.

[7] Concepts Statement 5, paragraph 83(b) states that "revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled the benefits represented by the revenues."

If an arrangement (*i.e.*, outside the scope of SOP 81–1) requires the delivery or performance of multiple deliverables, or "elements," the existence of undelivered elements may affect the conclusion as to whether revenue for a delivered element may be recognized as discussed in EITF Issue 00–21.[8]

In licensing and similar arrangements (*e.g.*, licenses of motion pictures, software, technology, and other intangibles), the staff believes that delivery does not occur for revenue recognition purposes until the license term begins.[9] Accordingly, if a licensed product or technology is physically delivered to the customer, but the license term has not yet begun, revenue should not be recognized prior to inception of the license term. Upon inception of the license term, revenue should be recognized in a manner consistent with the nature of the transaction and the earnings process.

Question 4

Facts: Company R is a retailer that offers "layaway" sales to its customers. Company R retains the merchandise, sets it aside in its inventory, and collects a cash deposit from the customer. Although Company R may set a time period within which the customer must finalize the purchase, Company R does not require the customer to enter into an installment note or other fixed payment commitment or agreement when the initial deposit is received. The merchandise generally is not released to the customer until the customer pays the full purchase price. In the event that the customer fails to pay the remaining purchase price, the customer forfeits its cash deposit. In the event the merchandise is lost, damaged, or destroyed, Company R either must refund the cash deposit to the customer or provide replacement merchandise.

Question: In the staff's view, when may Company R recognize revenue for merchandise sold under its layaway program?

Interpretive Response: Provided that the other criteria for revenue recognition are met, the staff believes that Company R should recognize revenue from sales made under its layaway program upon delivery of the merchandise to the customer. Until then, the amount of cash received should be recognized as a liability entitled such as "deposits received from customers for layaway sales" or a similarly descriptive caption. Because Company R retains the risks of ownership of the merchandise, receives only a deposit from the customer, and does not have an enforceable right to the remainder of the purchase price, the staff would object to Company R recognizing any revenue upon receipt of the cash deposit. This is consistent with item two (2) in the Commission's criteria for bill-and-hold transactions which states that "the customer must have made a fixed commitment to purchase the goods."

Question 5

Facts: Registrants may negotiate arrangements pursuant to which they may receive nonrefundable fees upon entering into arrangements or on certain specified dates. The fees may ostensibly be received for conveyance of a license or other intangible right or for delivery of particular products or services. Various business factors may influence how the registrant and customer structure the payment terms. For example, in exchange for a greater up-front fee for an intangible right, the registrant may be willing to receive lower unit prices for related products to be delivered in the future. In some circumstances, the right, product, or service conveyed in conjunction with the nonrefundable fee has no utility to the purchaser separate and independent of the registrant's performance of the other elements of the arrangement. Therefore, in the absence of the registrant's continuing involvement under the arrangement, the customer would not have paid the fee. Examples of this type of arrangement include the following:

- A registrant sells a lifetime membership in a health club. After paying a nonrefundable "initiation fee," the customer is permitted to use the health club indefinitely, so long as the customer also pays an additional usage fee each month. The monthly usage fees collected from all customers are adequate to cover the operating costs of the health club.
- A registrant in the biotechnology industry agrees to provide research and development activities for a customer for a specified term. The customer needs to use certain technology owned by the registrant for use in the research and development activities. The technology is not sold or licensed separately without the research and development activities. Under the terms of the arrangement, the customer is required to pay a nonrefundable "technology access fee" in addition to periodic payments for research and development activities over the term of the contract.
- A registrant requires a customer to pay a nonrefundable "activation fee" when entering into an arrangement to provide telecommunications services. The terms of the arrangement require the customer to pay a monthly usage fee that is adequate to recover the registrant's operating costs. The costs incurred to activate the telecommunications service are nominal.

Question: When should the revenue relating to nonrefundable, up-front fees in these types of arrangements be recognized?

Interpretive Response: The staff believes that registrants should consider the specific facts and circumstances to determine the appropriate accounting for nonrefundable, up-front fees. Unless the up-front fee is in exchange for products delivered or services performed that represent the culmination of a separate earnings process,[10] the deferral of revenue is appropriate.

[8] Paragraph 4 of EITF Issue 00–21 describes the scope of that consensus. As of the January 23, 2003 of the EITF (the EITF subsequently established a working group to revisit the scope of the consensus; accordingly, registrants should consult the current EITF Abstract for the final resolution of the scope of the consensus), paragraph 4 states that "This Issue applies to all deliverables (that is, products, services, or rights to use assets) within contractually binding arrangements (whether written, oral, or implied, and hereinafter referred to as "arrangements;") in all industries under which a vendor will perform multiple revenue-generating activities, except as follows:

a. To the extent that a deliverables(s) in an arrangement is within the scope of other existing higher-level authoritative literature that provides guidance on whether and/or how to separate multiple-deliverable arrangements and how to allocate value among those separate units of accounting (including, but not limited to, Statements 13, 45, and 66; Technical Bulletin 90–1; and SOPs 81–1, 997–2, and 00–2), that deliverables(s) should be accounted for in accordance with that literature. However, if that arrangement also includes a deliverable(s) that is *not* within the scope of such higher-level literature, this Issue should be applied to determine (1) whether that deliverable(s) represents a separate unit of accounting from the deliverable(s) that is within the scope of other higher-level literature and, if so, (2) how to allocate the arrangement consideration to the separate units of accounting, unless the higher-level literature provides guidance with respect to (1) or (2), above, for the deliverable(s) that is not otherwise in the scope of the higher-level literature. The literature to be applied first is that which is applicable to the first delivered item(s).

b. Arrangements that include vendor offers to a customer for either (1) free or discounted products or services that will be delivered (either by the vendor or by another unrelated entity) at a future date if the customer completes a specified cumulative level of revenue transactions with the vendor or remains a customer of the vendor for a specified time period or (2) a rebate or refund of a determinable cash amount if the customer completes a specified cumulative level of revenue transactions with the vendor or remains a customer of the vendor for a specified time period, are excluded from the scope of this Issue. Additionally, arrangements involving the sale of award credits by broad-based loyalty program operators are excluded from the scope of this Issue."

[9] SOP 00–2, paragraph 7.

[10] See Concepts Statement 5, footnote 51, for a description of the "earning process."

In the situations described above, the staff does not view the activities completed by the registrants (*i.e.*, selling the membership, signing the contract, or enrolling the customer or activating telecommunications services) as discrete earnings events.[11] The terms, conditions, and amounts of these fees typically are negotiated in conjunction with the pricing of all the elements of the arrangement, and the customer would ascribe a significantly lower, and perhaps no, value to elements ostensibly associated with the up-front fee in the absence of the registrant's performance of other contract elements. The fact that the registrants do not sell the initial rights, products, or services separately (*i.e.*, without the registrants' continuing involvement) supports the staff's view. The staff believes that the customers are purchasing the on-going rights, products, or services being provided through the registrants' continuing involvement. Further, the staff believes that the earnings process is completed by performing under the terms of the arrangements, not simply by originating a revenue-generating arrangement.

Supply or service transactions may involve the charge of a nonrefundable initial fee with subsequent periodic payments for future products or services. The initial fees may, in substance, be wholly or partly an advance payment for future products or services. In the examples above, the on-going rights or services being provided or products being delivered are essential to the customers receiving the expected benefit of the up-front payment. Therefore, the up-front fee and the continuing performance obligation related to the services to be provided or products to be delivered are assessed as an integrated package. In such circumstances, the staff believes that up-front fees, even if nonrefundable, are earned as the products and/or services are delivered and/or performed over the term of the arrangement or the expected period of performance[12] and generally should be deferred and recognized systematically over the periods that the fees are earned.[13]

Question 6

Facts: Company A provides its customers with activity tracking or similar services (*e.g.*, tracking of property tax payment activity, sending delinquency letters on overdue accounts, etc.) for a ten-year period. Company A requires customers to prepay for all the services for the term specified in the arrangement. The on-going services to be provided are generally automated after the initial customer set-up. At the outset of the arrangement, Company A performs set-up procedures to facilitate delivery of its on-going services to the customers.[14] Such procedures consist primarily of establishing the necessary records and files in Company A's pre-existing computer systems in order to provide the services. Once the initial customer set-up activities are complete, Company A provides its services in accordance with the arrangement. Company A is not required to refund any portion of the fee if the customer terminates the services or does not utilize all of the services to which it is entitled. However, Company A is required to provide a refund if Company A terminates the arrangement early. Assume Company A's activities are not within the scope of Statement 91.

Question: When should Company A recognize the service revenue?

Interpretive Response: The staff believes that, provided all other revenue recognition criteria are met, service revenue should be recognized on a straight-line basis, unless evidence suggests that the revenue is earned or obligations are fulfilled in a different pattern, over the contractual term of the arrangement or the expected period during which those specified services will be performed,[15] whichever is longer. In this case, the customer contracted for the on-going activity tracking service, not for the set-up activities. The staff notes that the customer could not, and would not, separately purchase the set-up services without the on-going services. The services specified in the arrangement are performed continuously over the contractual term of the arrangement (and any subsequent renewals). Therefore, the staff believes that Company A should recognize revenue on a straight-line basis, unless evidence suggests that the revenue is earned or obligations are fulfilled in a different pattern, over the contractual term of the arrangement or the expected period during which those specified services will be performed, whichever is longer.

In this situation, the staff would object to Company A recognizing revenue in proportion to the costs incurred because the set-up costs incurred bear no direct relationship to the performance of services specified in the arrangement. The staff also believes that it is inappropriate to recognize the entire amount of the prepayment as revenue at the outset of the arrangement by accruing the remaining costs because the services required by the contract have not been performed.

4. Fixed or Determinable Sales Price

A company's contracts may include customer cancellation or termination clauses. Cancellation or termination provisions may be indicative of a demonstration period or an otherwise incomplete transaction. Examples of transactions that financial management and auditors should be aware of and where such provisions may exist include "side" agreements and significant transactions with unusual terms and conditions. These contractual provisions raise questions as to whether the sales price is fixed or determinable. The sales price in arrangements that are cancelable by the customer are neither fixed nor determinable until the cancellation privileges lapse.[1] If the cancellation privileges expire ratably over a stated contractual term, the sales price is considered to become determinable ratably over the stated term.[2] Short-term rights of return, such as thirty-day money-back guarantees, and other customary rights to return products are not considered to be cancellation privileges, but should be

[11] In a similar situation, lenders may collect nonrefundable loan origination fees in connection with lending activities. The FASB concluded in Statement 91 that loan origination is not a separate revenue-producing activity of a lender, and therefore, those nonrefundable fees collected at the outset of the loan arrangement are not recognized as revenue upon receipt but are deferred and recognized over the life of the loan (paragraphs 5 and 37).

[12] The revenue recognition period should extend beyond the initial contractual period if the relationship with the customer is expected to extend beyond the initial term and the customer continues to benefit from the payment of the up-front fee (*e.g.*, if subsequent renewals are priced at a bargain to the initial up-front fee).

[13] A systematic method would be on a straight-line basis, unless evidence suggests that revenue is earned or obligations are fulfilled in a different pattern, in which case that pattern should be followed.

[14] Footnote 1 of SOP 98–5 states that "this SOP does not address the financial reporting of costs incurred related to ongoing customer acquisition, such as policy acquisition costs in Statement 60 * * * and loan origination costs in Statement 91 * * *. The SOP addresses the more substantive one-time efforts to establish business with an entirely new class of customers (for example, a manufacturer who does all of its business with retailers attempts to sell merchandise directly to the public)." As such, the set-up costs incurred in this example are not within the scope of SOP 98–5. The staff believes that the incremental direct costs (Statement 91 provides an analogous definition) incurred related to the acquisition or origination of a customer contract, unless specifically provided for in the authoritative literature, should be accounted for in accordance with paragraph 4 of Technical Bulletin 90–1 or paragraph 5 of Statement 91.

[15] *See* Note 12, *supra*.

[1] SOP 97–2, paragraph 31.

[2] *Ibid.*

accounted for in accordance with Statement 48.[3]

Question 7

Facts: Company M is a discount retailer. It generates revenue from annual membership fees it charges customers to shop at its stores and from the sale of products at a discount price to those customers. The membership arrangements with retail customers require the customer to pay the entire membership fee (*e.g.*, $35) at the outset of the arrangement. However, the customer has the unilateral right to cancel the arrangement at any time during its term and receive a full refund of the initial fee. Based on historical data collected over time for a large number of homogeneous transactions, Company M estimates that approximately 40% of the customers will request a refund before the end of the membership contract term. Company M's data for the past five years indicates that significant variations between actual and estimated cancellations have not occurred, and Company M does not expect significant variations to occur in the foreseeable future.

Question: May Company M recognize in earnings the revenue for the membership fees and accrue the costs to provide membership services at the outset of the arrangement?

Interpretive Response: No. In the staff's view, it would be inappropriate for Company M to recognize the membership fees as earned revenue upon billing or receipt of the initial fee with a corresponding accrual for estimated costs to provide the membership services. This conclusion is based on Company M's remaining and unfulfilled contractual obligation to perform services (*i.e.*, make available and offer products for sale at a discounted price) throughout the membership period. Therefore, the earnings process, irrespective of whether a cancellation clause exists, is not complete.

In addition, the ability of the member to receive a full refund of the membership fee up to the last day of the membership term raises an uncertainty as to whether the fee is fixed or determinable at any point before the end of the term. Generally, the staff believes that a sales price is not fixed or determinable when a customer has the unilateral right to terminate or cancel the contract and receive a cash refund. A sales price or fee that is variable until the occurrence of future events (other than product returns that are within the scope of Statement 48) generally is not fixed or determinable until the future event occurs. The revenue from such transactions should not be recognized in earnings until the sales price or fee becomes fixed or determinable. Moreover, revenue should not be recognized in earnings by assessing the probability that significant, but unfulfilled, terms of a contract will be fulfilled at some point in the future. Accordingly, the revenue from such transactions should not be recognized in earnings prior to the refund privileges expiring. The amounts received from customers or subscribers (*i.e.*, the $35 fee mentioned above) should be credited to a monetary liability account such as "customers" refundable fees."

The staff believes that if a customer has the unilateral right to receive both (1) the seller's substantial performance under an arrangement (*e.g.*, providing services or delivering product) and (2) a cash refund of prepaid fees, then the prepaid fees should be accounted for as a monetary liability. In consideration of whether the monetary liability can be derecognized, Statement 140 provides that liabilities may be derecognized only if (1) the debtor pays the creditor and is relieved of its obligation for the liability (paying the creditor includes delivery of cash, other financial assets, goods, or services or reacquisition by the debtor of its outstanding debt securities) or (2) the debtor is legally released from being the primary obligor under the liability.[4] If a customer has the unilateral right to receive both (1) the seller's substantial performance under the arrangement and (2) a cash refund of prepaid fees, then the refund obligation is not relieved upon performance of the service or delivery of the products. Rather, the seller's refund obligation is relieved only upon refunding the cash or expiration of the refund privilege.

Some have argued that there may be a limited exception to the general rule that revenue from membership or other service transaction fees should not be recognized in earnings prior to the refund privileges expiring. Despite the fact that Statement 48 expressly does not apply to the accounting for service revenue if part or all of the service fee is refundable under cancellation privileges granted to the buyer,[5] they believe that in certain circumstances a potential refund of a membership fee may be seen as being similar to a right of return of products under Statement 48. They argue that revenue from membership fees, net of estimated refunds, may be recognized ratably over the period the services are performed whenever pertinent conditions of Statement 48 are met, namely, there is a large population of transactions that grant customers the same unilateral termination or cancellation rights and reasonable estimates can be made of how many customers likely will exercise those rights.

The staff believes that, because service arrangements are specifically excluded from the scope of Statement 48, the most direct authoritative literature to be applied to the extinguishment of obligations under such contracts is Statement 140. As noted above, because the refund privilege extends to the end of the contract term irrespective of the amount of the service performed, Statement 140 indicates that the liability would not be extinguished (and therefore no revenue would be recognized in earnings) until the cancellation or termination and related refund privileges expire. Nonetheless, the staff recognizes that over the years the accounting for membership refunds evolved based on analogy to Statement 48 and that practice did not change when Statement 140 became effective. Reasonable people held, and continue to hold, different views about the application of the accounting literature. For the staff to prohibit such accounting in this SAB may result in significant change in practice that, in these particular circumstances, may be more appropriately addressed in a formal rulemaking or standards-setting project.

Pending further action in this area by the FASB, the staff will not object to the recognition of refundable membership fees, net of estimated refunds, as earned revenue over the membership term in the limited circumstances where all of the following criteria have been met:[6]

- The estimates of terminations or cancellations and refunded revenues are being made for a large pool of homogeneous items (*e.g.*, membership or other service transactions with the same characteristics such as terms, periods, class of customers, nature of service, etc.).
- Reliable estimates of the expected refunds can be made on a timely basis.[7] Either of the following two items would be considered indicative of an inability to make reliable estimates: (1) recurring,

[3] *Ibid.*

[4] Statement 140, paragraph 16.

[5] Statement 48, paragraph 4.

[6] The staff will question further analogies to the guidance in Statement 48 for transactions expressly excluded from its scope.

[7] Reliability is defined in Concepts Statement 2 as "the quality of information that assures that information is reasonably free from error and bias and faithfully represents what it purports to represent." Paragraph 63 of Concepts Statement 5 reiterates the definition of reliability, requiring that "the information is representationally faithful, verifiable, and neutral."

significant differences between actual experience and estimated cancellation or termination rates (*e.g.*, an actual cancellation rate of 40% versus an estimated rate of 25%) even if the impact of the difference on the amount of estimated refunds is not material to the consolidated financial statements[8] or (2) recurring variances between the actual and estimated amount of refunds that are material to either revenue or net income in quarterly or annual financial statements. In addition, the staff believes that an estimate, for purposes of meeting this criterion, would not be reliable unless it is remote[9] that material adjustments (both individually and in the aggregate) to previously recognized revenue would be required. The staff presumes that reliable estimates cannot be made if the customer's termination or cancellation and refund privileges exceed one year.

- There is a sufficient company-specific historical basis upon which to estimate the refunds,[10] and the company believes that such historical experience is predictive of future events. In assessing these items, the staff believes that estimates of future refunds should take into consideration, among other things, such factors as historical experience by service type and class of customer, changing trends in historical experience and the basis thereof (*e.g.*, economic conditions), the impact or introduction of competing services or products, and changes in the customer's "accessibility" to the refund (*i.e.*, how easy it is for customers to obtain the refund).
- The amount of the membership fee specified in the agreement at the outset of the arrangement is fixed, other than the customer's right to request a refund.

If Company M does not meet all of the foregoing criteria, the staff believes that Company M should not recognize in earnings any revenue for the membership fee until the cancellation privileges and refund rights expire.

If revenue is recognized in earnings over the membership period pursuant to the above criteria, the initial amounts received from customer or subscribers (*i.e.*, the $35 fee mentioned above) should be allocated to two liability accounts. The amount of the fee representing estimated refunds should be credited to a monetary liability account, such as "customers' refundable fees," and the remaining amount of the fee representing unearned revenue should be credited to a nonmonetary liability account, such as "unearned revenues." For each income statement presented, registrants should disclose in the footnotes to the financial statements the amounts of (1) the unearned revenue and (2) refund obligations as of the beginning of each period, the amount of cash received from customers, the amount of revenue recognized in earnings, the amount of refunds paid, other adjustments (with an explanation thereof), and the ending balance of (1) unearned revenue and (2) refund obligations.

If revenue is recognized in earnings over the membership period pursuant to the above criteria, the staff believes that adjustments for changes in estimated refunds should be recorded using a retrospective approach whereby the unearned revenue and refund obligations are remeasured and adjusted at each balance sheet date with the offset being recorded as earned revenue.

Companies offering memberships often distribute membership packets describing and discussing the terms, conditions, and benefits of membership. Packets may include vouchers, for example, that provide new members with discounts or other benefits. The costs associated with the vouchers should be expensed when distributed. Advertising costs to solicit members should be accounted for in accordance with SOP 93–7. Incremental direct costs incurred in connection with enrolling customers (*e.g.*, commissions paid to agents) should be accounted for as follows: (1) If revenue is deferred until the cancellation or termination privileges expire, incremental direct costs should be either (a) charged to expense when incurred if the costs are not refundable to the company in the event the customer obtains a refund of the membership fee. or (b) if the costs are refundable to the company in the event the customer obtains a refund of the membership fee, recorded as an asset until the earlier of termination or cancellation or refund; or (2) if revenue, net of estimated refunds, is recognized in earnings over the membership period, a like percentage of incremental direct costs should be deferred and recognized in earnings in the same pattern as revenue is recognized, and the remaining portion should be either (a) charged to expense when incurred if the costs are not refundable to the company in the event the customer obtains a refund of the membership fee, or (b) if the costs are refundable to the company in the event the customer obtains a refund of the membership fee, recorded as an asset until the refund occurs.[11] All costs other than incremental direct costs (*e.g.*, indirect costs) should be expensed as incurred.

Question 8

Facts: Company A owns and leases retail space to retailers. Company A (lessor) renews a lease with a customer (lessee) that is classified as an operating lease. The lease term is one year and provides that the lease payments are $1.2 million, payable in equal monthly installments on the first day of each month, plus one percent of the lessee's net sales in excess of $25 million if the net sales exceed $25 million during the lease term (*i.e.*, contingent rental). The lessee has historically experienced annual net sales in excess of $25 million in the particular space being leased, and it is probable that the lessee will generate in excess of $25 million net sales during the term of the lease.

Question: In the staff's view, should the lessor recognize any rental income attributable to the one percent of the lessee's net sales exceeding $25 million before the lessee actually achieves the $25 million net sales threshold?

Interpretive Response: No. The staff believes that contingent rental income "accrues" (*i.e.*, it should be recognized as revenue) when the changes in the factor(s) on which the contingent lease payments is (are) based actually occur.[12]

Statement 13 paragraph 19(b) states that lessors should account for operating leases as follows: "Rent shall be reported in income over the lease term as it becomes receivable according to the provisions of the lease. However, if the rentals vary from a straight-line basis, the income shall be recognized on a straight-line basis unless another systematic and rational basis is more

[8] For example, if an estimate of the expected cancellation rate varies from the actual cancellation rate by 100% but the dollar amount of the error is immaterial to the consolidated financial statements, some would argue that the estimate could still be viewed as reliable. The staff disagrees with that argument.

[9] The term "remote" is used here with the same definition as used in Statement 5.

[10] Paragraph 8 of Statement 48 notes various factors that may impair the ability to make a reasonable estimate of returns, including the lack of sufficient historical experience. The staff typically expects that the historical experience be based on the particular registrant's historical experience for a service and/or class of customer. In general, the staff typically expects a start-up company, a company introducing new services, or a company introducing services to a new class of customer to have at least two years of experience to be able to make reasonable and reliable estimates.

[11] Statement 91, paragraph 5 and Technical Bulletin 90–1, paragraph 4 both provide for the deferral of incremental direct costs associated with acquiring a revenue-producing contract. Even though the revenue discussed in this example is refundable, if a registrant meets the aforementioned criteria for revenue recognition over the membership period, the staff would analogize to this guidance. However, if neither a nonrefundable contract nor a reliable basis for estimating net cash inflows under refundable contracts exists to provide a basis for recovery of incremental direct costs, the staff believes that such costs should be expensed as incurred. *See* Note 14 of SAB Topic 13.A.3.

[12] Lessees should follow the guidance established in EITF Issue 98–9.

representative of the time pattern in which use benefit from the leased property is diminished, in which case that basis shall be used."

Statement 29 amended Statement 13 and clarifies that "lease payments that depend on a factor that does not exist or is not measurable at the inception of the lease, such as future sales volume, would be contingent rentals in their entirety and, accordingly, would be excluded from minimum lease payments and included in the determination of income as they accrue." [Summary] Paragraph 17 of Statement 29 provides the following example of determining contingent rentals:

> A lease agreement for retail store space could stipulate a monthly base rental of $200 and a monthly supplemental rental of one-fourth of one percent of monthly sales volume during the lease term. Even if the lease agreement is a renewal for store space that had averaged monthly sales of $25,000 for the past 2 years, minimum lease payments would include only the $200 monthly base rental; the supplemental rental is a contingent rental that is excluded from minimum lease payments. The future sales for the lease term do not exist at the inception of the lease, and future rentals would be limited to $200 per month if the store were subsequently closed and no sales were made thereafter.

Technical Bulletin 85–3 addresses whether it is appropriate for lessors in operating leases to recognize scheduled rent increases on a basis other than as required in Statement 13, paragraph 19(b). Paragraph 2 of Technical Bulletin 85–3 states "using factors such as the time value of money, anticipated inflation, or *expected future revenues* [emphasis added] to allocate scheduled rent increases is inappropriate because these factors do not relate to the *time pattern* of the physical usage of the leased property. However, such factors may affect the periodic reported rental income or expense if the lease agreement involves contingent rentals, which are excluded from minimum lease payments and accounted for separately under Statement 13, as amended by Statement 29." In developing the basis for why scheduled rent increases should be recognized on a straight-line basis, the FASB distinguishes the accounting for scheduled rent increases from contingent rentals. Paragraph 13 states "There is an important substantive difference between lease rentals that are contingent upon some specified future event and scheduled rent increases that are unaffected by future events; the accounting under Statement 13 reflects that difference. If the lessor and lessee eliminate the risk of variable payments by agreeing to scheduled rent increases, the accounting should reflect those different circumstances."

The example provided in Statement 29 implies that contingent rental income in leases classified as sales-type or direct-financing leases becomes "accruable" when the changes in the factors on which the contingent lease payments are based actually occur. Technical Bulletin 85–3 indicates that contingent rental income in operating leases should not be recognized in a manner consistent with scheduled rent increases (*i.e.*, on a straight-line basis over the lease term or another systematic and rational allocation basis if it is more representative of the time pattern in which the leased property is physically employed) because the risk of variable payments inherent in contingent rentals is substantively different than scheduled rent increases. The staff believes that the reasoning in Technical Bulletin 85–3 supports the conclusion that the risks inherent in variable payments associated with contingent rentals should be reflected in financial statements on a basis different than rental payments that adjust on a scheduled basis and, therefore, operating lease income associated with contingent rents would not be recognized as time passes or as the leased property is physically employed. Furthermore, prior to the lessee's achievement of the target upon which contingent rentals are based, the lessor has no legal claims on the contingent amounts. Consequently, the staff believes that it is inappropriate to anticipate changes in the factors on which contingent rental income in operating leases is based and recognize rental income prior to the resolution of the lease contingencies.

Because Company A's contingent rental income is based upon whether the customer achieves net sales of $25 million, the contingent rentals, which may not materialize, should not be recognized until the customer's net sales actually exceed $25 million. Once the $25 million threshold is met, Company A would recognize the contingent rental income as it becomes accruable, in this case, as the customer recognizes net sales. The staff does not believe that it is appropriate to recognize revenue based upon the probability of a factor being achieved. The contingent revenue should be recorded in the period in which the contingency is resolved.

Question 9

Facts: Paragraph 8 of Statement 48 lists a number of factors that may impair the ability to make a reasonable estimate of product returns in sales transactions when a right of return exists.[13] The paragraph concludes by stating "other factors may preclude a reasonable estimate."

Question: What "other factors," in addition to those listed in paragraph 8 of Statement 48, has the staff identified that may preclude a registrant from making a reasonable and reliable estimate of product returns?

Interpretive Response: The staff believes that the following additional factors, among others, may affect or preclude the ability to make reasonable and reliable estimates of product returns: (1) Significant increases in or excess levels of inventory in a distribution channel (sometimes referred to as "channel stuffing"), (2) lack of "visibility" into or the inability to determine or observe the levels of inventory in a distribution channel and the current level of sales to end users, (3) expected introductions of new products that may result in the technological obsolescence of and larger than expected returns of current products, (4) the significance of a particular distributor to the registrant's (or a reporting segment's) business, sales and marketing, (5) the newness of a product, (6) the introduction of competitors' products with superior technology or greater expected market acceptance, and other factors that affect market demand and changing trends in that demand for the registrant's products. Registrants and their auditors should carefully analyze all factors, including trends in historical data, that may affect registrants' ability to make reasonable and reliable estimates of product returns.

The staff reminds registrants that if a transaction fails to meet all of the conditions of paragraphs 6 and 8 in Statement 48, no revenue may be recognized until those conditions are subsequently met or the return privilege has substantially expired, whichever occurs first.[14] Simply deferring recognition of the gross margin on the transaction is not appropriate.

5. Income Statement Presentation

Question 10

[13] These factors include "(a) the susceptibility of the product to significant external factors, such as technological obsolescence or changes in demand, (b) relative long periods in which a particular product may be returned, (c) absence of historical experience with similar types of sales of similar products, or inability to apply such experience because of changing circumstances, for example, changes in the selling enterprise's marketing policies and relationships with its customers, and (d) absence of a large volume of relatively homogeneous transactions."

[14] Statement 48, paragraph 6.

Facts: Company A operates an internet site from which it will sell Company T's products. Customers place their orders for the product by making a product selection directly from the internet site and providing a credit card number for the payment. Company A receives the order and authorization from the credit card company, and passes the order on to Company T. Company T ships the product directly to the customer. Company A does not take title to the product and has no risk of loss or other responsibility for the product. Company T is responsible for all product returns, defects, and disputed credit card charges. The product is typically sold for $175 of which Company A receives $25. In the event a credit card transaction is rejected, Company A loses its margin on the sale (*i.e.*, the $25).

Question: In the staff's view, should Company A report revenue on a gross basis as $175 along with costs of sales of $150 or on a net basis as $25, similar to a commission?

Interpretive Response: Company A should report the revenue from the product on a net basis. In assessing whether revenue should be reported gross with separate display of cost of sales to arrive at gross profit or on a net basis, the staff considers whether the registrant: [1]

1. Acts as principal in the transaction,
2. takes title to the products,
3. has risks and rewards of ownership, such as the risk of loss for collection, delivery, or returns, and
4. acts as an agent or broker (including performing services, in substance, as an agent or broker) with compensation on a commission or fee basis.[2]

If the company performs as an agent or broker without assuming the risks and rewards of ownership of the goods, sales should be reported on a net basis.

B. Disclosures

Question 1

Question: What disclosures are required with respect to the recognition of revenue?

Interpretive Response: A registrant should disclose its accounting policy for the recognition of revenue pursuant to Opinion 22. Paragraph 12 thereof states that "the disclosure should encompass important judgments as to appropriateness of principles relating to recognition of revenue * * *" Because revenue recognition generally involves some level of judgment, the staff believes that a registrant should always disclose its revenue recognition policy. If a company has different policies for different types of revenue transactions, including barter sales, the policy for each material type of transaction should be disclosed. If sales transactions have multiple elements, such as a product and service, the accounting policy should clearly state the accounting policy for each element as well as how multiple elements are determined and valued. In addition, the staff believes that changes in estimated returns recognized in accordance with Statement 48 should be disclosed, if material (*e.g.*, a change in estimate from two percent of sales to one percent of sales).

Regulation S–X requires that revenue from the sales of products, services, and other products each be separately disclosed on the face of the income statement.[1] The staff believes that costs relating to each type of revenue similarly should be reported separately on the face of the income statement.

MD&A requires a discussion of liquidity, capital resources, results of operations and other information necessary to an understanding of a registrant's financial condition, changes in financial condition and results of operations.[2] This includes unusual or infrequent transactions, known trends or uncertainties that have had, or might reasonably be expected to have, a favorable or unfavorable material effect on revenue, operating income or net income and the relationship between revenue and the costs of the revenue. Changes in revenue should not be evaluated solely in terms of volume and price changes, but should also include an analysis of the reasons and factors contributing to the increase or decrease. The Commission stated in FRR 36 that MD&A should "give investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant's financial condition and results of operations, with a particular emphasis on the registrant's prospects for the future." [3] Examples of such revenue transactions or events that the staff has asked to be disclosed and discussed in accordance with FRR 36 are:

- Shipments of product at the end of a reporting period that significantly reduce customer backlog and that reasonably might be expected to result in lower shipments and revenue in the next period.
- Granting of extended payment terms that will result in a longer collection period for accounts receivable (regardless of whether revenue has been recognized) and slower cash inflows from operations, and the effect on liquidity and capital resources. (The fair value of trade receivables should be disclosed in the footnotes to the financial statements when the fair value does not approximate the carrying amount.) [4]
- Changing trends in shipments into, and sales from, a sales channel or separate class of customer that could be expected to have a significant effect on future sales or sales returns.
- An increasing trend toward sales to a different class of customer, such as a reseller distribution channel that has a lower gross profit margin than existing sales that are principally made to end users. Also, increasing service revenue that has a higher profit margin than product sales.
- Seasonal trends or variations in sales.
- A gain or loss from the sale of an asset(s).[5]

Question 2

Question: Will the staff expect retroactive changes by registrants to comply with the accounting described in this bulletin?

Interpretive Response: All registrants are expected to apply the accounting and disclosures described in this bulletin. The staff, however, will not object if registrants that have not applied this accounting do not restate prior financial statements provided they report a change in accounting principle in accordance with Opinion 20 and Statement 3 no later than the fourth fiscal quarter of the fiscal year beginning after December 15, 1999. In periods subsequent to transition, registrants should disclose the amount of revenue (if material to income before income taxes) recognized in those periods that was included in the cumulative effect adjustment. If a registrant files financial statements with the Commission before applying the guidance in this bulletin, disclosures similar to those described in SAB Topic 11.M should be provided. With regard to question 10 of Topic 13.A and Topic 8.A regarding income statement presentation, the staff would normally expect retroactive application

[1] Subsequent to the issuance of this SAB, the EITF provided additional guidance on gross vs. net presentation in Issue 99–19.

[2] *See*, for example, ARB 43, Chapter 11A, paragraph 20; SOP 81–1, paragraphs 58–60; and Statement 45, paragraph 16.

[1] See Regulation S–X, Article 5–03(b)(1) and (2).

[2] See Regulation S–K, Article 303 and FRR 36.

[3] FRR 36, also see In the Matter of Caterpillar Inc., AAER 363 (March 31, 1992).

[4] Statement 107.

[5] Gains or losses from the sale of assets should be reported as "other general expenses" pursuant to Regulation S–X, Article 5–03(b)(6). Any material item should be stated separately.

to all periods presented unless the effect of applying the guidance herein is immaterial.

However, if registrants have not previously complied with GAAP, for example, by recording revenue for products prior to delivery that did not comply with the applicable bill-and-hold guidance, those registrants should apply the guidance in Opinion 20 for the correction of an error.[6] In addition, registrants should be aware that the Commission may take enforcement action where a registrant in prior financial statements has violated the antifraud or disclosure provisions of the securities laws with respect to revenue recognition.

[6] Opinion 20, paragraph 13 and paragraphs 36–37 describe and provide the accounting and disclosure requirements applicable to the correction of an error in previously issued financial statements. Because the term "error" as used in Opinion 20 includes "oversight or misuse of facts that existed at the time that the financial statements were prepared," that term includes both unintentional errors as well as intentional fraudulent financial reporting and misappropriation of assets as described in SAS 99.

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Federal Register

Friday,
May 16, 2003

Part VI

Department of Agriculture

Rural Housing Service

Notice of Availability of Funds; Notices

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Availability of Funds; Multi-Family Housing, Single Family Housing

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Housing Service (RHS) announces the availability of housing funds for fiscal year 2003 (FY 2003). This action is taken to comply with 42 U.S.C. 1490p, which requires that RHS publish in the **Federal Register** notice of the availability of any housing assistance.

EFFECTIVE DATE: May 16, 2003.

FOR FURTHER INFORMATION CONTACT: For information regarding this notice contact Teresa Sumpter, Loan Specialist, Single Family Housing Direct Loan Division, telephone (202) 720–1485, for single family housing (SFH) issues and Tammy S. Daniels, Loan Specialist, Multi-Family Housing Processing Division, telephone (202) 720–0021, for multi-family housing (MFH) issues, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, DC 20250. (The telephone numbers listed are not toll free numbers). For information on applying for assistance, visit our Internet Web site at *http://offices.usda.gov* and select your State or check the blue pages in your local telephone directory under "Rural Development" for the office serving your area. Near the end of this Notice is a listing of Rural Development State Directors, State Office addresses, and phone numbers.

SUPPLEMENTARY INFORMATION:

Programs Affected

The following programs are subject to the provisions of Executive Order 12372 that requires intergovernmental consultation with State and local officials. These programs or activities are listed in the Catalog of Federal Domestic Assistance under Nos.

10.405 Farm Labor Housing (LH) Loans and Grants;
10.410 Very Low to Moderate Income Housing Loans;
10.411 Rural Housing Site Loans and Self-Help Housing Land Development Loans;
10.415 Rural Rental Housing Loans;
10.417 Very Low Income Housing Repair Loans and Grants;
10.420 Rural Self-Help Housing Technical Assistance;
10.427 Rural Rental Assistance Payments;
10.433 Rural Housing Preservation Grants;
10.442 Housing Application Packaging Grants.

Discussion of Notice

Part 1940, subpart L of 7 CFR contains the "Methodology and Formulas for Allocation of Loan and Grant Program Funds." To apply for assistance under these programs or for more information, contact the Rural Development Office for your area.

Multi-Family Housing (MFH)

I. General

A. This provides guidance on MFH funding for the Rural Rental Housing program (RRH) for FY 2003 (it does not include carryover funds). Allocation computations have been performed in accordance with 7 CFR 1940.575 and 1940.578. For FY 2003, State Directors, under the Rural Housing Assistance Grants (RHAG), will have the flexibility to transfer their initial allocations of budget authority between the Single Family Housing (SFH) Section 504 Rural Housing Grants and Section 533 Housing Preservation Grant (HPG) programs.

B. MFH loan and grant levels for FY 2003 are as follows:

MFH Loan Programs Credit Sales—*$1,987,851
Section 514 Farm Labor Housing (LH) loans—*$37,480,202
Section 515 Rural Rental Housing (RRH) loans—*$115,052,541
Section 521 Rental Assistance (RA) and 502(c)(5)(C) Advance—*$721,281,000
Section 516 LH grants——*$17,698,209
Sections 525 Technical and Supervisory Assistance grants
(TSA) and 509 Housing Application Packaging grants—$1,093,978
(HAPG) (Shared between single and multi-family housing—(includes carryover)
Section 533 Housing Preservation grants (HPG)—*$9,935,000
Section 538 Guaranteed Rural Rental Housing program—*$99,350,000

*Does not include disaster or regular program carryover

II. Funds not Allocated to States

A. *Credit Sales Authority.* For FY 2003, $1,987,851 will be set aside for credit sales to program and nonprogram buyers. Credit sale funding will not be allocated by State.

B. *Section 538 Guaranteed Rural Rental Housing Program.* Guaranteed loan funds will be made available under a Notice of Funding Availability (NOFA) being published in this **Federal Register**. Additional guidance is provided in the NOFA.

III. Farm Labor Housing (LH) Loans and Grants

The Administrator has the authority to transfer the allocation of budget authority between the two programs. Upon NOFA closing, the Administrator will evaluate the responses and determine proper distribution of funds between loans and grants.

A. *Section 514 Farm LH Loans.*

1. These loans are funded in accordance with 7 CFR 1940.579(a).

—FY 2003 Appropriation—$37,480,202
—Available for Off-Farm Loans—$30,480,202
—Available for On-Farm Loans—$3,000,000
—National Office Reserve—$4,000,000

2. Off-farm loan funds will be made available under a NOFA being published in this **Federal Register**. Additional guidance is provided in the NOFA.

B. *Section 516 Farm LH Grants.*

1. Grants are funded in accordance with 7 CFR 1940.579(b). Unobligated prior year balances and cancellations will be added to the amount shown. FY 2003 Appropriation—$17,698,209
Available for LH Grants for Off-Farm—$13,198,209
Available for Technical Assistance Grants—$1,500,000
National Office Reserve—$3,000,000

2. Labor Housing grant funds for Off-Farm will be made available under a NOFA being published in this **Federal Register**. Additional guidance is provided in the NOFA.

C. Labor Housing Rental Assistance (RA) will be held in the National Office for use with LH loan and grant applications. RA is only available with a LH loan of at least 5 percent of the total development cost. Projects without a LH loan cannot receive RA.

IV. Section 515 RRH Loan Funds.

FY 2003 Section 515 Rural Rental Housing allocation (Total)—$115,052,541
New Construction funds and set-asides—$29,252,541
New construction loans—$7,145,186
Set-aside for nonprofits—$10,354,728
Set-aside for underserved counties and colonias—$5,752,627
Earmark for EZ, EC, or REAP Zones—$5,000,000
State RA designated reserve—$1,000,000
Rehab and repair funds and equity—$60,800,000
Rehab and repair loans—$55,800,000
Designated equity loan reserve—$5,000,000
General Reserve—$25,000,000

A. *New construction loan funds.* New construction loan funds will be made

available using a national NOFA being published in this **Federal Register**. Additional guidance is provided in the NOFA.

B. *National Office New Construction Set-asides.* The following legislatively mandated set-asides of funds are part of the National office set-aside:

1. *Nonprofit Set-aside.* An amount of $10,354,728 has been set aside for nonprofit applicants. All Nonprofit loan proposals must be located in designated places as defined in 7 CFR 1944–E.

2. *Underserved Counties and Colonias Set-Aside.* An amount of $5,752,627 has been set aside for loan requests to develop units in the underserved 100 most needy counties or colonias as defined in section 509(f) of the Housing Act of 1949 as amended. Priority will be given to proposals to develop units in colonias or tribal lands.

3. *EZ, EC or REAP Zone Earmark.* An amount of $5,000,000 has been earmarked for loan requests to develop units in EZ or EC communities or REAP Zones until June 30, 2003.

C. *Rental Assistance (RA).* Limited new construction RA will be held in the National office for use with Section 515 Rural Rental Housing loans.

D. *Designated Reserves for State RA.* An amount of $1 million of Section 515 loan funds has been set aside for matching with projects in which an active State sponsored RA program is available. The State RA program must be comparable to the RHS RA program.

E. *Repair and Rehabilitation Loans.* Tenant health and safety continues to be the top priority. Repair and rehabilitation funds must be first targeted to RRH facilities that have physical conditions that affect the health and safety of tenants and subsequently made available to facilities that have deferred maintenance. All funds will be held in the National office and will be distributed based upon indicated rehabilitation needs in the MFH survey conducted in October 2002.

F. *Designated Reserve for Equity Loans.* An amount of $5 million has been designated for the equity loan preservation incentive described in 7 CFR 1965–E. The $5 million will be further divided into $4 million for equity loan requests currently on the pending funding list and $1 million to facilitate the transfer of properties from for-profit owners to nonprofit corporations and public bodies. Funds for such transfers would be authorized only for for-profit owners who are currently on the pending funding list who agree to transfer to nonprofit corporations or public bodies rather than to remain on the pending list. If insufficient transfer requests are generated to utilize the full $1 million set aside for nonprofit and public body transfers, the balance will revert to the existing pending equity loan funding list.

G. *General Reserve.* There is one general reserve fund of $25,000,000. Some examples of immediate allowable uses include, but are not limited to, hardships and emergencies, RH cooperatives or group homes, or RRH preservation.

V. Section 533 Housing Preservation Grants (HPG).

Total Available—$9,935,000
Less General Reserve—$997,400
Less Earmark for EZ, EC or REAP Zones—$596,100
Total Available for Distribution—$8,341,500

Amount available for allocation. *See* end of this Notice for HPG State allocations. Fund availability will be announced in a NOFA being published in the **Federal Register.**

The amount of $596,100 is earmarked for EZ, EC or REAP Zones until June 30, 2003.

Single Family Housing (SFH)

I. General

All SFH programs are administer through field offices. For more information or to make application, please contact the Rural Development office servicing your area. To locate these offices, contact the appropriate State Office from the attached State Office listing, visit our Web site at *http://offices.usda.gov* or check the blue pages in your local telephone directory under "Rural Development" for the office serving your area.

A. This notice provides SFH allocations for FY 2003. Allocation computations have been made in accordance with 7 CFR 1940.563 through 1940.568. Information on basic formula criteria, data source and weight, administrative allocation, pooling of funds, and availability of the allocation are located on a chart at the end of this notice.

B. The SFH levels authorized for FY 2003 are as follows:

Section 502 Guaranteed Rural Housing (RH) loans
  Nonsubsidized Guarantees—Purchase—$2,621,781,311
  Nonsubsidized Guarantees—Refinance—$223,537,222
Section 502 Direct RH loans
  Very low-income subsidized loans—$456,661,223
  Low-income subsidized loans—$581,205,194
Credit sales (Nonprogram)—$10,000,000
Section 504 housing repair loans—$34,772,498
Section 504 housing repair grants—*/**$31,324,797
Section 509 compensation for construction defects—**$478,837
Section 523 mutual and self-help housing grants—**/***$51,319,662
Section 523 Self-Help Site Loans—$4,978,752
Section 524 RH site loans—$5,013,027
Section 306C Water and waste disposal grants—**$1,255,875
Section 525 Supervisory and technical Assistance and Section 509 Housing Application Packaging Grants Total Available for single and multi-family—**$1,093,978
Section 504 housing repair grants (additional)—**$1,176,953 (Formerly North Carolina Elderly Modular Housing Demo Program)
Natural disaster funds (Section 502 loans)—**$1,443,493
Natural disaster funds (Section 504 loans) —**$13,777,141
Natural disaster funds (Section 504 grants) —**$4,563,493

* Includes $596,100 for EZ/EC and REAP communities until June 30, 2003.
** Carryover funds are included in the balance.
*** Includes $993,500 for EZ/EC and REAP communities until June 30, 2003.

C. *SFH Funding Not Allocated to States.* The following funding is not allocated to States by formula. Funds are made available to each state on a case-by-case basis.

1. *Credit sale authority.* Credit sale funds in the amount of $10,000,000 are available only for nonprogram sales of Real Estate Owned (REO) property.

2. *Section 509 Compensation for Construction Defects.* $478,837 is available for compensation for construction defects.

3. *Section 523 Mutual and Self-Help Technical Assistance Grants.* $51,319,662 is available for Section 523 Mutual and Self-Help Technical Assistance Grants. Of these funds, $993,500 is earmarked for EZ, EC or REAP Zones until June 30, 2003. A technical review and analysis must be completed by the Technical and Management Assistance (T&MA) contractor on all predevelopment, new, and existing (refunding) grant applications.

4. *Section 523 Mutual and Self-Help Site Loans and Section 524 RH Site Loans.* $4,978,752 and $5,013,027 are available for Section 523 Mutual Self-Help and Section 524 RH Site loans, respectively.

5. *Section 306C WWD Grants to Individuals in Colonias.* The objective of

the Section 306C WWD individual grant program is to facilitate the use of community water or waste disposal systems for the residents of the colonias along the U.S.-Mexico border.

The total amount available to Arizona, California, New Mexico, and Texas will be $1,255,875 for FY 2003. This amount includes the carryover unobligated balance of $255,875 and the transferred amount of $1 million from the Rural Utilities Service (RUS) to RHS for processing individual grant applications.

6. *Section 525 Technical and Supervisory Assistance (TSA) and Section 509 Housing Application Packaging Grants (HAPG).* $1,093,978 is available for the TSA and HAPG programs. Funds are available on a limited basis for TSA grants. In accordance with the provisions of 7 CFR 1944.525, funding will be targeted nationally and then on an individual basis to States/areas with the highest degree of substandard housing and persons in poverty eligible to receive Agency housing assistance. The five States with the highest degrees of substandard housing and poverty are: Texas, California, Puerto Rico, North Carolina and Georgia. Funds not to exceed $150,000 or one project per state will be targeted nationally to these States. From any remaining funds, priority will be given to requests for projects that serve any of the 100 counties with the highest degrees of poverty and substandard housing. States should submit proposals from potential applicants to the National Office for review and concurrence prior to authorizing an application. Applications on-hand as of April 15, 2003, will be funded in the preceding order regardless of date of application.

Requests should be submitted to the National Office for HAPG based on projected usage of these funds for the quarter or as needed. HAPG requests should be submitted using the NORF system. Reserve funds will be held at the National Office and requests from eligible States will be considered on a first-come, first-served basis.

7. *Section 504 housing repair grants (additional)(formerly North Carolina Elderly Modular Housing Demonstration Program).* Budget authority was earmarked in FY 2001 for the North Carolina Elderly Modular Housing Demonstration Program. These funds were used to provide Section 502 loans and grants for modular housing in North Carolina for very-low and low-income elderly families who lost their housing as a result of a major disaster declared by the President. Section 766, Title III of the 2003 Appropriations Act provides that "after September 30, 2002, any funds remaining for the demonstration program may be used, within the State in which the demonstration program is carried out, for fiscal year 2003 and subsequent fiscal years to make grants, and to cover the costs * * * of loans authorized, under Section 504 of the Housing Act of 1949* * *" $1,176,953 of unobligated funds have been transferred to the Section 504 grant program in FY 2003 for use by the State of North Carolina only.

8. *Natural Disaster Funds.* Funds are available until exhausted to those States with active Presidential Declarations.

9. *Deferred Mortgage Payment Demonstration.* There is no FY 2003 funding provided for deferred mortgage authority or loans for deferred mortgage assumptions.

II. State Allocations

A. *Section 502 Nonsubsidized Guaranteed RH (GRH) Loans.*

1. *Purchase—Amount Available for Allocation.*

Total Available—Purchase $2,621,781,311
Less National Office General Reserve—$722,420,311
Less Special Outreach Area Reserve—$309,609,000
Basic Formula—Administrative Allocation—$1,589,752,000

a. *National office General Reserve.* The Administrator may restrict access to this reserve for States not meeting their goals in special outreach areas.

b. *Special Outreach Areas.* FY 2003 GRH funding is allocated to States in two funding streams. Seventy percent of GRH funds may be used in any eligible area. Thirty percent of GRH funds are to be used in special outreach areas. Special outreach areas for the GRH program are defined as those areas within a State that are *not* located within a metropolitan statistical area (MSA).

c. *National Office Special Area Outreach Reserve.* A special outreach area reserve fund has been established at the National office. Funds from this reserve may only be used in special outreach areas.

2. *Refinance—Amount available for allocation.*

Total Available—Refinance—$223,537,222
Less National office general reserve—$144,037,222
Basic formula—Administrative Allocation—$79,500,000

a. *Refinance Funds.* Refinance loan funds will be distributed to each State at $1.5 million per State. Additional funds will be distributed based on prior usage of refinance funds.

b. *National office general reserve.* The Administrator may restrict access to this reserve for States not meeting their goals in special outreach areas.

B. *Section 502 Direct RH loans.*

1. *Amount Available for Allocation.*

Total Available—$1,037,866,417
Less Required Set Aside for Underserved Counties and Colonias—$51,893,320
EZ, EC and REAP Earmark—$45,505,725
Less General Reserve—$127,000,000
Administrator's Reserve—$10,000,000
Hardships & Homelessness—$1,000,000
Rural Housing Demonstration Program—$1,000,000
Homeownership Partnership—$95,000,000
Program funds for the sale of REO properties—$20,000,000
Less Designated Reserve for Self-Help—$100,000,000
Basic Formula Administrative Allocation—$713,467,372

2. *Reserves.*

a. *State Office Reserve.* State Directors must maintain an adequate reserve to fund the following applications:

(i) Hardship and homeless applicants including the direct Section 502 loan and Section 504 loan and grant programs.

(ii) Mutual Self-Help loans.

(iii) Subsequent loans for essential improvements or repairs and transfers with assumptions.

(iv) States will leverage with funding from other sources.

(v) Areas targeted by the State according to its strategic plan.

b. *National Office Reserves.*

(i) *General Reserve.* The National office has a general reserve of $127 million. Of this amount, the Administrator's reserve is $10 million. One of the purposes of the Administrator's reserve will be for loans in Indian Country. Indian Country is defined as land inside the boundaries of Indian reservations, communities made up mainly of Native Americans, Indian trust and restricted land, and tribal allotted lands.

(ii) *Hardship and Homelessness Reserve.* $1 million has been set aside for hardships and homeless.

(iii) *Rural Housing Demonstration Program.* $1 million dollars has been set aside for innovative demonstration initiatives.

(iv) *Program Credit Sales.* $20 million dollars has been set aside for program sales of REO property.

c. *Homeownership Partnership.* $95 million dollars has been set aside for Homeownership Partnerships. These funds will be used to expand existing

partnerships and create new partnerships, such as the following:

(i) Department of Treasury, Community Development Financial Institutions (CDFI)—Funds will be available to fund leveraged loans made in partnership with the Department of Treasury CDFI participants.

(ii) Partnership initiatives established to carry out the objectives of the rural home loan partnership (RHLP).

d. *Designated Reserve for Self-Help.* $100 million dollars has been set aside for matching funds to assist participating Self-Help applicants. The matching funds were established on the basis of the National office contributing 75 percent from the National office reserve and States contributing 25 percent of their allocated Section 502 RH funds.

e. *Underserved Counties and Colonias.* An amount of $51,893,320 has been set aside for the 100 underserved counties and colonias.

f. *Empowerment Zone (EZ) and Enterprise Community (EC) or Rural Economic Area Partnership (REAP) earmark.* An amount of $45,505,725 has been earmarked until June 30, 2003, for loans in EZ, EC or REAP Zones.

g. *State Office Pooling.* If pooling is conducted within a State, it must not take place within the first 30 calendar days of the first, second, or third quarter. (There are no restrictions on pooling in the fourth quarter.)

h. *Suballocation by the State Director.* The State Director may suballocate to each area office using the methodology and formulas required by 7 CFR part 1940, subpart L. If suballocated to the area level, the Rural Development Manager will make funds available on a first-come, first-served basis to all offices at the field or area level. No field office will have its access to funds restricted without the prior written approval of the Administrator.

B. *Section 504 Housing Loans and Grants.* Section 504 grant funds are included in the Rural Housing Assistance Grant program (RHAG) in the FY 2003.appropriation.

1. *Amount available for allocation.*

Section 504 Loans

Total Available—$34,772,498
Less 5% for 100 Underserved Counties and Colonias—$1,738,624
EZ, EC or REAP Zone Earmark—$1,400,000
Less General Reserve—$1,500,000
Basic Formula—Administrative Allocation—$30.133,874

Section 504 Grants

Total Available—$31,324,797
Less 5% for 100 Underserved Counties and Colonias—$1,566,239
Less EZ, EC or REAP Earmark—$596,100
Less General Reserve—$1,629,458
Basic Formula-Administrative Allocation—$27,533,000

2. *Reserves and Set-asides.*

a. *State Office Reserve.* State Directors must maintain an adequate reserve to handle all anticipated hardship applicants based upon historical data and projected demand.

b. *Underserved Counties and Colonias.* Approximately $1,738,624 and $1,536,434 have been set aside for the 100 underserved counties and colonias until June 30, 2003, for the Section 504 loan and grant programs, respectively.

c. *Empowerment Zone (EZ) and Enterprise Community (EC) or Rural Economic Area Partnership (REAP) Earmark (Loan Funds Only).* $1,400,000 and $596,100 have been earmarked through June 30, 2003; for EZ, EC or REAPs for the Section 504 loan and grant programs, respectively.

d. *General Reserve.* $1.5 million for Section 504 loan hardships and $1.629 million for Section 504 grant extreme hardships have been set-aside in the general reserve. For Section 504 grants, an extreme hardship case is one requiring a significant priority in funding, ahead of other requests, due to severe health or safety hazards, or physical needs of the applicant.

INFORMATION ON BASIC FORMULA CRITERIA, DATA SOURCE AND WEIGHT, ADMINISTRATIVE ALLOCATION, POOLING OF FUNDS, AND AVAILABILITY OF THE ALLOCATION

#	Description	Section 502 nonsubsidized guaranteed RH loans	Section 502 direct RH loans	Section 504 loans and grants
1	Basic formula criteria, data source, and weight.	*See* 7 CFR 1940.563(b)	*See* 7 CFR 1940.565(b)	*See* 7 CFR 1940.566(b) and 1940.567(b)
2	Administrative Allocation:			
	Western Pacific Area	$1,000,000	$1,000,000	$1,000,000 loan $500,000 grant.
3	Pooling of funds:			
	a. Mid-year pooling	If necessary	If necessary	If necessary.
	b. Year-end pooling	August 15, 2003	August 15, 2003	August 15, 2003.
	c. Underserved counties & colonias.	N/A	June 30, 2003	June 30, 2003.
	d. EZ, EC or REAP	N/A	June 30, 2003	June 30, 2003.
	e. Credit sales	N/A	June 30, 2003	N/A.
4	Availability of the allocation:			
	a. first quarter	40 percent	50 percent	50 percent
	b. second quarter	70 percent	70 percent	70 percent
	c. third quarter	90 percent	90 percent	90 percent
	d. fourth quarter	100 percent	100 percent	100 percent

1. Data derived from the 1990 U.S. Census was provided to each State by the National office on August 12, 1993.
2. Due to the absence of Census data.
3. All dates are tentative and are for the close of business (COB). Pooled funds will be placed in the National office reserve and made available administratively. The Administrator reserves the right to redistribute funds based upon program performance.
4. Funds will be distributed cumulatively through each quarter listed until the National office year-end pooling date.

Dated: May 12, 2003.

Arthur A. Garcia,

Administrator, Rural Housing Service.

BILLING CODE 3410–XV–P

USDA Rural Development State Directors and State Office Locations

	GEORGIA	
Steve Pelham Sterling Centre 4121 Carmichael Road, Suite 601 Montgomery, AL 36106-3683 (334) 279-3400	F. Stone Workman Stephens Federal Building 355 E Hancock Avenue Athens, GA 30601-2768 (706) 546-2162	Michael B. Taylor 3727 Government Street Alexandria, LA 71302 (318) 473-7920
	HAWAII	
Bill Allen Suite 201 800 W Evergreen Palmer, AK 99645-6539 (907) 761-7705	Lorraine Shin Room 311, Federal Building 154 Waianuenue Avenue Hilo, HI 96720 (808) 933-8309	Michael W. Aube PO Box 405 967 Illinois Avenue, Suite 4 Bangor, ME 04402-0405 (207) 990-9106
	IDAHO	
Eddie Browning Phoenix Corporate Center 3003 N Central Avenue, Suite 900 Phoenix, AZ 85012-2906 (602) 280-8755	Michael A. Field Suite A1 9173 W Barnes Dr Boise, ID 83709 (208) 378-5600	David H. Tuttle 451 West Street Amherst, MA 01002 (413) 253-4300
	ILLINOIS	
John M. Allen Room 3416 700 W Capitol Little Rock, AR 72201-3225 (501) 301-3200	Douglas Wilson 2118 W. Park Court Suite A Champaign, IL 61821 (217) 403-6222	Harry Brumer (Acting) Suite 200 3001 Coolidge Road East Lansing, MI 48823 (517) 324-5100
	INDIANA	
D. Paul Venosdel Agency 4169 430 G Street Davis, CA 95616-4169 (530) 792-5800	Robert White 5975 Lakeside Boulevard Indianapolis, IN 46278 (317) 290-3100	Stephen G. Wenzel 410 AgriBank Bldg 375 Jackson Street St. Paul, MN 55101-1853 (651) 602-7835
	IOWA	
Ginette "GiGi" Dennis Room E100 655 Parfet Street Lakewood, CO 80215 (720) 544-2903	Daniel W. Brown, PhD 873 Federal Bldg 210 Walnut Street Des Moines, IA 50309 (515) 284-4663	Nick Walters Federal Bldg, Suite 831 100 W Capitol Street Jackson, MS 39269 (601) 965-4316
	KANSAS	
Marlene B. Elliott PO Box 400 5201 S DuPont Highway Camden, DE 19934-9998 (302) 697-4300	Charles (Chuck) R. Banks 1303 SW First American Place Suite 100 Topeka, KS 66604-4040 (785) 271-2700	Gregory Branum Parkade Center, Suite 235 601 Business Loop 70 West Columbia, MO 65203 (573) 876-0976
	KENTUCKY	
Charles W. Clemons, Sr. PO Box 147010 4440 NW 25th Place Gainesville, FL 32614-7010 (352) 338-3435	Kenneth Slone Suite 200 771 Corporate Drive Lexington, KY 40503 (859) 224-7300	W. T. (Tim) Ryan Suite B 900 Technology Boulevard Bozeman, MT 59715 (406) 585-2580

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M. James Barr Federal Bldg, Room 152 100 Centennial Mall N Lincoln, NE 68508 (402) 437-5551	Brent J. Kisling Suite 108 100 USDA Stillwater, OK 74074-2654 (405) 742-1000	John R. Cox Wallace F Bennett Federal Bldg 125 S State Street, Room 4311 Salt Lake City, UT 84147 (801) 524-4320
NEVADA	**OREGON**	**VERMONT & NEW HAMPSHIRE**
Larry J. Smith 1390 South Curry Street Carson City, NV 89703 (775) 887-1795	Lynn Schoessler Suite 1410 101 SW Main Portland, OR 97204-3222 (503) 414-3300	Jolinda H. LaClair City Center, 3rd Floor 89 Main Street Montpelier, VT 05602 (802) 828-6000
NEW JERSEY	**PENNSYLVANIA**	**VIRGINIA**
Andrew M. G. Law 5th Floor N, Suite 500 8000 Midlantic Drive Mt. Laurel, NJ 08054 (856) 787-7700	Byron E. Ross Suite 330 One Credit Union Place Harrisburg, PA 17110-2996 (717) 237-2299	Joseph W. Newbill Culpeper Bldg, Suite 238 1606 Santa Rosa Road Richmond, VA 23229 (804) 287-1598
NEW MEXICO	**PUERTO RICO**	**WASHINGTON**
Jeff Condrey Room 255 6200 Jefferson Street, NE Albuquerque, NM 87109 (505) 761-4950	Jose A. Otero IBM Building Suite 601 Hato Rey, PR 00918-5481 (787) 766-5095	Jackie J. Gleason Suite B 1835 Black Lake Blvd, SW Olympia, WA 98512-5715 (360) 704-7740
NEW YORK	**SOUTH CAROLINA**	**WEST VIRGINIA**
Patrick H. Brennan The Galleries of Syracuse 441 S Salina Street, Suite 357 Syracuse, NY 13202-2541 (315) 477-6416	Charles Sparks Strom Thurmond Federal Bldg 1835 Assembly Street, Room 1007 Columbia, SC 29201 (803) 765-5163	Jenny N. Phillips Federal Bldg, Room 320 75 High Street Morgantown, WV 26505-7500 (304) 284-4860
NORTH CAROLINA	**SOUTH DAKOTA**	**WISCONSIN**
John Cooper Suite 260 4405 Bland Road Raleigh, NC 27609 (919) 873-2000	Lynn Jensen Federal Bldg, Room 210 200 Fourth Street, SW Huron, SD 57360 (605) 352-1100	Frank Frassetto 4949 Kirschling Court Stevens Point, WI 54481 (715) 345-7600
NORTH DAKOTA	**TENNESSEE**	**WYOMING**
Clare Carlson Federal Bldg, Room 208 220 East Rooser, PO Box 1737 Bismarck, ND 58502-1737 (701) 530-2061	Mary (Ruth) Tackett Suite 300 3322 W End Avenue Nashville, TN 37203-1084 (615) 783-1300	John E. Cochran Federal Building, Room 1005 100 East B, PO Box 820 Casper, WY 82602 (307) 261-6300
OHIO	**TEXAS**	
Randall Hunt Federal Bldg, Room 507 200 N High Street Columbus, OH 43215-2477 (614) 255-2500	R. Bryan Daniel Federal Bldg, Suite 102 101 S Main Temple, TX 76501 (254) 742-9700	

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RURAL HOUSING SERVICE FY 2003
SECTION 533
HOUSING PRESERVATION GRANT
ALLOCATION IN THOUSANDS

STATE	FORMULA FACTOR	TOTAL ALLOCATION
ALABAMA	0.02957	$246,658
ALASKA	0.00587	$48,965
ARIZONA	0.01780	$148,479
ARKANSAS	0.02310	$192,689
CALIFORNIA	0.04653	$388,130
COLORADO	0.00840	$70,069
DELAWARE	0.00190	$15,849
MARYLAND	0.00880	$73,405
FLORIDA	0.02890	$241,069
VIRGIN ISLANDS	0.00273	$22,772
GEORGIA	0.03867	$322,566
HAWAII	0.00790	$65,898
WPA	0.00647	$53,970
IDAHO	0.00743	$61,977
ILLINOIS	0.02250	$187,684
INDIANA	0.02157	$179,926
IOWA	0.01340	$111,776
KANSAS	0.01130	$94,259
KENTUCKY	0.03483	$290,534
LOUISIANA	0.03170	$264,426
MAINE	0.00913	$76,158
MASSACHUSETTS	0.00793	$66,148
CONNECTICUT	0.00453	$37,787
RHODE ISLAND	0.00100	$8,342
MICHIGAN	0.02977	$248,326
MINNESOTA	0.01673	$139,553
MISSISSIPPI	0.03180	$265,260
MISSOURI	0.02460	$205,201
MONTANA	0.00620	$51,717
NEBRASKA	0.00713	$59,475
NEVADA	0.00263	$21,938
NEW JERSEY	0.00657	$54,804
NEW MEXICO	0.01437	$119,867
NEW YORK	0.02753	$229,641
NORTH CAROLINA	0.04497	$375,117
NORTH DAKOTA	0.00413	$34,450
OHIO	0.03450	$287,782
OKLAHOMA	0.01917	$159,907
OREGON	0.01423	$118,700
PENNSYLVANIA	0.03687	$307,551
PUERTO RICO	0.04923	$410,652
SOUTH CAROLINA	0.02690	$224,386
SOUTH DAKOTA	0.00597	$49,799
TENNESSEE	0.02973	$247,993
TEXAS	0.07645	$637,708
UTAH	0.00430	$35,868
VERMONT	0.00403	$33,616
NEW HAMPSHIRE	0.00503	$41,958
VIRGINIA	0.02660	$221,884
WASHINGTON	0.01743	$145,392
WEST VIRGINIA	0.01937	$161,575
WISCONSIN	0.01873	$156,236
WYOMING	0.00307	$25,608
DISTR.	1.00000	$8,341,500
N/O RES.		$997,400
EZ/EC/REAP		$596,100
TTL AVAIL.		$9,935,000

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 502 DIRECT RURAL HOUSING LOANS

STATES	STATE BASIC FORMULA FACTOR	TOTAL FY 2003 ALLOCATION
1 ALABAMA	0.0267275	$19,042
2 ARIZONA	0.0145422	$10,361
3 ARKANSAS	0.0208104	$14,827
4 CALIFORNIA	0.0454819	$32,404
5 COLORADO	0.0091766	$6,538
6 CONNECTICUT	0.0066693	$4,752
7 DELAWARE	0.0024571	$1,751
9 FLORIDA	0.0312406	$22,258
10 GEORGIA	0.0374586	$26,688
12 IDAHO	0.0076722	$5,466
13 ILLINOIS	0.0266774	$19,007
15 INDIANA	0.0270785	$19,293
16 IOWA	0.0163474	$11,647
18 KANSAS	0.0127369	$9,075
20 KENTUCKY	0.0288838	$20,579
22 LOUISIANA	0.0246715	$17,578
23 MAINE	0.0108314	$7,717
24 MARYLAND	0.0115334	$8,217
25 MASSACHUSETTS	0.0109818	$7,824
26 MICHIGAN	0.0353525	$25,188
27 MINNESOTA	0.0199077	$14,184
28 MISSISSIPPI	0.0250226	$17,828
29 MISSOURI	0.0252733	$18,006
31 MONTANA	0.0063685	$4,537
32 NEBRASKA	0.0086752	$6,181
33 NEVADA	0.0028583	$2,036
34 NEW HAMPSHIRE	0.0072711	$5,180
35 NEW JERSEY	0.0097784	$6,967
36 NEW MEXICO	0.0110320	$7,860
37 NEW YORK	0.0359041	$25,581
38 NORTH CAROLINA	0.0484405	$34,512
40 NORTH DAKOTA	0.0045131	$3,215
41 OHIO	0.0390131	$27,796
42 OKLAHOMA	0.0174005	$12,397
43 OREGON	0.0154949	$11,040
44 PENNSYLVANIA	0.0467857	$33,333
45 RHODE ISLAND	0.0015545	$1,108
46 SOUTH CAROLINA	0.0258249	$18,399
47 SOUTH DAKOTA	0.0062682	$4,466
48 TENNESSEE	0.0291846	$20,793
49 TEXAS	0.0660415	$47,052
52 UTAH	0.0040618	$2,894
53 VERMONT	0.0052653	$3,751
54 VIRGINIA	0.0289841	$20,650
56 WASHINGTON	0.0187042	$13,326
57 WEST VIRGINIA	0.0175008	$12,469
58 WISCONSIN	0.0237188	$16,899
59 WYOMING	0.0036105	$2,572
60 ALASKA	0.0055160	$3,930
61 HAWAII	0.0067195	$4,787
62 W PAC ISLANDS	N/A	$1,000
63 PUERTO RICO	0.0239695	$17,077
64 VIRGIN ISLANDS	0.0020058	$1,429
STATE TOTALS	1.0000000	$713,467
100 UNDERSERVED COUNTIES/COLONIAS		$51,893
EMPOWERMENT ZONES AND ENTERPRISE COMMUNITY EARMARK		$45,506
GENERAL RESERVE		$127,000
SELF HELP		$100,000
TOTAL		$1,037,866

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 502 DIRECT RURAL HOUSING LOANS

STATES	TOTAL FY 2003 ALLOCATION	VERY LOW-INCOME ALLOCATION 44 PERCENT	LOW-INCOME ALLOCATION 56 PERCENT
1 ALABAMA	$19,042	$8,379	$10,664
2 ARIZONA	$10,361	$4,559	$5,802
3 ARKANSAS	$14,827	$6,524	$8,303
4 CALIFORNIA	$32,404	$14,258	$18,146
5 COLORADO	$6,538	$2,877	$3,661
6 CONNECTICUT	$4,752	$2,091	$2,661
7 DELAWARE	$1,751	$770	$980
9 FLORIDA	$22,258	$9,793	$12,464
10 GEORGIA	$26,688	$11,743	$14,945
12 IDAHO	$5,466	$2,405	$3,061
13 ILLINOIS	$19,007	$8,363	$10,644
15 INDIANA	$19,293	$8,489	$10,804
16 IOWA	$11,647	$5,125	$6,522
18 KANSAS	$9,075	$3,993	$5,082
20 KENTUCKY	$20,579	$9,055	$11,524
22 LOUISIANA	$17,578	$7,734	$9,843
23 MAINE	$7,717	$3,395	$4,322
24 MARYLAND	$8,217	$3,616	$4,602
25 MASSACHUSETTS	$7,824	$3,443	$4,382
26 MICHIGAN	$25,188	$11,083	$14,105
27 MINNESOTA	$14,184	$6,241	$7,943
28 MISSISSIPPI	$17,828	$7,844	$9,984
29 MISSOURI	$18,006	$7,923	$10,084
31 MONTANA	$4,537	$1,996	$2,541
32 NEBRASKA	$6,181	$2,720	$3,461
33 NEVADA	$2,036	$896	$1,140
34 NEW HAMPSHIRE	$5,180	$2,279	$2,901
35 NEW JERSEY	$6,967	$3,065	$3,901
36 NEW MEXICO	$7,860	$3,458	$4,402
37 NEW YORK	$25,581	$11,255	$14,325
38 NORTH CAROLINA	$34,512	$15,185	$19,327
40 NORTH DAKOTA	$3,215	$1,415	$1,801
41 OHIO	$27,796	$12,230	$15,566
42 OKLAHOMA	$12,397	$5,455	$6,942
43 OREGON	$11,040	$4,857	$6,182
44 PENNSYLVANIA	$33,333	$14,667	$18,667
45 RHODE ISLAND	$1,108	$487	$620
46 SOUTH CAROLINA	$18,399	$8,096	$10,304
47 SOUTH DAKOTA	$4,466	$1,965	$2,501
48 TENNESSEE	$20,793	$9,149	$11,644
49 TEXAS	$47,052	$20,703	$26,349
52 UTAH	$2,894	$1,273	$1,621
53 VERMONT	$3,751	$1,651	$2,101
54 VIRGINIA	$20,650	$9,086	$11,564
56 WASHINGTON	$13,326	$5,864	$7,463
57 WEST VIRGINIA	$12,469	$5,486	$6,982
58 WISCONSIN	$16,899	$7,435	$9,463
59 WYOMING	$2,572	$1,132	$1,441
60 ALASKA	$3,930	$1,729	$2,201
61 HAWAII	$4,787	$2,106	$2,681
62 W PAC ISLANDS	$1,000	$440	$560
63 PUERTO RICO	$17,077	$7,514	$9,563
64 VIRGIN ISLANDS	$1,429	$629	$800
STATE TOTALS	$713,467	$313,925	$399,542
100 Underserved Counties and Colonias	$51,893	$22,833	$29,060
EZ/EC/REAP Reserve	$45,506	$20,023	$25,483
General Reserve	$127,000	$43,880	$83,120
Self-Help	$100,000	$56,000	$44,000
TOTAL	$1,037,866	$456,661	$581,205

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 502 GUARANTEED PURCHASE LOANS (NONSUBSIDIZED)

STATES	STATE BASIC FORMULA FACTOR	TOTAL FY 2003 ALLOCATION
ALABAMA	0.0253847	$40,330
ALASKA	0.0061561	$9,781
ARIZONA	0.0155290	$24,672
ARKANSAS	0.0213661	$33,946
CALIFORNIA	0.0524861	$83,387
COLORADO	0.0100701	$15,999
DELAWARE	0.0024043	$3,820
MARYLAND	0.0104750	$16,642
FLORIDA	0.0308357	$48,990
VIRGIN ISLANDS	0.0027236	$4,327
GEORGIA	0.0385293	$61,214
HAWAII	0.0083323	$13,238
W PAC ISLANDS	N/A	$1,000
IDAHO	0.0077774	$12,356
ILLINOIS	0.0256395	$40,735
INDIANA	0.0236023	$37,497
IOWA	0.0151422	$24,057
KANSAS	0.0123032	$19,547
KENTUCKY	0.0286790	$45,564
LOUISIANA	0.0256223	$40,708
MAINE	0.0113916	$18,099
MASSACHUSETTS	0.0117468	$18,663
CONNECTICUT	0.0065708	$10,439
RHODE ISLAND	0.0017216	$2,735
MICHIGAN	0.0337181	$53,570
MINNESOTA	0.0184738	$29,350
MISSISSIPPI	0.0259670	$41,255
MISSOURI	0.0253687	$40,305
MONTANA	0.0067138	$10,667
NEBRASKA	0.0083216	$13,221
NEVADA	0.0029735	$4,724
NEW JERSEY	0.0091825	$14,589
NEW MEXICO	0.0117200	$18,620
NEW YORK	0.0369739	$58,742
NORTH CAROLINA	0.0471742	$74,947
NORTH DAKOTA	0.0040847	$6,490
OHIO	0.0378081	$60,068
OKLAHOMA	0.0175713	$27,916
OREGON	0.0166212	$26,407
PENNSYLVANIA	0.0438367	$69,645
PUERTO RICO	0.0250931	$39,867
SOUTH CAROLINA	0.0249510	$39,641
SOUTH DAKOTA	0.0065435	$10,396
TENNESSEE	0.0276859	$43,986
TEXAS	0.0665018	$105,654
UTAH	0.0039861	$6,333
VERMONT	0.0057475	$9,131
NEW HAMPSHIRE	0.0075234	$11,953
VIRGINIA	0.0278404	$44,231
WASHINGTON	0.0200905	$31,919
WEST VIRGINIA	0.0172518	$27,409
WISCONSIN	0.0222867	$35,408
WYOMING	0.0035006	$5,562
STATE TOTALS	1.0000000	$1,589,752
GENERAL RESERVE		$722,420
SPECIAL OUTREACH AREAS RESERVE		$309,609
TOTAL		$2,621,781

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 502 GUARANTEED REFINANCE LOANS (NONSUBSIDIZED)

STATES	STATE BASIC FORMULA FACTOR	TOTAL FY 2003 ALLOCATION
ALABAMA	N/A	$1,500
ALASKA	N/A	$1,500
ARIZONA	N/A	$1,500
ARKANSAS	N/A	$1,500
CALIFORNIA	N/A	$1,500
COLORADO	N/A	$1,500
DELAWARE	N/A	$1,500
MARYLAND	N/A	$1,500
FLORIDA	N/A	$1,500
VIRGIN ISLANDS	N/A	$1,500
GEORGIA	N/A	$1,500
HAWAII	N/A	$1,500
W PAC ISLANDS	N/A	$1,500
IDAHO	N/A	$1,500
ILLINOIS	N/A	$1,500
INDIANA	N/A	$1,500
IOWA	N/A	$1,500
KANSAS	N/A	$1,500
KENTUCKY	N/A	$1,500
LOUISIANA	N/A	$1,500
MAINE	N/A	$1,500
MASSACHUSETTS	N/A	$1,500
CONNECTICUT	N/A	$1,500
RHODE ISLAND	N/A	$1,500
MICHIGAN	N/A	$1,500
MINNESOTA	N/A	$1,500
MISSISSIPPI	N/A	$1,500
MISSOURI	N/A	$1,500
MONTANA	N/A	$1,500
NEBRASKA	N/A	$1,500
NEVADA	N/A	$1,500
NEW JERSEY	N/A	$1,500
NEW MEXICO	N/A	$1,500
NEW YORK	N/A	$1,500
NORTH CAROLINA	N/A	$1,500
NORTH DAKOTA	N/A	$1,500
OHIO	N/A	$1,500
OKLAHOMA	N/A	$1,500
OREGON	N/A	$1,500
PENNSYLVANIA	N/A	$1,500
PUERTO RICO	N/A	$1,500
SOUTH CAROLINA	N/A	$1,500
SOUTH DAKOTA	N/A	$1,500
TENNESSEE	N/A	$1,500
TEXAS	N/A	$1,500
UTAH	N/A	$1,500
VERMONT	N/A	$1,500
NEW HAMPSHIRE	N/A	$1,500
VIRGINIA	N/A	$1,500
WASHINGTON	N/A	$1,500
WEST VIRGINIA	N/A	$1,500
WISCONSIN	N/A	$1,500
WYOMING	N/A	$1,500
STATE TOTALS	0.0000000	$79,500
GENERAL RESERVE		$144,037
TOTAL		$223,537

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 504 RURAL HOUSING LOANS

	STATES	STATE BASIC FORMULA FACTOR	TOTAL FY 2003 ALLOCATION
1	ALABAMA	0.0290630	$845
2	ARIZONA	0.0200434	$583
3	ARKANSAS	0.0225489	$656
4	CALIFORNIA	0.0531151	$1,544
5	COLORADO	0.0085185	$248
6	CONNECTICUT	0.0040087	$117
7	DELAWARE	0.0020043	$100
9	FLORIDA	0.0295641	$860
10	GEORGIA	0.0395858	$1,151
12	IDAHO	0.0075163	$219
13	ILLINOIS	0.0225489	$656
15	INDIANA	0.0220478	$641
16	IOWA	0.0130282	$379
18	KANSAS	0.0115250	$335
20	KENTUCKY	0.0320695	$933
22	LOUISIANA	0.0295641	$860
23	MAINE	0.0100217	$291
24	MARYLAND	0.0095206	$277
25	MASSACHUSETTS	0.0080174	$233
26	MICHIGAN	0.0290630	$845
27	MINNESOTA	0.0175380	$510
28	MISSISSIPPI	0.0300651	$874
29	MISSOURI	0.0240521	$699
31	MONTANA	0.0060130	$175
32	NEBRASKA	0.0070152	$204
33	NEVADA	0.0030065	$100
34	NEW HAMPSHIRE	0.0055119	$160
35	NEW JERSEY	0.0070152	$204
36	NEW MEXICO	0.0150326	$437
37	NEW YORK	0.0285619	$831
38	NORTH CAROLINA	0.0476031	$1,384
40	NORTH DAKOTA	0.0040087	$117
41	OHIO	0.0330717	$962
42	OKLAHOMA	0.0175380	$510
43	OREGON	0.0150326	$437
44	PENNSYLVANIA	0.0370803	$1,078
45	RHODE ISLAND	0.0010022	$100
46	SOUTH CAROLINA	0.0280608	$816
47	SOUTH DAKOTA	0.0060130	$175
48	TENNESSEE	0.0295641	$860
49	TEXAS	0.0781694	$2,271
52	UTAH	0.0040087	$117
53	VERMONT	0.0045098	$131
54	VIRGINIA	0.0295641	$860
56	WASHINGTON	0.0185402	$539
57	WEST VIRGINIA	0.0180391	$525
58	WISCONSIN	0.0195423	$568
59	WYOMING	0.0035076	$102
60	ALASKA	0.0080174	$233
61	HAWAII	0.0100217	$291
62	W PAC ISLANDS	N/A	$1,000
63	PUERTO RICO	0.0340738	$991
64	VIRGIN ISLANDS	0.0030065	$100
	STATE TOTALS	0.9971607	$30,134
	GENERAL RESERVE		$1,500
	EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES E		$1,400
	100 UNDERSERVED COUNTIES/COLONIAS		$1,738
	TOTAL		$34,772

RURAL HOUSING SERVICE
FISCAL YEAR 2003
ALLOCATION IN THOUSANDS
SECTION 504 RURAL HOUSING GRANTS

STATES	STATE BASIC FORMULA FACTOR	TOTAL FY 2003 ALLOCATION
01 ALABAMA	0.0280565	$741
02 ARIZONA	0.0170343	$450
03 ARKANSAS	0.0223784	$591
04 CALIFORNIA	0.0480968	$1,269
05 COLORADO	0.0083501	$220
06 CONNECTICUT	0.0053441	$141
07 DELAWARE	N/A	$100
09 FLORIDA	0.0340685	$899
10 GEORGIA	0.0367406	$970
12 IDAHO	0.0073481	$194
13 ILLINOIS	0.0263864	$696
15 INDIANA	0.0243824	$644
16 IOWA	0.0163662	$432
18 KANSAS	0.0133602	$353
20 KENTUCKY	0.0297265	$785
22 LOUISIANA	0.0260524	$688
23 MAINE	0.0103542	$273
24 MARYLAND	0.0100202	$264
25 MASSACHUSETTS	0.0096861	$256
26 MICHIGAN	0.0317305	$837
27 MINNESOTA	0.0197063	$520
28 MISSISSIPPI	0.0270545	$714
29 MISSOURI	0.0257184	$679
31 MONTANA	0.0060121	$159
32 NEBRASKA	0.0086841	$229
33 NEVADA	N/A	$100
34 NEW HAMPSHIRE	0.0060121	$159
35 NEW JERSEY	0.0083501	$220
36 NEW MEXICO	0.0123582	$326
37 NEW YORK	0.0323985	$855
38 NORTH CAROLINA	0.0470948	$1,243
40 NORTH DAKOTA	0.0046761	$123
41 OHIO	0.0360726	$952
42 OKLAHOMA	0.0183703	$485
43 OREGON	0.0156983	$414
44 PENNSYLVANIA	0.0437547	$1,155
45 RHODE ISLAND	N/A	$100
46 SOUTH CAROLINA	0.0260524	$688
47 SOUTH DAKOTA	0.0063461	$167
48 TENNESSEE	0.0293925	$776
49 TEXAS	0.0714772	$1,887
52 UTAH	0.0040087	$106
53 VERMONT	0.0046761	$123
54 VIRGINIA	0.0283905	$749
56 WASHINGTON	0.0183703	$485
57 WEST VIRGINIA	0.0180363	$476
58 WISCONSIN	0.0223783	$591
59 WYOMING	N/A	$100
60 ALASKA	0.0056781	$150
61 HAWAII	0.0076821	$203
62 W PAC ISLANDS	N/A	$1,000
63 PUERTO RICO	0.0263865	$696
64 VIRGIN ISLANDS	N/A	$100
STATE TOTALS	0.9863187	$27,533
GENERAL RESERVE		$1,629
EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES EARM		$596
100 UNDERSERVED COUNTIES/COLONIAS		$1,566
TOTAL		$31,324

[FR Doc. 03–12243 Filed 5–15–03; 8:45 am]
BILLING CODE 3410–XV–C

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funding Availability (NOFA) for the Section 515 Rural Rental Housing Program for Fiscal Year 2003

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Notice.

SUMMARY: This NOFA announces the availability of new construction loan funds for the section 515 Rural Rental Housing (RRH) program for Fiscal Year (FY) 2003. By prior notice in the **Federal Register**, the Agency announced a deadline of February 25, 2003, 5 p.m. local time for each Rural Development State Office for submitting applications for section 515 new construction loan funds and section 521 Rental Assistance (RA). The "Notice of Timeframe to Submit Applications for the Section 515 Rural Rental Housing Program for Fiscal Year 2003" was published in the **Federal Register** on December 27, 2002 (67 FR 79033). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application and for the Agency to select and process selected applications within the current fiscal year. Detailed information regarding the application and selection process, as well as a listing of the Rural Development State Offices, may be found in the December 27, 2002, notice.

FOR FURTHER INFORMATION CONTACT: For general information, applicants may contact Linda Armour, Senior Loan Officer, Multi-Family Housing Processing Division, Rural Housing Service, United States Department of Agriculture, Stop 0781, 1400 Independence Avenue, SW., Washington, DC 20250, telephone (202) 720–1753 (voice) (this is not a toll free number) or (800) 877–8339 (TDD-Federal Information Relay Service).

SUPPLEMENTARY INFORMATION:

Programs Affected

The Rural Rental Housing program is listed in the Catalog of Federal Domestic Assistance under Number 10.415, Rural Rental Housing Loans. Rental Assistance is listed in the Catalog under Number 10.427, Rural Rental Assistance Payments.

Discussion of Notice

I. Authority and Distribution Methodology

A. Authority

Section 515 of the Housing Act of 1949 (42 U.S.C. 1485) provides RHS with the authority to make loans to any individual, corporation, association, trust, Indian tribe, public or private nonprofit organization, consumer cooperative, or partnership to provide rental or cooperative housing and related facilities in rural areas for very-low, low, or moderate income persons or families, including elderly persons and persons with disabilities. Rental Assistance (RA) is a tenant subsidy for very-low and low-income families residing in rural rental housing facilities with RHS financing and may be requested with applications for such facilities.

B. Distribution Methodology

The total amount available for FY 2003 for section 515 is $115,052,541, of which $29,252,541 is available for new construction as follows:

Section 515 new construction funds—$7,145,186
Set-aside for nonprofits—10,354,728
Set-aside for Underserved Counties and Colonias—5,752,627
Set-aside for EZ, EC, and REAP Zones—5,000,000
State Rental Assistance (RA) Designated reserve—1,000,000

C. Set-asides and State RA Reserve

1. *Nonprofit set-aside.* An amount of $10,354,728 has been set aside for nonprofit applicants. Details on this set-aside are provided in the notice published in the **Federal Register** on December 27, 2002.

2. *Underserved counties and colonias set-aside.* An amount of $5,752,627 has been set aside for loan requests to develop units in the 100 most needy underserved counties or colonias as defined in section 509(f) of the Housing Act of 1949.

3. *EZ, EC, and REAP set-aside.* An amount of $5,000,000 has been set aside to develop units in EZ, EC, or REAP communities. If requests for this set-aside exceed available funds, selection will be made by point score.

4. *State RA Reserve.* $1,000,000 is available nationwide in a reserve for States with viable State Rental Assistance (RA) programs. In order to participate, States are to submit specific written information about the State RA program, *i.e.*, a memorandum of understanding, documentation from the provider, etc., to the National Office.

Dated: May 12, 2003.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 03–12244 Filed 5–15–03; 8:45 am]
BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funds Availability (NOFA) for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Notice.

SUMMARY: This NOFA announces the availability of funds for section 514 Farm Labor Housing loan funds and section 516 Farm Labor Housing grant funds for new construction and acquisition and rehabilitation of off-farm units for farmworker households. Applications may also include requests for section 521 rental assistance (RA) and operating assistance for migrant units. By prior notice in the **Federal Register**, the Agency announced a deadline of March 27, 2003, 5 p.m., local time for each Rural Development State Office, for submitting applications for sections 514/516 Farm Labor Housing Loans and Grants and Section 521 Rental Assistance (RA). The "Notice of Timeframe for Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003" was published in the **Federal Register** on December 27, 2002 (67 FR 79030). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application, and for the Agency to select and process selected applications within the current fiscal year. This Notice changes the timeframe to submit applications for the Section 514 Farm Labor Housing Loans and Section 516 Farm Labor Housing Grants for Off-Farm Housing for Fiscal Year 2003 to be August 14, 2003. Detailed information regarding the application and selection process, as well as a listing of the Rural Development State Offices, may be found in the December 27, 2002, notice.

FOR FURTHER INFORMATION CONTACT: For general information, applicants may contact Mary Fox, Senior Loan Specialist or David Layfield, Senior Loan Specialist, of the Multi-Family Housing Processing Division, Rural Housing Service, United States Department of Agriculture, Stop 0781,

1400 Independence Avenue, SW., Washington, DC 20250, telephone (202) 720–1624 or (202) 690–0759 (voice) (this is not a toll free number) or (800) 877–8339 (TDD-Federal Information Relay Service).

SUPPLEMENTARY INFORMATION:

Programs Affected

The Farm Labor Housing Program is listed in the Catalog of Federal Domestic Assistance under Number 10.405, Farm Labor Housing Loans and Grants. Rental Assistance is listed in the Catalog under Number 10.427, Rural Rental Assistance Payments.

Definitions

Farm Labor. Farm labor includes services in connection with cultivating the soil, raising or harvesting any agriculture or aquaculture commodity; or in catching, netting, handling, planting, drying, packing, grading, storing, or preserving in its unmanufactured state any agriculture or aquaculture commodity; or delivering to storage, market, or a carrier for transportation to market or to process any agricultural or aquacultural commodity.

Migrant Agricultural Laborers. Agricultural laborers and family dependents who establish a temporary residence while performing agriculture work at one or more locations away from the place they call home or home base. (This does not include day-haul agricultural workers whose travels are limited to work areas within one day of their work locations.)

Off-Farm Labor Housing. Housing for farm laborers regardless of the farm where they work.

Discussion of Notice

I. Authority and Distribution Methodology

A. Authority

The Farm Labor Housing program is authorized by the Housing Act of 1949: Section 514 (42 U.S.C. 1484) for loans and section 516 (42 U.S.C. 1486) for grants. Tenant subsidies (rental assistance (RA)) are available through section 521 (42 U.S.C. 1490a). Sections 514 and 516 provide RHS the authority to make loans and grants for financing off-farm housing to broad-based nonprofit organizations, nonprofit organizations of farmworkers, federally recognized Indian tribes, agencies or political subdivisions of State or local government, public agencies (such as local housing authorities) and with section 514 loans to nonprofit limited partnerships in which the general partner is a nonprofit entity.

B. Distribution Methodology

Because RHS has the ability to adjust loan and grant levels, final loan and grant levels will fluctuate. The estimated funds available for fiscal year (FY) 2003 for off-farm housing are:
Section 514 loans—$30,480,202
Section 516 grants—13,198,209

c. Section 514 and Section 516 Funds

Section 514 loan funds and section 516 grant funds will be distributed to States based on a national competition, as follows:

1. States will accept, review, and score requests in accordance with 7 CFR part 1944, subpart D. The scoring factors are:

(a) The presence and extent of leveraged assistance, including donated land, for the units that will serve program-eligible tenants, calculated as a percentage of the RHS total development cost (TDC). RHS TDC excludes non-RHS eligible costs such as a developer's fee. Leveraged assistance includes, but is not limited to, funds for hard construction costs, section 8 or other non-RHS tenant subsidies, and state or federal funds. A minimum of ten percent leveraged assistance is required to earn points; however, if the total percentage of leveraged assistance is less than ten percent and the proposal includes donated land, two points will be awarded for the donated land. Points will be awarded in accordance with the following table. (0 to 20 points)

Percentage	Points
75 or more	20
60–74	18
50–59	16
40–49	12
30–39	10
20–29	8
10–19	5
0–9	0
Donated land in proposals with less than ten percent total leveraged assistance	2

(b) Seasonal, temporary, migrant housing. (5 points for up to and including 50 percent of the units; 10 points for 51 percent or more.)

(c) The selection criteria contained in 7 CFR part 1944, subpart D includes one optional criteria set by the National Office. The National office initiative will be used in the selection criteria as follows:

Up to 10 Points will be awarded based on the presence of and extent to which a tenant services plan exists that clearly outlines services that will be provided to the residents of the proposed project. These services may include but are not limited to: Transportation related services, on-site English as a Second Language (ESL) classes, move-in funds, emergency assistance funds, homeownership counseling, food pantries, after school tutoring, and computer learning centers. Two points will be awarded for each resident service included in the tenant services plan up to a maximum of 10 points. Plans must detail how the services are to be administered, who will administer them, and where they will be administered. All tenant service plans must include letters of intent that clearly state the service that will be provided at the project for the benefit of the residents from any party administering each service, including the applicant. (0 to 10 points)

2. States will conduct preliminary eligibility review, score applications, and forward to the National Office.

3. The National office will rank all requests nationwide and distribute funds to States in rank order, within funding and RA limits. In case of point-score ties in the National ranking, first preference will be given to a preapplication to develop units in a state that does not have existing RHS-financed off-farm LH units; second preference to a preapplication will be from a State that has not yet been selected in the current funding cycle. In the event there are multiple preapplications in either category, one preapplication from each State (the highest State-ranked) will compete by computer-based random lottery. If necessary, the process will be completed until all same-pointed preapplications are selected or funds are exhausted.

II. Funding Limits

A. Individual requests may not exceed $3 million (total loan and grant).

B. No State may receive more than 30 percent of the total available funds unless an exception is granted from the Administrator.

C. Rental Assistance and Operating Assistance will be held in the National office for use with section 514 loans and section 516 grants and will be awarded based on each project's financial structure and need.

III. Application Process

All applications for sections 514 and 516 funds must be filed with the appropriate Rural Development State office and must meet the requirements of 7 CFR part 1944, subpart D, and section IV of this NOFA. Incomplete applications will not be reviewed and will be returned to the applicant. No application will be accepted after 5 p.m., local time, on August 14, 2003 unless date and time is extended by another Notice published in the **Federal Register**.

IV. Application Submission Requirements

A. Each application shall include all of the information, materials, forms and exhibits required by 7 CFR part 1944, subpart D, as well as comply with the provisions of this NOFA. Applicants are encouraged, but not required, to include a check list and to have their applications indexed and tabbed to facilitate the review process. The Rural Development State office will base its determination of completeness of the application and the eligibility of each applicant on the information provided in the application.

B. Applicants are advised to contact the Rural Development State office serving the place in which they desire to submit an application for application information.

Dated: May 12, 2003.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 03–12245 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funding Availability (NOFA) for the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) for Fiscal Year (FY) 2003

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Notice.

SUMMARY: This NOFA announces the availability of funds for the section 538 Guaranteed Rural Rental Housing Program for FY 2003. Congress appropriated $99.350 million to the section 538 GRRHP for FY 2003. All applicants that submitted responses to a prior section 538 GRRHP notice published in the **Federal Register** on December 27, 2002 (67 FR 79038) and the correction to the notice published in the **Federal Register** on January 28, 2003 (68 FR 4166) will be considered for FY 2003 funding. The commitment of program dollars will be made to applicants of selected responses that have fulfilled the necessary requirements for obligation as described in the notice published in the **Federal Register** on December 27, 2002 (67 FR 79038).

The Agency will continue to review eligible responses from eligible applicants as described in the notice published in the **Federal Register** on December 27, 2002 (67 FR 79038) and the correction to the notice published in the **Federal Register** on January 28, 2003 (68 FR 4166) until all funds are expended. The Agency will issue a notice to inform the public when funds have been exhausted for FY 2003.

Dated: May 12, 2003.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 03–12246 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funds Availability (NOFA) for Section 533 Housing Preservation Grants for Fiscal Year (FY) 2003

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Notice.

SUMMARY: This NOFA announces the availability of funds for section 533 Housing Preservation Grant (HPG) Program. By prior notice in the **Federal Register,** the Agency announced a deadline of March 27, 2003, 5 p.m., local time for each Rural Development State Office, for submitting applications for Section 533 Housing Preservation Grant Program. The "Notice of Timeframe for the section 533 Housing Preservation Grants for Fiscal Year 2003" was published in the **Federal Register** on December 27, 2002 (67 FR 79036). This was done prior to passage of a final appropriations act to allow sufficient time for applicants to complete an application and for the Agency to select and process selected applications within the current fiscal year. Detailed information regarding the application and selection process, as well as a listing of the Rural Development State Offices, may be found in the December 27, 2002, Notice.

FOR FURTHER INFORMATION CONTACT: For general information, applicants may contact Mary Fox, Senior Loan Officer, Multi-Family Housing Processing Division, Rural Housing Service, United States Department of Agriculture, Stop 0781, 1400 Independence Avenue, SW., Washington, DC 20250, telephone (202) 720–1624 (voice) (this is not a toll free number) or (800) 877–8339 (TDD—Federal Information Relay Service).

SUPPLEMENTARY INFORMATION:

Programs Affected

This program is listed in the Catalog of Federal Domestic Assistance under Number 10.433, Rural Housing Preservation Grants. This program is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V). Applicants are referred to 7 CFR 1944.674 and 1944.676(f), (g), and (h) for specific guidance on these requirements relative to the HPG program.

Discussion of Notice

I. Authority and Distribution Methodology

A. Authority

The HPG program is a grant program which provides qualified public agencies, private nonprofit organizations, and other eligible entities grant funds to assist very low- and low-income homeowners to repair and rehabilitate their homes in rural areas, and to assist rental property owners and cooperative housing complexes to repair and rehabilitate their units if they agree to make such units available to low- and very low-income persons. This action is taken to comply with Agency regulations found in 7 CFR part 1944, subpart N, which requires the Agency to announce the opening and closing dates for receipt of preapplications for HPG funds from eligible applicants. The intended effect of this Notice is to provide eligible organizations notice of these dates.

B. Distribution Methodology

The funding instrument for the HPG program will be a grant agreement. The term of the grant can vary from 1 to 2 years, depending on available funds and demand. No maximum or minimum grant levels have been established at the National level. You should contact the State office to determine the allocation and the State maximum grant level, if any. For FY 2003, $9,935,000 is available for the Housing Preservation Grant Program. A set aside of $596,100 has been established for grants located in Empowerment Zones, Enterprise Communities, and REAP Zones, $997,400 has been set aside for the Administrator's reserve and $8,341,500 has been distributed under a formula allocation to States pursuant to 7 CFR part 1940, subpart L, "Methodology and Formulas for Allocation of Loan and Grant Program Funds." Decisions on funding will be based on preapplications.

Dated: May 12, 2003.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 03–12247 Filed 5–15–03; 8:45 am]

BILLING CODE 3410–XV–P

Federal Register

Friday,
May 16, 2003

Part VII

Department of Housing and Urban Development

24 CFR Part 200

Appraiser Qualifications for Placement on FHA Single Family Appraiser Roster; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR–4620–F–02]

RIN 2502–AH59

Appraiser Qualifications for Placement on FHA Single Family Appraiser Roster

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule makes several changes designed to strengthen the licensing and certification requirements for placement on the Federal Housing Administration (FHA) Appraiser Roster (Appraiser Roster or FHA Appraiser Roster). First, the final rule requires that appraisers on the Appraiser Roster must have credentials that are based on the minimum licensing/certification standards issued by the Appraiser Qualifications Board of the Appraisal Foundation. The final rule also clarifies that an appraiser may be removed from the Appraiser Roster if the appraiser loses his or her license or certification in any state due to disciplinary action, even if the appraiser continues to be licensed or certified in another state. Further, the final rule provides that an appraiser whose license or certification in any state has been revoked, suspended, or surrendered as a result of a state disciplinary action will be automatically suspended from the Appraiser Roster until HUD receives evidence demonstrating that the state imposed sanction has been lifted. An appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal, but may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified. This final rule follows publication of a November 30, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.

DATES: *Effective Date:* With the exception of § 200.202(b)(1) and (c), this final rule is effective on June 16, 2003. HUD will publish a notice in the **Federal Register** announcing the effective date of § 200.202(b)(1) and (c).

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Room 9266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000; telephone (202) 708–2121 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On November 30, 2001 (66 FR 60128), HUD published a proposed rule designed to strengthen the licensing and certification requirements for placement on the Appraiser Roster. The Appraiser Roster lists those appraisers who are eligible to perform FHA single family appraisals. HUD maintains the Appraiser Roster to provide a means by which HUD can ensure the competency of appraisers performing FHA appraisals. The Appraiser Roster regulations are located in 24 CFR part 200, subpart G (consisting of §§ 200.200–200.206).

Under the November 30, 2001, proposed rule, appraisers on the Appraiser Roster would be required to have credentials based on the minimum licensing/certification standards issued by the Appraiser Qualifications Board (AQB) of the Appraisal Foundation. Further, an appraiser would be subject to removal from the Appraiser Roster if the appraiser loses his or her license or certification in any state due to disciplinary action, even if the appraiser continues to be licensed or certified in another state. The proposed rule also provides that an appraiser who is licensed or certified in a single state and whose state license or certification has expired, or has been revoked, suspended, or surrendered as a result of a state disciplinary action would be automatically suspended from the Appraiser Roster and prohibited from conducting FHA appraisals until HUD receives evidence demonstrating license or certification renewal or that the state-imposed sanction has been lifted.

The preamble to the November 30, 2001, proposed rule provides additional details regarding the proposed amendments to the FHA Appraiser Roster licensing and certification requirements.

II. This Final Rule

This final rule follows publication of the November 30, 2001, proposed rule and takes into consideration the public comments received on the proposed rule. The most significant differences between this final rule and the November 30, 2001, proposed rule are as follows:

1. *Twelve-month phase-in of AQB requirements for appraisers listed on the Appraiser Roster.* The final rule provides that an appraiser who is included on the Appraiser Roster on the effective date of this rule, but who does not meet the minimum AQB licensing/certification criteria in effect on that date, has until 12 months following the effective date of the final rule to fully comply with the AQB criteria and submit evidence of such compliance to HUD. Failure to submit such evidence to HUD by the deadline date constitutes cause for removal from the Appraiser Roster. The phase-in period does not restrict HUD's ability to remove an unsatisfactory appraiser from the Appraiser Roster for any other cause identified in § 200.204.

2. *Automatic suspension of appraisers licensed or certified in multiple states.* The final rule provides that an appraiser whose license or certification in any state has been revoked, suspended, or surrendered as a result of a state disciplinary action will be automatically suspended from the Appraiser Roster until HUD receives evidence demonstrating that the state-imposed sanction has been lifted. The proposed rule would have limited automatic suspension to appraisers licensed or certified in a single state.

3. *Clarification of scope of automatic suspensions not due to state disciplinary action.* The final rule clarifies that an appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal. The appraiser may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified.

III. Discussion of the Public Comments Received on the November 30, 2001, Proposed Rule

The public comment period on the proposed rule closed on January 29, 2002. HUD received fourteen public comments on the proposed rule. Comments were received from the Appraisal Foundation; realtors; appraisers; state real estate appraiser boards; and national organizations representing banking institutions, appraisers, realtors, and state appraiser regulatory agencies. This section of the preamble presents a summary of the significant issues raised by the public commenters, and HUD's responses to the comments.

A. Comments Regarding AQB Criteria

Comment: How will HUD determine whether state requirements conform to AQB criteria? Several commenters asked

how HUD would determine whether state licensing/certification requirements comply with AQB criteria, since both the state requirements and the AQB standards are subject to periodic change. Accordingly, states that comply with the current AQB criteria may later fall out of compliance due to changes adopted by the AQB or the state legislature. To address these concerns, one of the commenters suggested that an appraiser be eligible for inclusion on the Appraiser Roster if the state requirements conformed to the AQB criteria in effect at the time the appraiser obtained the license or certification. Two other commenters recommended that the final rule focus on whether individual appraisers comply with the AQB criteria, rather than on whether state requirements are in compliance with these standards.

HUD response. HUD will periodically monitor the compliance of the states with the minimum AQB requirements to ensure that all appraisers included on the Appraiser Roster meet these standards.

Comment: How will HUD treat appraisers who received their AQB license or certification through "grandfathering?" Several commenters questioned the impact of the proposed rule on "grandfathered" appraisers who received their licensing or certification prior to the state's adoption of AQB criteria. Two of the commenters recommended that HUD immediately remove such appraisers from the Appraiser Roster and require them to re-apply and demonstrate compliance with the AQB requirements. However, other commenters cautioned against such removals. One of these commenters suggested that "grandfathered" appraisers should instead be allowed to remain on the Appraiser Roster if they can provide a letter from the state appraiser licensing agency attesting that the appraiser satisfies the AQB criteria.

HUD Response. The final rule provides that appraisers, including the "grandfathered" appraisers mentioned by the commenters, who are included on the Appraiser Roster on the effective date of this rule, but who do not meet the minimum AQB licensing/certification criteria in effect on that date, have 12 months following the effective date of the final rule to fully comply with the AQB criteria and submit evidence of such compliance to HUD. Failure to submit such evidence to HUD by the deadline date constitutes cause for removal from the Appraiser Roster. The phase-in period does not restrict HUD's ability to remove unsatisfactory appraisers from the Appraiser Roster for any other cause identified in § 200.204.

Comment: Will HUD remove appraisers licensed or certified in states that do not currently meet the AQB criteria? One commenter posed this question.

HUD Response. As noted in the response to the preceding comment, HUD will allow such an appraiser to remain on the Appraiser Roster for 12 months following the effective date of the final rule, at which time the appraiser must be in full compliance with the AQB criteria.

Comments: AQB requirements should be "phased-in." One commenter wrote that the proposed AQB requirements should be "phased-in" to provide appraisers with sufficient time to satisfy these criteria.

HUD Response. HUD agrees with the commenter. As noted, an appraiser currently included on the Appraiser Roster, but who does not meet the minimum AQB licensing/certification criteria in effect on that date, has 12 months following the effective date of the final rule to fully comply with the AQB criteria and submit evidence of such compliance to HUD. Failure of the appraiser to submit such evidence to HUD by the deadline date constitutes cause for removal from the Appraiser Roster. The phase-in period does not restrict HUD's ability to remove an unsatisfactory appraiser from the Appraiser Roster for any other cause identified in § 200.204.

Comment: HUD should identify those states whose licensing and certification requirements do not meet AQB criteria. One commenter made this suggestion.

HUD Response. The Appraisal Subcommittee is the official authority for determining and identifying each state's compliance with the AQB criteria.

Comment: HUD's use of the phrase "professional credentials" may be inappropriate. One commenter wrote that the proposed rule's use of the phrase "professional credentials" when referring to the AQB criteria is inappropriate. According to the commenter, the term "professional credentials" is commonly understood by appraisers to refer to designations earned within professional membership organizations. The commenter wrote that reference in the proposed rule to this phrase is misapplied if used to apply to the gap between a state's licensing and certification criteria and the minimum AQB criteria. The commenter recommended that HUD create a more appropriate phrase to identify this concept.

HUD Response. HUD has revised the proposed rule to be more sensitive to the issues raised by the commenter. The final rule refers to "credentials," rather than "professional credentials."

B. Other Comments Regarding Qualifications for Placement on the Appraiser Roster

Comment: Appraisers should be required to have at least two years experience as licensed or certified appraisers for placement on the Appraiser Roster. One commenter made this suggestion. According to the commenter, FHA appraisals are often more complicated than those for conventional mortgage loans, and thus require additional experience. The commenter wrote that in comparison to conventional appraisals, FHA appraisals require a higher degree of skill and more knowledge of construction, depreciation, cost estimating for repairs, and estimating the useful and remaining life of residential improvements and equipment.

HUD Response. At this time, HUD does not plan additional changes to the experience requirements for placement on the Appraiser Roster. Rather, HUD will rely on the AQB experience criteria. HUD believes that the AQB standard is sufficient to ensure that appraisers included on the Appraiser Roster have the necessary experience to perform FHA appraisals.

Comment: HUD should determine whether an appraiser has been subject to state disciplinary action before approving the appraiser for placement on the Appraiser Roster. Two commenters made this recommendation. The commenters wrote that HUD might consider using the National Registry of Appraisers maintained by the Appraisal Subcommittee for this purpose. However, one of the commenters cautioned that the National Registry may be inadequate and suggested that HUD should consider establishing its own independent verification methods.

HUD Response. The change requested by the commenters is outside the scope of the November 30, 2001, proposed rule and would require additional notice and comment prior to implementation. At this time, HUD does not plan additional changes to the requirements for placement on the Appraiser Roster. HUD believes the current placement procedures are adequate to ensure that appraisers included on the Appraiser Roster are competent to perform FHA appraisals.

C. Comment Regarding Automatic Suspension From the Appraiser Roster

Comment: Appraisers who are licensed or certified in multiple states should also be subject to automatic suspension. Under the November 30, 2001, proposed rule, only those appraisers licensed or certified in a single state would be subject to automatic suspension from the Appraiser Roster due to state disciplinary action. Three commenters recommended that the scope of automatic suspensions be expanded to include appraisers licensed or certified in multiple states. The commenters suggested that such appraisers should be automatically suspended from the Appraiser Roster if they lose their license or certification due to disciplinary action in any state.

HUD Response. HUD agrees with the commenters and has revised the proposed rule accordingly.

Comment: HUD should clarify that voluntarily electing not to renew a state license or certification does not constitute "disciplinary action" for purposes of automatic suspension from the Appraiser Roster. One commenter made this suggestion. The commenter wrote that depending on state law, if an appraiser willingly allows his or her license to expire, it might appear that the license expired due to disciplinary action. The commenter suggested that the final rule clarify that the voluntary expiration of a state appraisal license or certification does not constitute a disciplinary action.

HUD Response. HUD has revised the regulatory text to be more sensitive to the issue raised by the commenter. Specifically, the final rule clarifies that an appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal. The appraiser may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified.

Comment: HUD should report appraisers who have been removed from the Appraiser Roster to the appropriate state appraisal licensing authorities. Three commenters made this suggestion.

HUD Response. HUD will provide this information to states as appropriate.

Comment: Appraisers should not be removed from Appraiser Roster prior to state review of case. One commenter wrote that anytime HUD's review process determines that an appraiser is performing unethical or substandard work, the appraiser should be suspended from the Appraiser Roster and referred by HUD to the appropriate state agency for disciplinary action. The commenter wrote that an appraiser should not be removed from the Appraiser Roster until the state agency has had the opportunity to review the case and determine whether disciplinary action is appropriate. According to the commenter, this method will protect appraisers from the administrative burden of reapplying for placement on the Appraiser Roster.

HUD Response. The suggestion made by the commenter is outside the scope of the November 30, 2001, proposed rule. At this time, HUD does not anticipate making any changes to the Appraiser Roster removal procedures. HUD believes that the existing removal procedures are sufficient to safeguard the interests of FHA homebuyers, HUD, and appraisers included on the Appraiser Roster.

IV. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this proposed rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Paperwork Reduction Act

The information collection requirements contained in this final rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and are pending OMB approval. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

The burden of the information collections in this rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

Section reference	Number of parties	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 200.202(b)(1) and (c) (submission of evidence of compliance with AQB standards).	1,800	1 × .33	.50	900

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this 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.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received within sixty (60) days from the date of this proposal. Comments must refer to the final rule by name and docket number (FR–4620) and must be sent to:

Lauren Wittenberg, HUD Desk Officer, Office of Management and Budget, New Executive Office Building,

Washington, DC 20503–0001, *Lauren_Wittenberg@omb.eop.gov*
and
Gloria Diggs, Reports Liaison Officer, Office of the Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development, 451 7th Street, SW, Room 9116, Washington, DC 20410–0001.

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4332 *et seq.*).

Regulatory Flexibility Act

The Secretary has reviewed this final rule before publication, and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The reasons for HUD's determination are as follows.

The final rule requires that appraisers on the Appraiser Roster have credentials that are based on the minimum licensing/certification standards issued by the AQB of the Appraisal Foundation. An analysis of the FHA Appraiser Roster indicates that of the approximately 22,163 appraisers currently on the Appraiser Roster, only approximately 330 do not have licensing in conformance with the standards issued by the AQB. In most instances, these appraisers already have some of the hours of education or experience required to meet the AQB criteria, thus further minimizing the impacts of the final rule. For example, most appraisers on the Appraiser Roster have been listed for some time, and thus few of these appraisers will have difficulty providing evidence to their state board demonstrating acceptable experience levels. With regard to the education requirements, the AQB standards only require 90 hours of education for Licensed Real Property Appraiser and 120 hours of education for Certified Residential Real Property Appraiser certification. Given the few number of appraisers currently on the Appraiser Roster who do not have a state designation based on AQB criteria and the relatively little time and expense that would be required for most of these appraisers to meet AQB criteria, HUD has determined that the final rule will not have a significant economic impact on small entities.

In addition to the new AQB standards, the final rule also clarifies that an appraiser may be removed from the Appraiser Roster if the appraiser loses his or her license or certification in any state due to disciplinary action, even if the appraiser continues to be licensed or certified in another state. The final rule also provides that an appraiser whose state license or certification in any state has been revoked, suspended, or surrendered as a result of a state disciplinary action, will be automatically suspended from the Appraiser Roster and prohibited from conducting FHA appraisals until HUD receives evidence demonstrating that the state imposed sanction has been lifted. An appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal. An appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal, but may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified. To the extent that these changes have an impact on small entities it will be as a result of actions taken by the appraisers themselves (*i.e.*, violation of applicable standards resulting in disciplinary action or otherwise failing to maintain their professional state licensing or certification).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule will not have federalism implications and will not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule will not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 200 as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 1. The authority citation for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1701–1715z-18; 42 U.S.C. 3535(d).

Subpart G—Appraiser Roster

■ 2. In § 200.202 revise paragraph (b)(1) and add paragraph (c) to read as follows:

§ 200.202 How do I apply for placement on the Appraiser Roster?

* * * * *

(b) * * *

(1) You must be a state-licensed or state-certified appraiser with credentials based on the minimum licensing/certification criteria issued by the Appraiser Qualifications Board (AQB) of the Appraisal Foundation. For purposes of this section, an appraiser is not deemed to have credentials based on AQB standards if the state licensing/certification requirements did not conform to AQB criteria at the time the appraiser obtained the license or certification. This is true even if the state has subsequently adopted AQB criteria and has "grandfathered" previously licensed or certified appraisers.

* * * * *

(c) *Delayed effective date of AQB requirements for appraisers currently*

listed on the Appraiser Roster. An appraiser who is included on the Appraiser Roster on June 16, 2003, but does not meet the minimum AQB licensing/certification criteria in effect on this date, has until 12 months following this date to comply with the AQB criteria and submit evidence of compliance to HUD. Failure to submit such evidence to HUD by the deadline date constitutes cause for removal under § 200.204.

■ 3. Amend § 200.204 as follows:

■ a. Revise paragraph (a)(1);

■ b. Redesignate paragraphs (c) and (d) as paragraphs (d) and (e) respectively; and,

■ c. Add new paragraph (c):

The addition and revision read as follows:

§ 200.204 What actions may HUD take against unsatisfactory appraisers on the Appraiser Roster?

* * * * *

(a) * * *

(1) *Cause for removal.* Cause for removal includes, but is not limited to:

(i) Significant deficiencies in appraisals, including non-compliance with Civil Rights requirements regarding appraisals;

(ii) Losing standing as a state-certified or state-licensed appraiser due to disciplinary action in any state in which the appraiser is certified or licensed;

(iii) Prosecution for committing, attempting to commit, or conspiring to commit fraud, misrepresentation, or any other offense that may reflect on the appraiser's character or integrity;

(iv) Failure to perform appraisal functions in accordance with instructions and standards issued by HUD;

(v) Failure to comply with any agreement made between the appraiser and HUD or with any certification made by the appraiser;

(vi) Being issued a final debarment, suspension, or limited denial of participation;

(vii) Failure to maintain eligibility requirements for placement on the Appraiser Roster as set forth under this subpart or any other instructions or standards issued by HUD; or,

(viii) Failure to comply with HUD-imposed education requirements under paragraph (d) of this section within the specified period for complying with such education requirements.

* * * * *

(c) *Automatic suspension from Appraiser Roster.*—(1) *Appraisers subject to state disciplinary action.* An appraiser whose state licensing or certification in any state has been revoked, suspended, or surrendered as a result of a state disciplinary action is automatically suspended from the Appraiser Roster and prohibited from conducting FHA appraisals in any state until HUD receives evidence demonstrating that the state imposed sanction has been lifted.

(2) *Expirations not due to state disciplinary action.* An appraiser whose licensing or certification in a state has expired is automatically suspended from the Appraiser Roster in that state and may not conduct FHA appraisals in that state until HUD receives evidence that demonstrates renewal, but may continue to perform FHA appraisals in other states in which the appraiser is licensed or certified.

* * * * *

Dated: May 9, 2003.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 03–12205 Filed 5–15–03; 8:45 am]

BILLING CODE 4210–27–P

Federal Register

Friday,
May 16, 2003

Part VIII

Department of Education

Office of Innovation and Improvement—Professional Development for Arts Educators; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.351C]

Office of Innovation and Improvement—Professional Development for Arts Educators; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

Purpose of Program: This program is authorized under Subpart 15 of Part D of Title V of the Elementary and Secondary Education Act (ESEA), as amended by Public Law 107–110, the No Child Left Behind Act of 2001. Through this competition, the Secretary will make grants to eligible entities for the implementation of high-quality professional development programs in elementary and secondary education. This program will fund model professional development programs for music, dance, drama, and visual arts educators that use innovative instructional methods, especially those linked to scientifically-based research.

The Professional Development for Arts Educators Program provides resources that LEAs can use in pursuit of the objectives of the No Child Left Behind Act which aims for all elementary and secondary students to achieve high standards. In particular, this program provides an opportunity for eligible entities to create new programs in schools identified for improvement, corrective action, or restructuring under Title I, Part A of the ESEA.

Eligible Applicants: A local educational agency (LEA), including charter schools that are considered LEAs under State law and regulations, acting on behalf of an individual school or schools where 75 percent or more of the children are from low-income families, based on the poverty criteria described in Title I, Section 1113(a)(5) of the ESEA, in collaboration with at least one of the following: (1) An institution of higher education; (2) a State educational agency; or (3) a public or private non-profit agency with a history of providing high-quality professional development services to public schools. Only schools where 75 percent or more of the children served are from low-income families may receive services under this program. Each school served through this program must submit evidence that it meets the poverty criteria. Applicants may submit records kept for the purpose of Title I of the ESEA that demonstrate proof of eligibility for each school to be served.

Note: The LEA must serve as the fiscal agent for the program.

Applications Available: 5–16–03.

Notification of Intent to Apply for Funding: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by e-mail that it intends to submit an application for funding. The Secretary requests that this e-mail notification be sent no later than June 16, 2003 to the following Internet address: *lynyetta.johnson@ed.gov.*

Applicants that fail to provide this e-mail notification may still apply for funding.

Deadline for Transmittal of Applications: 7–10–03.

Deadline for Intergovernmental Review: 9–8–03.

Available Funds: Approximately $4.4 million.

Estimated Range of Awards: $250,000—$325,000.

Estimated Average Size of Awards: $290,000.

Estimated Number of Awards: 14–17.

Project Period: Up to 36 months.

Note: The Department is not bound by any estimates in this notice. Funding for the second and third years is subject to the availability of funds and the approval of continuation awards (34 CFR 75.253).

Page Limit: The program narrative is limited to no more than 40 pages. The page limit applies to the narrative section only. All of the application narrative must be included in the narrative section. If the narrative section of an application exceeds the page limitation, the application will not be reviewed. In addition, the following standards are required: (1) Each "page" is 8.5" x 11" (on one side only) with one inch margins (top, bottom, and sides); (2) double space (no more than three lines per vertical inch) all text in the application narrative including titles, headings, footnotes, quotations, and captions as well as all text in charts, tables, figures, and graphs; and (3) use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).

Project Directors Meeting: Applicants are encouraged to budget for a two-day project directors meeting in Washington, DC.

Applicable Regulations and Statute: (a) *Regulations.* The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, 86, 97, 98, and 99. (b) *Statute.* Title V, Part D, Subpart 15, of the Elementary and Secondary Education Act as reauthorized by the No Child Left Behind Act of 2001.

Absolute Priority: Under 34 CFR 75.105(c)(3), the Secretary considers only applications that meet the following absolute priority:

Professional development programs designed for K–12 arts teachers that focus on—

(1) The development, enhancement, or expansion of standards-based arts education programs; or

(2) The integration of arts instruction into other subject area content.

Funded projects must address all aspects of high-quality professional development programs as described under the PROGRAM GOALS section of this notice.

Invitational Priority. The Secretary is particularly interested in applications that meet the following priority.

Invitational Priority. A project that provides for alternative routes to teacher certification or licensure through comprehensive, high-quality training programs in order to place music, drama, dance, and visual arts teachers in the classroom as soon as possible.

Under 34 CFR 75.105(c)(1), the Secretary does not give an application that meets this invitational priority a competitive or absolute preference over other applications.

Selection Criteria: The Secretary will use the following selection criteria to evaluate applications under this competition. The maximum score for all selection criteria is 100 points. The maximum score for each criterion is indicated in parenthesis with the criterion. The criteria are as follows:

(a) *Significance* (15 points). The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project involves the development of promising new strategies that build on, or are alternatives to, existing strategies.

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of the Project Design* (15 points). The Secretary considers the quality of the project design of the proposed project. In determining the quality of the project design, the Secretary considers the following factors:

(i) The extent to which the proposed project represents an exceptional approach for meeting the priority established for the competition.

(ii) The quality of the methodology to be employed in the proposed project.

(c) *Quality of Project Services* (10 points). The Secretary considers the quality of project services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants without regard to race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practices.

(ii) The extent to which the professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(d) *Quality of Project Personnel* (15 points). The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment without regard to race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel.

(ii) The qualifications, including relevant training and experience, of subcontractors.

(e) *Adequacy of Resources* (15 points). The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the lead applicant organization.

(ii) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(f) *Quality of the Management Plan* (15 points). The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The adequacy of procedures for ensuring continuous feedback and continuous improvement in the operation of the proposed project.

(iii) The extent to which the time commitments of the project director and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(g) *Quality of the Project Evaluation* (15 points). The Secretary considers the quality of the project evaluation. In determining the quality of the project evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(ii) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

Program Goals: This program supports the strengthening of standards-based arts education programs, which are an integral part of elementary and secondary school curricula. It also helps ensure that all students meet challenging State academic content standards and challenging State student academic achievement standards in the arts. Professional development activities that are developed, enhanced, or expanded through this program will assist music, dance, drama, and visual arts teachers in the implementation of arts education standards and will promote the integration of arts instruction into other subject areas.

Arts content and achievement standards have been voluntarily adopted in many States throughout the country. These standards help school districts to establish student performance standards based upon the unique needs of, and desired outcomes for, the students in their communities. The development and implementation of standards-based arts programs enable arts educators to assess and document the effectiveness of teaching strategies and materials in addition to student achievement. However, teachers often need professional development on how to implement art education standards for both arts programs and for programs designed to integrate arts into other subject areas.

High-quality professional development programs supported under this program must be linked to the implementation of arts standards and/or the integration of arts into other content areas and must include—

(1) Strategies for addressing student achievement;

(2) Strategies for meeting the needs of students who come from diverse cultural, linguistic, and socioeconomic backgrounds;

(3) The development of the intellectual and leadership potential of teachers;

(4) Rigorous and sustained activities that result in increased content area knowledge and classroom effectiveness of music, dance, drama, and visual arts teachers;

(5) Use of technological innovations relevant to arts instruction; and

(6) Increased opportunities for teachers to share and discuss new methods or teaching strategies with their peers.

The Department plans to disseminate information regarding promising teaching methods or practices that are developed or enhanced through this program to the arts education community and to the public in general.

Coordination Requirement: Under section 5551(f)(1) of the ESEA, the Secretary requires that each entity funded under this program coordinate, to the extent practicable, each project or program carried out with such assistance with appropriate activities of public or private cultural agencies, institutions, and organizations, including museums, arts education associations, libraries, and theaters.

Supplement, Not Supplant, Requirement: Under section 5551(f)(2) of the ESEA, the Secretary requires that assistance provided under this program be used only to supplement, and not to supplant, other assistance or funds made available from non-Federal sources for the activities assisted under this subpart.

Waiver of Proposed Rulemaking: In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed rules. Section 437(d)(2) of the General Education Provisions Act (GEPA), however, exempts from rulemaking requirements rules where the Secretary determines that such requirements will cause extreme hardship to the intended beneficiaries of the program affected by the regulations. The requirements of rulemaking would cause extreme hardship in this case because there is insufficient time to publish rules for notice and comment and to conduct a timely competition for grant awards. The Secretary, in accordance with section 437(d)(2) of GEPA, to ensure

timely and high-quality awards, has decided to forgo public comment on the rules in this notice. These rules will apply only to the FY 2003 grant competition.

For Applications Contact: Education Publication Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734. You may also contact ED Pubs at its Web site: *http://www.ed.gov/pbs/edpubs.html*. Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov*.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.351C.

FOR FURTHER INFORMATION CONTACT: Lynyetta Johnson, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E206 FB–6, Washington, DC 20202–6140. Telephone: (202) 269–1990 or via Internet: *lynyetta.johnson@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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Individuals with disabilities may obtain a copy of the application package in an alternative format by contacting that person. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

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Program Authority: 20 U.S.C. 7271.

Dated: May 12, 2003.

Nina Rees,

Deputy Under Secretary for Innovation and Improvement.

[FR Doc. 03–12284 Filed 5–15–03; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Friday,
May 16, 2003

Part IX

Department of Education

Office of Innovation and Improvement—Advance Placement (AP) Test Fee Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.330B]

RIN 1855–ZA01

Office of Innovation and Improvement—Advanced Placement (AP) Test Fee Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2003

Purpose of Program: The AP Test Fee program provides grants to States to enable them to pay advanced placement test fees on behalf of eligible low-income students who (1) are enrolled in an advanced placement course; and (2) plan to take an advanced placement exam. The program is designed to increase the number of low-income students who take advanced placement tests and receive scores for which college academic credit is awarded. Through participation in this program, low-income students will achieve to higher standards in English, mathematics, science, and other core subjects. The program also seeks to increase the number of low-income students who achieve a baccalaureate or advanced degree.

The AP Test Fee program provides resources that State Educational agencies (SEAs) and other eligible applicants can use in pursuit of the objectives of the No Child Left Behind Act of 2001 which aims for all elementary and secondary students to achieve to high standards. In particular, this program provides an opportunity for eligible entities to support advanced placement programs in schools identified for improvement, corrective action, or restructuring under Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended.

Eligible Applicants: SEAs in any State, including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Note: For purposes of this program, the Bureau of Indian Affairs is treated as an SEA.

Applications Available: 5–16–03.

Notification of Intent to Apply for Funding: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant for the AP Test Fee program to notify the Department by e-mail that it intends to submit an application for funding. The notification of intent to apply for funding should be sent no later than June 16, 2003 to the following Internet address: *madeline.baggett@ed.gov.*

Applicants who fail to provide this e-mail notification may still apply for funding.

Deadline for Transmittal of Applications: 6–30–03.

Deadline for Intergovernmental Review: 8–30–03.

Estimated Available Funds: Approximately $3 million.

Note: The Department expects to award a total of approximately $3 million in grants to States under the AP Test Fee program but, in accordance with statutory requirements, will make more funds available from the Advanced Placement Incentive program (CFDA No. 84.330C) if necessary.

Estimated Range of Awards: $50,000 to $500,000 per year.

Estimated Average Size of Awards: $275,000 per year.

Estimated Number of Awards: 4–50.

Note: These estimates are projections for the guidance of potential applicants. The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations and Statute: (a) *Regulations.* Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 85, 86, 97, 98, and 99. (b) *Statute.* Title I, Part G of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6531–6537.

Test Fee Funding Rule

In accordance with statutory requirements, the Department gives priority to funding proposals to use grant funds to pay advanced placement test fees on behalf of eligible low-income individuals. The Department intends to fund, at some level, all applications that meet the minimum Requirements for Approval of Applications as described in the application package.

Allowable Activities

States receiving grants under this program may use the grant funds to pay part or all of the cost of advanced placement test fees for low-income individuals who (1) are enrolled in an advanced placement class; and (2) plan to take an advanced placement test.

Award Basis

In determining grant award amounts, the Department will consider, among other things, the number of children in the State eligible to be counted under section 1124(c) of Title I of the ESEA in relation to the number of such children counted in all the States that apply for funding. Complete budget data must be submitted for each year of funding requested.

Definitions

The following definitions and other provisions are taken from the Advanced Placement Programs authorizing statute, in Title I, Part G of the ESEA. They are repeated in this application notice for the convenience of the applicant.

As used in this section:

(a) The term *advanced placement test* means an advanced placement test administered by the College Board or approved by the Secretary of Education.

Note: In addition to advanced placement tests administered by the College Board, the Department has approved advanced placement tests administered by the International Baccalaureate Organization. As part of the grant application process, applicants may request approval of tests from other educational entities that provide comparable programs of rigorous academic courses and testing through which students may earn college credit.

(b) The term *low-income individual* means an individual who is determined by an SEA or local educational agency to be a child from a low-income family on the basis of data used by the Secretary to determine allocations under section 1124 of Title I of the ESEA, data on children in families receiving assistance under part A of title IV of the Social Security Act, or data on children eligible to receive medical assistance under the Medicaid program under title XIX of the Social Security Act, or through an alternate method that combines or extrapolates from those data.

Information Dissemination

An SEA awarded a grant under the AP Test Fee program must disseminate information regarding the availability of advanced placement test fee payments under this program to eligible individuals through secondary school teachers and guidance counselors.

Supplement, Not Supplant, Rule

Funds provided under this program may be used only to supplement, and not supplant, other non-Federal funds that are available to assist low-income individuals in paying advanced placement test fees.

Waiver of Proposed Rulemaking

In accordance with the Administrative Procedure Act (5 U.S.C.

553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed rules that are not taken directly from the statute. Ordinarily, this practice would have applied to the rules in this notice. Section 437(d)(2) of the General Education Provisions Act (GEPA), however, exempts from this rulemaking requirement those rules where the Secretary determines it would cause extreme hardship to the intended beneficiaries of the program affected by the regulations. The Secretary, in accordance with section 437(d)(2) of GEPA, has decided to forego public comment with respect to the rules in this grant competition in order to ensure timely and high-quality awards. These rules will apply only to the FY 2003 grant competition.

For Applications Contact: Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433-7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD) you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pbs/edpubs.html.*

Or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.330B.

FOR FURTHER INFORMATION CONTACT: Madeline E. Baggett, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–6140. Telephone: (202) 260–2502 or via Internet: *madeline.baggett@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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Program Authority: 20 U.S.C. 6531–6537.

Dated: May 12, 2003.

Nina Rees,

Deputy Under Secretary for Innovation and Improvement.

[FR Doc. 03–12285 Filed 5–15–03; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Friday,
May 16, 2003

Part X

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1)(A)(i) congressional amendments to the sentencing guidelines made directly by the PROTECT Act, Pub. L. 108–21, and effective April 30, 2003; and (ii) conforming amendments to the amendments described in subdivision (i), promulgated pursuant to 401(m)(2)(C) of the PROTECT Act and 28 U.S.C. 994, and effective April 30, 2003; and (B) amendment to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) promulgated pursuant to section 104 of the PROTECT Act, and effective May 30, 2003; and (2) submission to Congress of amendments to the sentencing guidelines effective November 1, 2003.

SUMMARY: (1) PROTECT Act Amendments.—In the PROTECT Act, Congress directly amended §§ 2G2.2 (Trafficking in Materials Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 3E1.1 (Acceptance of Responsibility), 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), 5H1.6 (Family Ties and Responsibilities, and Community Ties), 5K2.0 (Grounds for Departure), 5K2.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior), and enacted a new policy statement at § 5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses). These amendments became effective on April 30, 2003. The PROTECT Act requires the Commission to distribute these amendments forthwith to federal courts and probation offices.

Pursuant to 401(m)(2)(C) of the PROTECT Act and section 994 of title 28, United States Code, the Commission promulgated conforming amendments to the congressional amendments to the guidelines made directly by the PROTECT Act. Section 994(x) of title 28, United States Code, requires the Commission to comply with the notice and comment procedures set forth in 5 U.S.C. 553. Section 553 provides, however, a "good cause" exception to the general notice and comment requirements if the "agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b); *see also* 5 U.S.C. 553(d)(3) (providing an exception to the otherwise applicable 30 day notice period "as otherwise provided by the agency for good cause found and published with the rule"). The effective date of the congressional amendments noted in the previous paragraph and the Act's directive to distribute such amendments forthwith made it impracticable to publish the conforming amendments in the **Federal Register** to provide an opportunity for public comment before the congressional amendments became effective. The Commission therefore had good cause not to publish those amendments before they became effective.

This notice also sets forth an amendment to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint), which Congress in the Act specifically directed the Commission to make "[n]otwithstanding any other provision of law regarding the amendment of Sentencing Guidelines". Pub. L. 108–21, section 104(a). The Act provides that this amendment shall "take effect on the date that is 30 days after the date of the enactment of this Act.". *Id.*

(2) Section 994(p) Amendments.—Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index.

This notice sets forth the amendments and the reason for each amendment.

DATES: (1) PROTECT Act Amendments.—The effective date for the amendments to §§ 2G2.2, 2G2.4, 3E1.1, 4B1.5, 5H1.6, 5K2.0, 5K2.13, and 5K2.20, and the enactment of § 5K2.22, is April 30, 2003. The effective date for the amendment to § 2A4.1 is May 30, 2003.

(2) Section 994(p) Amendments.—The Commission has specified an effective date of November 1, 2003, for the amendments made pursuant to 28 U.S.C. 994(p) set forth in Part Two of this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4590. The amendments set forth in this notice also may be accessed through the Commission's website at *http://www.ussc.gov*. The April 30, 2003 Supplement to the 2002 *Guidelines Manual* sets forth the PROTECT Act amendments and the emergency amendments promulgated by the Commission effective January 25, 2003. This Supplement, when used in conjunction with the 2002 Guidelines Manual, constitutes the operative *Guidelines Manual* effective April 30, 2003. It may be accessed through the Commission's Web site as well.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

(1) PROTECT Act Amendments.—The congressional amendments made by and pursuant to the PROTECT Act are set forth in Part One of this notice.

(2) Section 994(p) Amendments.—Notice of proposed amendments made pursuant to 28 U.S.C. 994(p) was published in the **Federal Register** on December 18, 2002 (*see* 67 FR 77532–77547), and January 17, 2003 (*see* 68 FR 2615–2628). The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 25, 2003. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth in Part Two of this notice. On May 1, 2003, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2003.

Authority: 28 U.S.C. 994(a), (o), and (p); USSC Rule of Practice and Procedure 4.1.

Diana E. Murphy,
Chair.

Part One: PROTECT Act Amendments

1. Amendment: Section 2G2.2(b) is amended by adding at the end the following:

"(6) If the offense involved—

(A) At least 10 images, but fewer than 150, increase by 2 levels;

(B) At least 150 images, but fewer than 300, increase by 3 levels;

(C) At least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.".

The Commentary to § 2G2.2 is amended by adding at the end the following:

"Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.".

Section 2G2.4(b) is amended by adding at the end the following:

"(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the offense involved—

(A) At least 10 images, but fewer than 150, increase by 2 levels;

(B) At least 150 images, but fewer than 300, increase by 3 levels;

(C) At least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.".

The Commentary to § 2G2.4 is amended by adding at the end the following:

"Background: Section 401(i)(B) of Public Law 108–21 directly amended subsection (b) to add subdivisions (4) and (5), effective April 30, 2003.".

Section 3E1.1(b) is amended by inserting "upon motion of the government stating that" before "the defendant has assisted authorities"; and by striking "taking one or more" and all that follows through "1 additional level" and inserting "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level".

The Commentary to § 3E1.1 captioned "Application Notes" is amended in Note 6 by striking "one or both of"; by striking "(1) or (2)"; by striking "(b)(2)" and inserting "(b)"; and by adding at the end the following new paragraph:

"Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108–21.".

The Commentary to § 3E1.1 captioned "Background" is amended by striking "one or more of" both places it appears; and by adding at the end the following:

"Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.".

The Commentary to § 4B1.5 captioned "Application Notes" is amended in Note 4(B) by striking subdivision (i) as follows:

"(i) In General—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) On at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) There were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, of if there were two separate occasions of prohibited sexual conduct involving the same two minors.".

and inserting:

"(i) In General—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.".

The Commentary to § 4B1.5 captioned "Background" is amended by striking "section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314" and inserting "section 632 of Public Law 102–141 and section 505 of Public Law 105–314"; and by adding at the end the following:

"Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.".

Section 5H1.6 is amended by striking "Family ties" and inserting "In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties"; and by inserting after the first sentence the following new paragraph:

"In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.".

Section 5H1.6 is amended by adding at the end the following:

"Commentary

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.".

Section 5K2.0 is amended by striking "Under" and inserting the following:

"(a) DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—Under";

and by adding at the end the following:

(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) Has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) Has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.".

The Commentary to § 5K2.0 is amended by inserting an asterisk after "Commentary" and by inserting the following new paragraph before "The United":

"[*Section 401(m)(2)(C) of Public Law 108–21 directs the Commission to revise § 5K2.0, within 180 days after the date of the enactment of that Public Law, or October 27, 2003, to conform § 5K2.0 to changes made by that Public Law, including changes to the appellate standard of review for decisions to depart from the guidelines. That directive has not been implemented yet in the following commentary.]".

The Commentary to § 5K2.0 is amended by striking "of this policy

statement" and inserting "of subsection (a)".

The Commentary to § 5K2.0 is amended by adding at the end the following:

"Section 401(b)(1) of Public Law 108–21 directly amended this policy statement to add subsection (b), effective April 30, 2003.".

Section 5K2.13 is amended by striking "or" before "(3)"; and by striking "public." and inserting "public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.".

The Commentary to § 5K2.13 is amended by adding at the end the following:

"Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.".

Section 5K2.20 is amended by striking "A sentence" and inserting "Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a sentence".

The Commentary to § 5K2.20 is amended by adding at the end the following:

"Background: Section 401(b)(3) of Public Law 108–21 directly amended this policy statement, effective April 30, 2003.".

Chapter Five, Part K, is amended by adding at the end the following:

"§ 5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.1.

(2) An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.".

Reason for Amendment: This amendment implements amendments to the guidelines made directly by the PROTECT Act, Pub. L. 108–21. In addition to amendments made directly by the PROTECT Act, this amendment makes technical and conforming amendments to those direct congressional amendments, pursuant to the Commission's authority to promulgate such technical and conforming amendments under section 401(m) of the PROTECT Act and 28 U.S.C. 994.

2. Amendment: Section 2A4.1 is amended in subsection (a) by striking "24" and inserting the following:

"(1) 24 (effective before, but not on or after, May 30, 2003).

(1) 32 (effective on and after May 30, 2003).";

in subsection (b)(4)(C), by inserting "(effective before, but not on or after, May 30, 2003)" after "level";

and by striking subsection (b)(5) as follows:

"(5) If the victim was sexually exploited, increase by 3 levels."

and inserting the following:

"(5) If the victim was sexually exploited:

(A) Increase by 3 levels (effective before, but not on or after, May 30, 2003).

(A) Increase by 6 levels (effective on and after May 30, 2003).".

The Commentary to § 2A4.1 captioned "Application Notes" is amended in Note 3 by inserting "(effective before, but not on or after, May 30, 2003)" after "resistance".

The Commentary to § 2A4.1 captioned "Background" is amended by adding at the end the following:

"Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21.".

Reason for Amendment: This amendment implements the directive to the Commission in section 104 of the PROTECT Act, Pub. L. 108–21.

Part Two: Section 994(p) Amendments

1. Amendment: Section 2A1.4(a)(1) is amended by striking "10" and inserting "12".

Section 2A1.4(a)(2) is amended by striking "14" and inserting "18".

Reason for Amendment: This amendment responds to a concern that the federal sentencing guidelines do not adequately reflect the seriousness of involuntary manslaughter offenses. Specifically, the Department of Justice, some members of Congress, and an ad hoc advisory group formed by the Commission to address Native American sentencing guideline issues expressed concern that most federal involuntary manslaughter cases involve vehicular homicides, which analysis of Commission data confirmed. These commentators also indicated that these offenses appear to be underpunished, particularly when compared to comparable cases arising under state law. This disparity with state punishments has been confirmed by studies undertaken by the Commission. In addition, Congress increased the maximum statutory penalty for involuntary manslaughter from three to six years' imprisonment in 1994.

In response to these concerns and the Commission's analysis, this amendment increases the base offense level in § 2A1.4(a)(2) for reckless involuntary manslaughter offenses from level 14 to level 18. This four level increase corresponds to an approximate 50 percent increase in sentence length for these offenses. This amendment also increases the base offense level in § 2A4.1(a)(1) for criminally negligent involuntary manslaughter offenses from level 10 to level 12. The two level increase represents an approximate 25 percent increase in the sentence length for these offenses.

2. Amendment: Sections 2B1.1, 2E5.3, 2J1.2, and 2T4.1, effective January 25, 2003 (see USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendment 647), are repromulgated with the following changes:

Section 2B1.1(a) is amended to read as follows:

"(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.".

Section 2B1.1(b)(12) is amended by striking "If the resulting" and all that follows through "to level 24."; and by inserting after subdivision (B) the following:

"(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.".

Section 2B1.1(b) is amended by striking the following:

"(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by 4 levels.";

and inserting the following:

"(14) If the offense involved—

(A) A violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) A violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.".

The Commentary to § 2B1.1 captioned "Application Notes" is amended by redesignating Notes 2 through 9 as Notes 3 through 10, respectively; by redesignating Notes 11 through 16 as Notes 13 through 18, respectively; by inserting after Note 1 the following:

"2. Application of Subsection (a)(1).—

(A) 'Referenced to This Guideline'.—For purposes of subsection (a)(1), an offense is 'referenced to this guideline' if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of § 1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of 'Statutory Maximum Term of Imprisonment'—For purposes of this guideline, 'statutory maximum term of imprisonment' means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.";

and by striking "10. Application of Subsection (b)(12)(B).—" and inserting "11. Application of Subsection (b)(12)(B).—".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, in subdivision (B)(ii)(IV) by striking "or more".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 13, as redesignated by this amendment, by striking "(b)(13)" each place it appears and inserting "(b)(14)"; by striking subdivision (A) and inserting the following:

"(A) Definitions.—For purposes of this subsection:

'Commodities law' means (i) the Commodities Exchange Act (7 U.S.C. 1 *et seq.*); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.

'Commodity pool operator' has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. 1a(4)).

'Commodity trading advisor' has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. 1a(5)).

'Futures commission merchant' has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. 1a(20)).

'Introducing broker' has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. 1a(23)).

'Investment adviser' has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

'Person associated with a broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)).

'Person associated with an investment adviser' has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).

'Registered broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(48)).

'Securities law' (i) means 18 U.S.C. 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.";

and in subdivision (B) by inserting "or commodities law" after "securities law" each place it appears.

The Commentary to § 2B1.1 captioned "Background" is amended in the first paragraph by striking the last sentence.

The Commentary to § 2C1.1 captioned "Application Notes" is amended in Note 2 by striking "Note 2" and inserting "Note 3".

The Commentary to § 2C1.7 captioned "Application Notes" is amended in Note 3 by striking "Note 2" and inserting "Note 3".

The Commentary to § 2J1.1 captioned "Application Notes" is amended in Note 1 by inserting "In General.—" before "Because".

The Commentary to § 2J1.1 captioned "Application Notes" is amended in Note 2 by inserting "Willful Failure to Pay Court-Ordered Child Support.—" before "For offenses".

The Commentary to § 2J1.1 captioned "Application Notes" is amended by adding at the end the following:

"3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is § 2B1.1. In such a case, § 2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 1 by inserting before the paragraph that begins "Substantial interference" the following:

"Definitions.—For purposes of this guideline:

'Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.".

The Commentary to § 2J1.2 captioned "Application Notes" is amended in Note 4 by inserting "Upward Departure Considerations.—" before "If a weapon"; by striking "a departure" and inserting "an upward departure"; and by inserting at the end the following:

"In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face), an upward departure would be warranted.".

Section 2J1.3(a) is amended by striking "12" and inserting "14".

Appendix A, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendments 647 and 648; *see also* this document, Amendment 5), is repromulgated without change.

Reason for Amendment: With this amendment the Commission continues its work to deter and punish economic and white collar crimes, building on its Economic Crime Package of 2001 and subsequent formation in early 2002 of an Ad Hoc Advisory Group on the Organizational Guidelines for sentencing corporations and other organizations. This 2003 amendment also implements directives in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the

"Act"), by making several modifications to §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2J1.2 (Obstruction of Justice), and 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records), as well as conforming changes to §§ 2J1.1 (Contempt), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), and 2T4.1 (Tax Table). The amendment also responds to increased statutory penalties for existing crimes and several severely punished new crimes created by the Act.

The directives in the Act generally pertain to serious fraud and related offenses and obstruction of justice offenses. Congress gave the Commission emergency amendment authority to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, fraud offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. This amendment expands upon the temporary emergency amendment effective January 25, 2003, and repromulgates it as a permanent amendment.

First, the amendment modifies the base offense level in § 2B1.1 to implement more fully the directive contained in section 905(b)(2) of the Act to consider whether the guidelines "for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act." Section 903 of the Act, for example, quadrupled the statutory maximum penalties for wire fraud and mail fraud from five to 20 years' imprisonment, while section 902 made attempts and conspiracies subject to these same heightened penalties. Specifically, the amendment provides a new higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to § 2B1.1 and the offense carries a statutory maximum term of imprisonment of 20 years or more. The alternative base offense levels are intended to calibrate better the base guideline penalty to the seriousness of the wide variety of offenses referenced to that guideline, as reflected by statutory maximum penalties established by Congress.

For those offenses to which the higher alternative base offense will apply (including wire fraud and mail fraud), the effect of the amendment is to limit the availability of a probation only sentence in Zone A of the sentencing table to offenses involving loss amounts of $10,000 or less, assuming a two level reduction for acceptance of responsibility. Prior to the amendment, a Zone A sentence was available for all offenses sentenced under § 2B1.1 involving loss amounts of $30,000 or less. Similarly, for those offenses for which the higher alternative base offense level will apply, the effect of the amendment is to require an imprisonment sentence in Zone D for offenses involving loss amounts of more than $70,000. Prior to the amendment, a Zone D sentence was required for all offenses sentenced under § 2B1.1 involving loss amounts of more than $120,000.

Second, the amendment expands the loss table at § 2B1.1(b)(1) to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, such as the serious corporate scandals that gave rise to several portions of the Act. Prior to the emergency amendment, the loss table at § 2B1.1(b)(1) provided sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The amendment adds two additional loss amount categories to the table; an increase of 28 levels for offenses in which the loss exceeded $200,000,000, and an increase of 30 levels for offenses in which the loss exceeded $400,000,000. These additions to the loss table address congressional concern regarding particularly extensive and serious fraud offenses and also more fully effectuate increases in statutory maximum penalties provided by the Act. The amendment also modifies the tax table in § 2T4.1 in a similar manner to maintain the longstanding proportional relationship between the loss table in § 2B1.1 and the tax table.

The amendment also adds a new factor to the general, enumerated factors that the court may consider in determining the amount of loss under § 2B1.1(b)(1). Specifically, the amendment adds the reduction in the value of equity securities or other corporate assets that resulted from the offense to the list of general factors set forth in Application Note 3(C) of § 2B1.1. This factor was added to provide courts additional guidance in determining loss in certain cases, particularly in complex white collar cases.

Third, the amendment addresses the directive contained in section 1104(b)(5) of the Act to "ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50." The amendment implements this directive by expanding the existing enhancement at § 2B1.1(b)(2) based on the number of victims involved in the offense. Prior to the emergency amendment, subsection (b)(2) provided a two level enhancement if the offense involved more than 10, but less than 50, victims (or was committed through mass-marketing), and a four level enhancement if the offense involved 50 or more victims. The amendment provides an additional two level increase, for a total of six levels, if the offense involved 250 or more victims. The Commission determined that an enhancement of this magnitude appropriately responds to the pertinent directive and accounts for the extensive nature of, and the large scale victimization caused by, such offenses.

Fourth, the amendment addresses directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Specifically, section 805(a)(4) directs the Commission to ensure that "a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims." In addition, section 1104(b)(1) directs the Commission to "ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses." The amendment implements these directives by expanding the scope of the existing enhancement at § 2B1.1(b)(12)(B).

Prior to the emergency amendment, § 2B1.1(b)(12)(B) provided a four level enhancement and a minimum offense

level of level 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The amendment expands the scope of this enhancement by providing two additional parts. The first part applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. The addition of this part reflects the Commission's determination that such an offense undermines the public's confidence in the securities and investment market much in the same manner as an offense that jeopardizes the safety and soundness of a financial institution undermines the public's confidence in the banking system. This part also reflects the likelihood that an offense that endangers the solvency or financial security of an employer of this size will similarly affect a substantial number of individual victims, without requiring the court to determine whether the solvency or financial security of each individual victim was substantially endangered.

A corresponding application note for § 2B1.1(b)(12)(B) sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. The list of factors that the court shall consider when applying the new enhancement includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce. As appropriate, the court may consider other factors not enumerated in the application note.

The amendment also modifies the application note to previously existing § 2B1.1(b)(12)(B), the financial institutions enhancement, to be consistent structurally with the new part of the enhancement. Prior to the emergency amendment, the presence of any one of the factors enumerated in the application note would trigger the financial institutions enhancement under § 2B1.1(b)(12)(B). Under the amendment, the application note to the financial institutions enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense substantially jeopardized the safety and soundness of a financial institution. The list of factors that the court shall consider when applying this enhancement includes references to insolvency, substantially reducing benefits to pensioners and insureds, and an inability to refund fully any deposit, payment, or investment on demand.

The second part added to § 2B1.1(b)(12)(B) by the amendment applies to offenses that substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense. The Commission concluded that the specificity of the directive in section 805(a)(4) required an enhancement focused specifically on conduct that endangers the financial security of individual victims. Thus, use of this part of the enhancement will be appropriate in cases in which there is sufficient evidence for the court to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of those victims. The Commission also determined that the enhancement provided in § 2B1.1(b)(12)(B) shall apply cumulatively with the enhancement at § 2B1.1(b)(2), which is based solely on the number of victims involved in the offense, to reflect the particularly acute harm suffered by victims of offenses to which the new parts of subsection (b)(12)(B) apply. To account for the overlapping nature of such conduct in some cases, however, the Commission added a provision at subsection (b)(12)(C) that limits the cumulative impact of subsections (b)(2) and (b)(12)(B) to eight levels, except for application of the minimum offense level of level 24.

Fifth, the amendment addresses the directive contained at section 1104(a)(2) of the Act to "consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." The emergency amendment implemented this directive by providing a new, four level enhancement that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company.

The amendment expands the scope of this enhancement to cover registered brokers and dealers, associated persons of a broker or dealer, investment advisers, and associated persons of an investment adviser. The amendment also expands the scope of this enhancement to apply if the offense involves a violation of commodities law and, at the time of the offense, the defendant was an officer or director of a futures commission merchant or introducing broker, a commodities trading advisor, or a commodity pool operator. The Commission concluded that a four level enhancement appropriately reflects the culpability of offenders who occupy such positions and who are subject to heightened fiduciary duties imposed by securities law or commodities law similar to duties imposed on officers and directors of publicly traded corporations. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and a corresponding application note provides that, in cases in which the new, four level enhancement applies, the existing two level enhancement for abuse of position of trust at § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

The corresponding application note also expressly provides that the enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud or commodities fraud statute (*e.g.*, 18 U.S.C. 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (*e.g.*, 18 U.S.C. 1341, prohibiting mail fraud), provided that the offense involved a violation of "securities law" or "commodities law" as defined in the application note.

Sixth, the amendment modifies § 2J1.2 to address the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. Specifically, section 805(a) of the Act directs the Commission to ensure that the base offense level and existing enhancements in § 2J1.2 are sufficient to deter and punish obstruction of justice offenses generally, and specifically are adequate in cases involving the destruction, alteration, or fabrication of a large amount of evidence, a large number of participants, the selection of evidence that is particularly probative or essential to the investigation, more than minimal planning, or abuse of a special skill or a position of trust. Section 1104(b) of the Act further directs the Commission to ensure that the "guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated."

The amendment implements these directives by making two modifications to § 2J1.2. First, the amendment increases the base offense level in § 2J1.2 from level 12 to level 14. Second, the amendment adds a new two level enhancement to § 2J1.2. This enhancement applies if the offense (1)

involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation. The amendment also adds an upward departure provision for offenses sentenced under § 2J1.2 that involve extreme acts of violence, for example, retaliating against a government witness by throwing acid in the witness's face. The Commission determined that existing adjustments in Chapter Three for aggravating role, § 3B1.1, and abuse of position of trust or use of special skill, § 3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Seventh, the amendment also increases the base offense level in the perjury guideline, § 2J1.3, from level 12 to level 14 in order to maintain the longstanding proportional relationship between the offense levels provided in the guidelines for perjury and obstruction of justice.

Eighth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, is referenced to § 2E5.3. Section 1520 provides a statutory maximum penalty of ten years' imprisonment for knowing and willful violations of document maintenance requirements as set forth in that section or in rules or regulations to be promulgated by the Securities and Exchange Commission pursuant to that section. The amendment also expands the existing cross reference in § 2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant violated 18 U.S.C. 1520 in order to obstruct justice, the cross reference provision in § 2E5.3 requires the court to apply § 2J1.2 instead of § 2E5.3. Other new offenses are listed in Appendix A (Statutory Index), as well as in the statutory provisions of the relevant guidelines.

Finally, the amendment amends the contempt guideline, § 2J1.1, by adding an application note clarifying that (1) § 2B1.1 is the most analogous guideline in a case involving a violation of a judicial order enjoining fraudulent behavior; and (2) the enhancement at § 2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply in such a case.

3. Amendment: Section 2B1.1(b) is amended by inserting after subsection (b)(12) the following:

"(13)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. 1030, and the offense involved (I) a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by 2 levels.

(ii) 18 U.S.C. 1030(a)(5)(A)(i), increase by 4 levels.

(iii) 18 U.S.C. 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.".

The Commentary to § 2B1.1 captioned "Statutory Provisions" is amended by inserting ", 2701" after "2332b(a)(1)".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 3(A)(v), as redesignated by Amendment 2, by striking subdivision (III) and inserting the following:

"(III) Offenses Under 18 U.S.C. 1030.—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.".

The Commentary to § 2B1.1 captioned "Application Notes" is amended by inserting before Note 13, as redesignated by Amendment 2, the following:

"12. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of subsection (b)(13):

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

'Government entity' has the meaning given that term in 18 U.S.C. 1030(e)(9).

'Personal information' means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

(B) Subsection (b)(13)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(13)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(12)(B), do not apply the enhancement under subsection (b)(12)(B).".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 18, as redesignated by Amendment 2, by adding at the end of subdivision (A)(ii) the following:

"An upward departure would be warranted, for example, in an 18 U.S.C. 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.";

by redesignating subdivision (B) as subdivision (C); and by inserting after subdivision (A) the following:

"(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(13)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.".

The Commentary to § 2B1.1 captioned "Background" is amended by adding at the end the following paragraph:

"Subsection (b)(13) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(13)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.".

Section 2B2.3(b)(1) is amended by striking "or " after "airport;" and by inserting after "residence" the following:

"; or (F) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security".

The Commentary to § 2B2.3 captioned "Application Notes" is amended in Note 1 by inserting after "United States Code." the following paragraph:

" 'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.";

and by inserting after "Instructions)." the following paragraph:

'Government entity' has the meaning given that term in 18 U.S.C. 1030(e)(9).".

Section 2B3.2(b)(3)(B) is amended to read as follows:

"(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of subdivisions (i)(I) through (i)(V), increase by 3 levels.".

The Commentary to § 2B3.2 captioned "Application Notes" is amended by striking Note 1 and inserting the following:

"1. Definitions.—For purposes of this guideline:

'Abducted,' 'bodily injury,' 'brandished,' 'dangerous weapon,' 'firearm,' 'otherwise used,' 'permanent or life-threatening bodily injury,' 'physically restrained,' and 'serious bodily injury' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

'Government entity' has the meaning given that term in 18 U.S.C. 1030(e)(9).".

The Commentary to § 2M3.2 captioned "Statutory Provisions" is amended by inserting "§ " before "793(a)"; and by inserting ", 1030(a)(1)" after "(g)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 2512 the following:

"18 U.S.C. 2701 2B1.1".

Reason for Amendment: This amendment addresses the serious harm and invasion of privacy that can result from offenses involving the misuse of, or damage to, computers. It implements the directive in section 225(b) of the Homeland Security Act of 2002, Pub. L. 107–296, which required the Commission to review, and if appropriate amend, the guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. 1030 (fraud and related activity in connection with computers) to ensure that the guidelines and policy statements reflect the serious nature and growing incidence of such offenses and the need for an effective deterrent and appropriate punishment. The directive further requires the Commission to consider the extent to which eight specific factors were or were not accounted for by the guidelines. The amendment responds to the directive by making several changes to §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2B2.3 (Trespass), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). These changes are designed to supplement existing guidelines and policy statements and thereby ensure that offenses under 18 U.S.C. 1030 are adequately addressed and punished.

First, the amendment adds a new specific offense characteristic at § 2B1.1(b)(13) with three alternative enhancements of two, four, and six levels. The first enhancement provides a two level increase for convictions under 18 U.S.C. 1030 that involve either (1) a computer system used to maintain or operate a critical infrastructure or used in furtherance of the administration of justice, national defense, or national security; or (2) an intent to obtain private personal information. The second enhancement provides a four level increase for a conviction under 18 U.S.C. 1030(a)(5)(A)(i), which requires a heightened showing of intent to cause damage. The third enhancement provides a six level increase, with a minimum offense level of level 24, for a conviction under 18 U.S.C. 1030 that resulted in a substantial disruption of a critical infrastructure. The graduated levels ensure incremental punishment for increasingly serious conduct, and were chosen in recognition of the fact that conduct supporting application of a more serious enhancement frequently will encompass behavior relevant to a lesser enhancement as well. Accordingly, the most serious applicable enhancement will apply in any particular case.

The minimum offense level of level 24 applicable to the third such enhancement was chosen to maintain parity with the minimum offense level that applies to an offense that substantially jeopardized the safety and soundness of a financial institution, substantially endangered the solvency or financial security of a publicly traded company or an organization of at least 1,000 employees, or substantially endangered the solvency or financial security of 100 or more victims. *See* § 2B1.1(b)(12)(B). Because of the potential overlap in certain cases, the commentary provides that the enhancement at § 2B1.1(b)(12)(B) will not apply in a case in which the conduct supporting the six level critical infrastructure enhancement is the only conduct that forms the basis for the § 2B1.1(b)(12)(B) enhancement.

The minimum offense level of level 24 applicable to the third enhancement also reflects the fact that some offenders to whom the enhancement may apply will be subject to a statutory maximum penalty of five years' imprisonment, *i.e.*, those convicted of an offense under 18 U.S.C. 1030(a)(5)(A)(ii). To ensure that the most egregious cases involving critical infrastructure are adequately addressed, the amendment also provides an encouraged upward departure for cases in which the disruption of the critical infrastructure has a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters.

A definition of critical infrastructure is provided in the commentary. This definition is derived in part from the definition of critical infrastructure in the USA PATRIOT Act (*see* Pub. L. 107–56, section 1016; 42 U.S.C. 5195c(e)) but was modified to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope. Examples of critical infrastructures are provided.

Second, the proposed amendment modifies the rule of construction relating to the calculation of loss in protected computer cases. This change was made to incorporate more fully the statutory definition of loss at 18 U.S.C. 1030(e)(11), added as part of the USA PATRIOT Act, and to clarify its application to all 18 U.S.C. 1030 offenses sentenced under § 2B1.1.

Third, the proposed amendment expands the upward departure note in § 2B1.1. That note provides that an upward departure may be warranted if an offense caused or risked substantial non-monetary harm, including physical harm. The amendment adds a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. 1030 involving damage to a protected computer that results in death.

Fourth, the amendment modifies § 2B2.3, to which 18 U.S.C. 1030(a)(3) (misdemeanor trespass on a government computer) offenses are referenced, and § 2B3.2, to which 18 U.S.C. 1030(a)(7) (extortionate demand to damage protected computer) offenses are referenced, to provide enhancements relating to computer systems used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security. The amendment expands the scope of existing enhancements to ensure that trespasses and extortions involving these types of important computer systems are addressed.

Finally, the amendment references offenses under 18 U.S.C. 2701 (unlawful access to stored communications) to § 2B1.1. Prior to the Act, a first offense under section 2701 was classified as a misdemeanor offense, and the guidelines did not reference the statute in Appendix A (Statutory Index). Given that the Act increased the penalties available for 18 U.S.C. 2701 offenses, the amendment references the statute in Appendix A. Section 2701 offenses are referenced to § 2B1.1 because such offenses involve the obtaining, altering, or denial of authorized access to stored wire or electronic communications, conduct that is related to fraud, theft, and property damage, which are covered by § 2B1.1.

4. Amendment: The Commentary to § 2B1.1 captioned "Application Notes", as amended by Amendment 3, is further amended in subdivision (A)(ii) of Note 18, as redesignated by Amendment 2, by adding at the end the following:

"An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.".

Section 2K1.3(a) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

"(3) 18, if the defendant was convicted under 18 U.S.C. 842(p)(2);".

Section 2K1.3(b)(3) is amended by inserting "(A) was convicted under 18 U.S.C. 842(p)(2); or (B)" after "defendant".

Section 2K1.3(c)(1) is amended by inserting "(A) was convicted under 18 U.S.C. 842(p)(2); or (B)" after "defendant".

The Commentary to § 2K1.3 captioned "Application Notes" is amended in Note 3 by striking "(3)" and inserting "(4)".

The Commentary to § 2K1.3 captioned "Application Notes" is amended in the second paragraph of Note 9 by striking "(3)" and inserting "(4)".

The Commentary to § 2K1.3 captioned "Application Notes" is amended in Note 11 by adding at the end the following new paragraph:

"In addition, for purposes of subsection (c)(1)(A), "that other offense" means, with respect to an offense under 18 U.S.C. 842(p)(2), the underlying Federal crime of violence.".

Section 2K1.4(a)(1)(B) is amended by striking "or a ferry" and inserting "a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use".

Section 2K1.4(a)(2) is amended to read as follows:

"(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or".

The Commentary to § 2K1.4 captioned "Statutory Provisions" is amended by inserting ", 2332f" after "2332a".

The Commentary to § 2K1.4 captioned "Application Notes" is amended in Note 1 by adding at the end the following new paragraph:

"'State or government facility', 'infrastructure facility', 'place of public use', and 'public transportation system' have the meaning given those terms in 18 U.S.C. 2332f(e)(3), (5), (6), and (7), respectively.".

Section 2M5.3 is amended in the heading by adding "or For a Terrorist Purpose" after "Organizations".

Section 2M5.3(b)(1) is amended in subdivision (C) by striking "or" after "explosives;"; in subdivision (D) by inserting "the intent," after "with" and by inserting a comma after "knowledge"; and by inserting "; or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act" after "(A) through (C)".

The Commentary to § 2M5.3 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; by inserting "§" before "2339B"; and by inserting ", 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B))" after "2339B".

The Commentary to § 2M5.3 captioned "Application Notes" is amended in Note 2(A) by inserting "funds or other" after "volume of the".

Section 2M6.1(a)(2) is amended by inserting "and" after "(a)(3),"; and by striking ", and (a)(5)".

Section 2M6.1(a)(3) is amended by inserting "or" after the semicolon.

Section 2M6.1(a)(4) is amended by inserting "(A)" after "if"; and by inserting "(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat." after "or".

Section 2M6.1(a) is amended by striking subdivision (5).

Section 2M6.1(b)(1) is amended by striking the comma after "(a)(2)" and

inserting "or"; and by striking ", or (a)(5)".

Section 2M6.1(b)(2) is amended by inserting "(A)" after "(a)(4)".

Section 2M6.1(b)(3) is amended by inserting "or" after "(a)(3),"; and by striking ", or (a)(5)".

The Commentary to § 2M6.1 captioned "Statutory Provisions" is amended by inserting "(only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D))," after "842(p)(2)"; and by striking ", but including any biological agent, toxin, or vector".

The Commentary to § 2M6.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "Select biological agent" by inserting "(A)" after "identified"; by inserting "and maintained" after "established"; and by striking "511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 CFR part 72." and inserting "351A of the Public Health Service Act (42 U.S.C. 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. 8401).".

The Commentary to § 2M6.1 captioned "Application Notes" is amended in Note 2 by striking "(a)(3)" each place it appears and inserting "(a)(4)(B)".

Chapter Two, Part Q, is amended by striking § 2Q1.4 in its entirety and inserting the following new guideline:

"§ 2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

(a) Base Offense Level (Apply the greatest):

(1) 26;

(2) 22, if the offense involved (A) a threat to tamper with a public water system; and (B) any conduct evidencing an intent to carry out the threat; or

(3) 16, if the offense involved a threat to tamper with a public water system but did not involve any conduct evidencing an intent to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense resulted in (A) a substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(c) Cross References

(1) If the offense resulted in death, apply § 2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

(3) If the offense involved extortion, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 42 U.S.C. 300i–1.

Application Notes:

1. Definitions.—For purposes of this guideline, 'permanent or life-threatening bodily injury' and 'serious bodily injury' have the meaning given those terms in Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

3. Departure Provisions.—

(A) Downward Departure Provision.—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) Upward Departure Provisions.—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. See Application Note 4 of § 3A1.4 (Terrorism).".

Chapter Two, Part Q, is amended by striking § 2Q1.5 in its entirety.

Section § 2S1.1(b)(1)(B)(iii) is amended by striking "terrorism,".

The Commentary to § 2S1.1 captioned "Statutory Provisions" is amended by inserting", 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(C))" after "1957".

The Commentary to § 2S1.3 captioned "Statutory Provisions" is amended by inserting "(but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. 1960(b)(1)(A) and (B))" after "1960".

The Commentary to § 2X2.1 captioned "Statutory Provisions" is amended by inserting ", 2339C(a)(1)(A)" after "2339A".

The Commentary to § 2X2.1 captioned "Application Notes" is amended in Note 1 by inserting "or § 2339C(a)(1)(A)" after "2339A"; and by inserting ", or provided or collected funds for," after "supported".

Section 2X3.1(a) is amended to read as follows:

"(a) Base Offense Level:

(1) 6 levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level 4.

(3)(A) The base offense level under this guideline shall be not more than level 30, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall be not more than level 20.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. 2339 or 2339A; or (ii) the conduct involved harboring a person who committed any offense listed in 18

U.S.C. 2339 or 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. 2332b(g)(5). In such a case, the base offense level under this guideline shall be not more than level 30, as provided in subdivision (A).".

The Commentary to § 2X3.1 captioned "Statutory Provisions" is amended by inserting ", 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C (a)(1)(A))" after "2339A".

The Commentary to § 2X3.1 captioned "Application Notes" is amended in Note 1 by inserting ", or in the case of a violation of 18 U.S.C. 2339C(c)(2)(A), 'underlying offense' means the violation of 18 U.S.C. 2339B with respect to which the material support or resources were concealed or disguised" after "that offense)".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1960 by inserting "2S1.1," before "2S1.3";

by inserting after the line referenced to 18 U.S.C. 2332d the following new line:

"18 U.S.C. 2332f 2K1.4, 2M6.1";

by inserting after the line referenced to 18 U.S.C. 2339B the following new lines:

"18 U.S.C. 2339C(a)(1)(A) 2X2.1
18 U.S.C. 2339C(a)(1)(B) 2M5.3
18 U.S.C. 2339C(c)(2)(A) 2X3.1
18 U.S.C. 2339C(c)(2)(B) 2M5.3, 2X3.1";

and in the line referenced to 42 U.S.C. 300i–1 by striking ", 2Q1.5".

Reason for Amendment: This amendment is a three part amendment that (1) further responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56; (2) responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188; and (3) responds to the Terrorist Bombings Preparedness and Response Act of 2002, Pub. L. 107–197.

First, this amendment makes changes to the money laundering and transactions structuring guidelines to complete work begun in 2002 to address the provisions of the USA PATRIOT Act. The amendment eliminates the six level enhancement for terrorism in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity) because such conduct is adequately accounted for by the terrorism adjustment at § 3A1.4 (Terrorism). The terrorism adjustment at § 3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5). Therefore, if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism, as defined in § 3A1.4, that adjustment will apply. This amendment also provides for the treatment of certain offenses under 18 U.S.C. 1960. The amendment changes Appendix A (Statutory Index) to refer violations of 18 U.S.C. 1960 to both §§ 2S1.1 and 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Case or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Referring violations of 18 U.S.C. 1960(b)(1)(C) to § 2S1.1 is appropriate because the essence of this offense is money laundering, rather than structuring transactions to evade reporting requirements.

The amendment also raises the maximum offense level in § 2X3.1 (Accessory After the Fact) from level 20 to level 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense. The Commission determined that the heightened maximum offense level of level 30 is appropriate for offenses involving the harboring of terrorists because of the relative seriousness of those offenses. Specifically, the heightened maximum offense level applies in any case in which the defendant is convicted under 18 U.S.C. 2339 or 2339A or in which the conduct involved harboring a person who committed any offense listed under those statutes, or who committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5).

Second, the amendment responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The amendment refers certain new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, § 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy).

The amendment also responds to amendments made to the Safe Drinking Water Act (42 U.S.C. 300i–1(a)) made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Section 1432(a) of the Safe Drinking Water Act prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from five years' imprisonment to 20 years' imprisonment. Section 1432(b) of the Act prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from three years' imprisonment to ten years' imprisonment.

The amendment consolidates §§ 2Q1.5 (Threatened Tampering with Public Water System) and 2Q1.4 (Tampering or Attempted Tampering with Public Water System). This consolidation reflects the similar manner in which threats to carry out a nuclear, biological, or chemical weapons offense are treated under § 2M6.1. Three alternative base offense levels are provided for the substantive offense and for a threat to carry out the substantive offense, either accompanied or unaccompanied by other conduct evidencing an intent to carry out the threat.

The amendment also increases the base offense level for offenses involving tampering and threatened tampering with a public water system. The amendment increases the base offense level for tampering with a public water system from level 18 to level 26. The six level enhancement for the risk of death or serious bodily injury (in the predecessor guideline) is incorporated into the base offense level, as are two levels for bodily injury (similar to the treatment of this aggravated conduct in the consumer product tampering guideline). A graduated enhancement for serious or life-threatening bodily injury, modeled after the nuclear, biological, and chemical guideline and the consumer product tampering guideline, is added. Likewise, the base offense level for threatening to tamper with a public water system, without conduct evidencing an intent to carry out the threat, is increased from level 10 to level 16. A base offense level of level 22 is provided if there is conduct evidencing an intent to carry out the threat. For point of comparison, the existing base offense levels for threatening communications under § 2A6.1 (Threatening or Harassing Communications) is level 12, and for threatened use of nuclear, biological, and chemical weapons under § 2M6.1 is level 20. These substantial increases in the base offense levels for threatened tampering of a public water system are

provided to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Additionally, the enhancement in subsection (b)(2) regarding the disruption of the public water system has been expanded slightly to make it consistent with similar enhancements in other related guidelines, such as the nuclear, biological, and chemical guideline, § 2M6.1.

This amendment adds an invited upward departure provision in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. 43. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the amendment adds an invited upward departure provision in the commentary of § 2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Third, the amendment amends Appendix A (and the Statutory Provisions of the pertinent Chapter Two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, and provides conforming amendments within a number of Chapter Two guidelines to incorporate more fully the new offenses into the offense guidelines. Section 102 of the Act created a new offense at 18 U.S.C. 2332f, which provides in subsection (a) that "whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (1) with the intent to cause death or serious bodily injury, or (2) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss" and in subsection (b) that "whoever attempts or conspires to commit [such] an offense" shall be punished as provided under 18 U.S.C. 2332a(a). Section 2332a offenses currently are referenced to §§ 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1. The amendment refers this new offense to those guidelines as well. In addition, the amendment amends the alternative base offense levels in § 2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. 2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and "places of public use".

Section 202 of the Act created a new offense at 18 U.S.C. 2339C. The amendment refers the new offense at 18 U.S.C. 2339C(1)(A) to § 2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the amendment treats these offenses in the same manner as 18 U.S.C. 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is also made in § 2X2.1 to provide a definition for the "underlying offense" that is aided and abetted.

The amendment also refers the new offense at 18 U.S.C. 2339C(a)(1)(B) to § 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to § 2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the provision of material support to terrorists, which appropriately is referenced to § 2M5.3. The amendment expands § 2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Additionally, 18 U.S.C. 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were (1) provided in violation of 18 U.S.C. 2339B, or (2) provided or collected in violation of 18 U.S.C. 2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. 2339C(c) is 10 years. The amendment references offenses under 18 U.S.C. 2339C(c)(2)(A) to § 2X3.1 (Accessory After the Fact), because the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. 2339B. An amendment is made in § 2X3.1 to provide a definition of the "underlying offense" to which the defendant is an accessory.

The amendment references offenses under 18 U.S.C. 2339C(c)(2)(B) to §§ 2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(1)(A), the offense should be sentenced under § 2X3.1. This is because the concealment occurs with respect to funds the defendant knows are to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B), the offense should be sentenced under § 2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is added to the Statutory Provisions of §§ 2M5.3 and 2X3.1.

Finally, an amendment is made to § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transaction Involving Explosive Materials) to add an additional base offense level of level 18 for certain offenses committed under 18 U.S.C. 842(p)(2) involving explosives, destructive devices, or weapons of mass destruction. The statute is referenced in Appendix A to §§ 2K1.3 and 2M6.1. The applicable offense levels at § 2M6.1 are

levels 42 and 28. The applicable base offense level at § 2K1.3 is level 12. The base offense level of level 12 appears to be disproportionately low compared with other 20 year offenses and compared with the treatment of 18 U.S.C. 842(p)(2) offenses under § 2M6.1. This is especially true in light of the definition of destructive device, defined at 18 U.S.C. 921(a)(4) to include any explosive, incendiary, or poison gas (1) bomb; (2) grenade; (3) rocket having a propellant charge of more than four ounces; (4) missile having an explosive or incendiary charge of more than one-quarter ounce; (5) mine; or (6) device similar to any of the devices described in the preceding clauses.

The amendment makes the enhancement at § 2K1.3(b)(3) and the cross reference at § 2K1.3(c)(1) applicable to 18 U.S.C. 842(p)(2) offenses. In cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18. Alternatively, the cross reference at subsection (c)(1) references such cases either to § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Guideline)), or to the most analogous homicide guideline if death resulted, if the resulting offense level is greater. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

5. Amendment: Part C of Chapter Two and §§ 3D1.2 and 5E1.2, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendment 648), are repromulgated without change. Appendix A, effective January 25, 2003 (*see* USSC Guidelines Manual Supplement to the 2002 Supplement to Appendix C, Amendments 647 and 648; see also this document, Amendment 2), is repromulgated without change.

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, (the "BCRA"), with an effective date of January 25, 2003. (*See* Amendment 648.) This amendment repromulgates without change the emergency amendment as a permanent amendment.

This amendment implements the directive from Congress contained in the BCRA to the effect that the Commission "promulgate a guideline, or amend an existing guideline * * *, for penalties for violations of the Federal Election Campaign Act of 1971 [the "FECA"] and related election laws * * *." The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years, and for more serious offenses, the maximum term of imprisonment is five years.

To punish these offenses effectively, the Commission chose to create a new guideline at § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property). The Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. The offenses that will be sentenced under § 2C1.8 include: violations of the statutory prohibitions against "soft money" (2 U.S.C. 441i); restrictions on "hard money" contributions (2 U.S.C. 441a); contributions by foreign nationals (2 U.S.C. 441e); restrictions on "electioneering communications" (as defined in 2 U.S.C. 434(f)(3)(C)); certain fraudulent misrepresentations (2 U.S.C. 441h); and "conduit contributions" (2 U.S.C. 441f).

The new guideline has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses (sentenced under § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) at a base offense level of level 6), nevertheless are more serious due to the additional harm, or the potential harm, of corrupting the elective process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct that may occur during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at § 2C1.8(b)(1), that uses the fraud loss table in § 2B1.1 incrementally to increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for "a large aggregate amount of illegal contributions."

Second, the new guideline provides alternative enhancements, at § 2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of attempts by foreign entities to tamper with the United States' election processes.

Third, the new guideline provides alternative enhancements of two levels each, at § 2C1.8(b)(3), when the offense involves either "governmental funds," defined broadly to include federal, state, or local funds, or an intent to derive "a specific, identifiable non-monetary Federal benefit" (*e.g.*, a presidential pardon). Each of these enhancements responds to specific directives of the BCRA.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in "30 or more illegal transactions." After a review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a "large number" in that context. This enhancement also responds to a specific directive in the BCRA to the effect that the Commission provide enhanced sentencing for cases involving "a large number of illegal transactions."

Fifth, the new guideline provides a four level enhancement, at § 2C1.8(b)(5), if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." This enhancement responds to information, received from the Federal Election Commission and the Public Integrity Section of the Department of Justice, which characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate,

if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under § 2C1.8.

Section 3D1.2 (Groups of Closely Related Counts) has been amended, consistent with the principles underlying the rules for grouping multiple counts of conviction, to include § 2C1.8 offenses among those in which the offense level is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm. (*See* § 3D1.2(d)).

Finally, § 5E1.2 (Fines for Individual Defendants) has been amended specifically to reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range unless the defendant began negotiations with the Federal Election Commission only after the defendant became aware that the defendant was the subject of a criminal investigation.

6. Amendment: Section 2D1.1(c) is amended in Note (B) of the "*Notes to Drug Quantity Table" by adding at the end the following new paragraph:

"The term 'Oxycodone (actual)' refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 9 by striking "or" after "amphetamine,"; and by inserting ", or oxycodone" after "methamphetamine".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10, in the Drug Equivalency Tables, in the subdivision captioned "Schedule I or II Opiates*" by striking "1 gm of Oxycodone = 500 gm of marihuana" and inserting "1 gm of Oxycodone (actual) = 6700 gm of marihuana".

Reason for Amendment: This amendment responds to proportionality issues in the sentencing of oxycodone trafficking offenses. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin. This prescription drug generally is sold in pill form and, prior to this amendment, the sentencing guidelines established penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines; and (2) because different amounts of oxycodone are found in pills of identical weight.

As an example of the first issue, the drug Percocet contains, in addition to oxycodone, the non-prescription pain reliever acetaminophen. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. In contrast, the weight of the oxycodone accounts for a substantially greater proportion of the weight of an OxyContin pill. To illustrate this difference, a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg with oxycodone accounting for 0.9 percent of the total weight of the pill. By comparison, the weight of an OxyContin pill containing 10 mg of oxycodone is approximately 135 mg with oxycodone accounting for 7.4 percent of the total weight. Consequently, prior to this amendment, trafficking 364 Percocet pills or 1,481 OxyContin pills resulted in the same five year sentence of imprisonment. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.8 grams of actual oxycodone while the 1,481 OxyContin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of OxyContin. Three different amounts of oxycodone (10, 20, and 40 mg) are contained in pills of identical weight (135 mg). As a result, prior to this amendment, an individual trafficking in a particular number of OxyContin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues, the amendment changes the Drug Equivalency Tables in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide sentences for oxycodone offenses using the weight of the actual oxycodone instead of calculating the weight of the entire pill. The amendment equates 1 gram of actual oxycodone to 6,700 grams of marihuana. This equivalency keeps penalties for offenses involving 10 mg OxyContin pills identical to levels that existed prior to the amendment, substantially increases penalties for all other doses of OxyContin, and decreases somewhat the penalties for offenses involving Percocet.

7. Amendment: Section 2L1.2(b)(1)(A)(vii) is amended by striking "committed for profit".

The Commentary to § 2L1.2 captioned "Application Notes" is amended in Note 1 by striking subdivision (A)(iv) and inserting the following:

"(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.".

The Commentary to § 2L1.2 captioned "Application Notes" is amended in Note 1 by striking subdivision (B) and inserting the following:

"(B) Definitions.—For purposes of subsection (b)(1):

(i) 'Alien smuggling offense' has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(N)).

(ii) 'Child pornography offense' means (I) an offense described in 18 U.S.C. 2251, 2251A, 2252, 2252A, or 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Crime of violence' means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An offense under Federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. 5845(a), or of an explosive material as defined in 18 U.S.C. 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

(VI) An offense under state or local law consisting of conduct that would

have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) 'Human trafficking offense' means (I) any offense described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, 1588, 1589, 1590, or 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) 'Sentence of imprisonment' has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) 'Terrorism offense' means any offense involving, or intending to promote, a 'Federal crime of terrorism', as that term is defined in 18 U.S.C. 2332b(g)(5).".

Section 2L1.2 captioned "Application Notes" is amended by striking Note 2 and inserting the following:

"2. Definition of 'Felony'.—For purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.".

Section 2L1.2 captioned "Application Notes" is amended by striking Notes 4 and 5; by redesignating Note 3 as Note 4; and by inserting after Note 2 the following:

"3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).".

Section 2L1.2 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) and inserting the following:

"(B) 'Three or more convictions' means at least three convictions for offenses that are not considered 'related cases', as that term is defined in Application Note 3 of § 4A1.2 (Definitions and Instructions for Computing Criminal History).".

Reason for Amendment: In 2001 the Commission comprehensively revised § 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions. In response to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors, particularly along the southwest border between the United States and Mexico, this amendment builds upon the 2001 amendment by clarifying the meaning of some of the terms used in § 2L1.2(b)(1).

First, the amendment adds commentary to define the following offenses: "alien smuggling", "child pornography", and "human trafficking." Prior to the amendment, these offenses received a 16 level increase but were not defined. The lack of definitions led to litigation regarding the meaning and scope of some of these terms. The Commission has determined that these offenses warrant application of the 16 level enhancement even though some of these offenses, as defined by the amendment, may not meet the statutory definition of an aggravated felony in 8 U.S.C. 1101(a)(43).

The amendment provides a definition of "alien smuggling offense" in a manner consistent with the "aggravated felony" definition in 8 U.S.C. 1101(a)(43)(N). This statutory definition excludes "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person)". This definition generally is consistent with the guideline's previous terminology of "alien smuggling offense committed for profit," and results in a 16 level increase only for the most serious of such offenses. The new definition also responds to concerns about whether an alien smuggling offense includes the offenses of harboring or transporting aliens. By explicitly incorporating the statutory definition of alien smuggling within the guideline definition, the amendment, in effect, adopts the Fifth Circuit's interpretation of "alien smuggling". *See United States* v. *Solis-Campozano*, 312 F.3d 164 (5th Cir. 2002) (holding that "alien smuggling offense" was not limited to the "offense of alien smuggling" but includes transporting aliens brought into the country as well).

Second, the amendment adds commentary that clarifies the meaning of the term "crime of violence" by providing that the term "means any of the following: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." The previous definition often led to confusion over whether the specified offenses listed in that definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense "the use, attempted use, or threatened use of physical force against the person of another." The amended definition makes clear that the enumerated offenses are always classified as "crimes of violence," regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another.

Third, the amendment adds commentary at Application Note 1(B)(vii) explaining that the term "sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release. The Commission's approach in clarifying this definition is consistent with the case law interpreting the term and the use of the term in Chapter Four of the guidelines. *See, e.g., United States* v. *Moreno-Cisneros*, 319 F.3d 456 (9th Cir. 2003) (holding that the length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release); *United States* v. *Compian-Torres*, 320 F.3d 514 (5th Cir. 2003) (same). Compare *United States* v. *Hidalgo-Macias*, 300 F.3d 281 (2d Cir. 2002) (holding that the imposition of a sentence of imprisonment following revocation of probation is a modification of the original sentence and must be considered part of the sentence imposed for the original offense), *with United States* v. *Rodriguez-Arreola*, 313 F.3d 1064 (8th Cir. 2002) (holding that the term "sentence imposed" when applied to an indeterminate sentence is the maximum term that a defendant may serve).

Fourth, the amendment adds commentary providing that the enhancements in subsection (b)(1) do

not apply to a conviction for an offense committed before the defendant was eighteen years of age, unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. This provision is consistent with the approach in Chapter Four of the guidelines.

The amendment also makes other minor technical and clarifying changes.

8. Amendment: Chapter Three, Part B, is amended by adding at the end the following new guideline:

"§ 3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

If—

(1) The defendant was convicted of a drug trafficking crime or a crime of violence; and

(2) (Apply the greater)—

(A) The offense involved the use of body armor, increase by 2 levels; or

(B) The defendant used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense, increase by 4 levels.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Body armor' means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. *See* 18 U.S.C. 921(a)(35).

'Crime of violence' has the meaning given that term in 18 U.S.C. 16.

'Drug trafficking crime' has the meaning given that term in 18 U.S.C. 924(c)(2).

'Offense' has the meaning given that term in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Use' means (A) active employment in a manner to protect the person from gunfire; or (B) use as a means of bartering. 'Use' does not mean mere possession (*e.g.*, 'use' does not mean that the body armor was found in the trunk of the car but not used actively as protection). 'Used' means put into 'use' as defined in this paragraph.

2. Application of Subdivision (2)(B).—Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant', for purposes of subdivision (2)(B), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Background: This guideline implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).".

Reason for Amendment: This amendment responds to the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273. The directive requires the Sentencing Commission to review and amend the guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in 18 U.S.C. 16) or drug trafficking crime (as defined in 18 U.S.C. 924(c)) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act included a sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the amendment creates a new Chapter Three adjustment at § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). The new adjustment provides for the greater of a two level adjustment if the defendant was convicted of a crime of violence or a drug trafficking crime and the offense involved the use of body armor, or a four level adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

An application note defines "drug trafficking crime" (as defined in 18 U.S.C. 924(e)(2)). This definition includes any felony punishable under the Controlled Substances Act. The application note also defines "crime of violence" (as defined in 18 U.S.C. 16). This definition includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of "crime of violence" and "drug trafficking offense" used in a number of other guidelines. The definition of "body armor" is the same as the statutory definition provided in 18 U.S.C. 921(a)(35).

An application note makes clear that in order for § 3B1.5 to apply, the body armor must be used, *i.e.*, actively employed either in a manner to protect the person from gunfire or as a means of bartering. Mere possession is insufficient to trigger the adjustment.

Another application note explains that in order for the heightened, four level adjustment to apply, the defendant must have used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

9. Amendment: Section 5G1.3(b) is amended to read as follows:

"(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) The court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) The sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.".

Section 5G1.3(c) is amended by inserting "involving an undischarged term of imprisonment" after "case".

The Commentary to § 5G1.3 captioned "Application Notes" is amended by striking Notes 2 through 7 and inserting the following:

"2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under § 1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level

under § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgement in a Criminal Case Order (i) the applicable subsection (*e.g.*, § 5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to § 5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under § 1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) The factors set forth in 18 U.S.C. 3584 (referencing 18 U.S.C. 3553(a));

(ii) The type (*e.g.*, determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) The time served on the undischarged sentence and the time likely to be served before release;

(iv) The fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) Any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of § 7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to § 5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* § 5K2.23 (Discharged Terms of Imprisonment).".

Chapter Five, Part K, is amended by adding at the end the following new policy statement:

"§ 5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A sentence below the applicable guideline range may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.".

Reason for Amendment: This amendment addresses a number of issues in § 5G1.3 (Imposition of a

Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

First, this amendment clarifies the rule for application of subsection (b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment by stating that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. By clarifying the application of subsection (b), this amendment addresses conflicting litigation regarding the meaning of "fully taken into account." Compare, *e.g.*, *United States* v. *Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is "fully taken into account" if and only if the guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding), *with United States* v. *Fuentes*, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been "fully taken into account" when the prior offense is part of the same course of conduct, common scheme, or plan).

Second, this amendment addresses how this guideline applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. Under this amendment, the sentence for the instant offense may be imposed concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment; however, the Commission recommends a consecutive sentence in this situation. This amendment also resolves a circuit conflict concerning whether the imposition of such sentence is required to be consecutive. The amendment follows holdings of the Second, Third, and Tenth Circuits stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. *See United States* v. *Maria*, 186 F.3d 65, 70–73 (2d Cir. 1999); *United States* v. *Swan*, 275 F.3d 272, 279–83 (3d Cir. 2002); *United States* v. *Tisdale*, 248 F.3d 964, 977–79 (10th Cir. 2001).

Third, this amendment provides a new downward departure provision in § 5K2.23 (Discharged Terms of Imprisonment) regarding the effect of discharged terms of imprisonment. This provision replaces the departure provision previously set forth in Application Note 7 of § 5G1.3. By placing the departure provision in Chapter Five, Part K, this amendment brings structural clarity to § 5G1.3 because the guideline applies to undischarged, rather than discharged, terms of imprisonment. For ease of application, the new commentary in § 5G1.3 provides a reference to § 5K2.23.

Finally, this proposed amendment addresses a circuit conflict regarding whether the sentencing court may grant "credit" or adjust the instant sentence for time served on a prior undischarged term covered under subsection (c). *Compare Ruggiano* v. *Reish*, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with *United States* v. *Fermin*, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). The amendment makes clear that the court may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c). However, the amendment adds commentary to § 5G1.3 to provide that courts may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense.

10. Amendment: Section 1B1.1 is amended by inserting before subsection (a) the following new paragraph:

"Except as specifically directed, the provisions of this manual are to be applied in the following order:".

The Commentary to § 1B1.1 captioned "Application Notes" is amended by striking Note 4 and inserting the following:

"4. (A) Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in § 2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.

(B) Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under § 2B3.1(b)(3) and an official victim adjustment under § 3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.".

The Commentary to § 1B1.1 captioned "Application Notes" is amended by adding at the end the following:

"7. Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: § 2B1.1 (Theft, Property Destruction, and Fraud).".

The Commentary to § 2A3.1 captioned "Application Notes" is amended in Note 1 by striking "'Prohibited sexual conduct'" and all that follows through "child pornography." and inserting the following:

"'Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense. 'Prohibited sexual conduct' includes the production of child pornography, but does not include trafficking in, or possession of, child pornography.".

The Commentary to § 2B1.1 captioned "Statutory Provisions" is amended by inserting "19 U.S.C. 2401f;" before "29 U.S.C.".

The Commentary to § 2C1.3 captioned "Statutory Provisions" is amended by inserting "; 40 U.S.C. 14309(a), (b)" after "1909".

Section § 2D1.11(e)(1) is amended in the subdivision captioned "List I Chemicals" by striking the period after "Gamma-butyrolactone" and inserting a semi-colon; and by adding at the end the following:

"714 G or more of Red Phosphorus.".

Section 2D1.11(e)(2) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 214 G but less than 714 G of Red Phosphorus;".

Section 2D1.11(e)(3) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 71 G but less than 214 G of Red Phosphorus;".

Section 2D1.11(e)(4) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 50 G but less than 71 G of Red Phosphorus;".

Section 2D1.11(e)(5) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 29 G but less than 50 G of Red Phosphorus;".

Section 2D1.11(e)(6) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 7 G but less than 29 G of Red Phosphorus;".

Section 2D1.11(e)(7) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 6 G but less than 7 G of Red Phosphorus;".

Section 2D1.11(e)(8) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 4 G but less than 6 G of Red Phosphorus;".

Section 2D1.11(e)(9) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 3 G but less than 4 G of Red Phosphorus;".

Section 2D1.11(e)(10) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"Less than 3 G of Red Phosphorus;".

The Commentary to 2G2.1 captioned "Application Notes" is amended by striking Note 6 and inserting the following:

"6. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 victims.".

Section 2G2.2(b)(5) is amended by inserting ", receipt, or distribution" after "transmission".

The Commentary to § 2H2.1 captioned "Statutory Provisions" is amended by inserting ", 1015(f)" after "597".

The Commentary to § 2K2.5 captioned "Statutory Provisions" is amended by inserting "; 40 U.S.C. 5104(e)(1)" after "930".

The Commentary to § 2N2.1 captioned "Statutory Provisions" is amended by inserting ", 8313" after "7734".

The Commentary to § 2R1.1 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; and by striking "§ 1" and inserting "§§ 1, 3(b)".

The Commentary to § 4B1.5 captioned "Application Notes" is amended Note 4(A) by striking "(i) means" and inserting "means any of the following: (i)"; by striking "includes" each place it appears; by inserting "or" before "(iii)"; and by striking "; and (iv)" and inserting ". It".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. 7734 the following new line:

"7 U.S.C. 8313 2N2.1";

by inserting after the line referenced to 15 U.S.C. 1 the following new line:

"15 U.S.C. 3(b) 2R1.1";

in the line referenced to 18 U.S.C. 1015 by inserting "(a)–(e)" after "1015";

by inserting after the line referenced to 18 U.S.C. 1015(a)–(e), as amended by this amendment, the following new line:

"18 U.S.C. 1015(f) 2H2.1";

by inserting after the line referenced to 19 U.S.C. 2316 the following new line:

"19 U.S.C. 2401f 2B1.1"; and

by inserting after the line referenced to 38 U.S.C. 3502 the following new lines:

"40 U.S.C. 5104(e)(1) 2K2.5

40 U.S.C. 14309(a), (b) 2C1.3".

Reason for Amendment: This six-part amendment makes several technical and conforming changes to various guideline provisions.

First, this amendment makes changes to § 1B1.1 (Application Instructions) to (1) provide an instruction making clear that the application instructions are to be applied in the order presented in the guideline; (2) provide an application note making clear that, absent an instruction to the contrary, Chapter Two enhancements, Chapter Three adjustments, and determinations under Chapter Four triggered by the same conduct are to be applied cumulatively; and (3) provide an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.

Second, this amendment adds red phosphorus to the Chemical Quantity Table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) in response to a recent classification of red phosphorus as a List I chemical.

Third, this amendment conforms the departure provision in Application Note 6 of § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to Application Note 12 of § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

Fourth, this amendment amends subsection (b)(5) of § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) to include receipt and distribution in the enhancement for use of a computer.

Fifth, this amendment restructures the definitions of "prohibited sexual conduct" in §§ 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of "means" and "includes".

Finally, this amendment responds to new legislation and makes other technical amendments as follows:

(1) Amends Appendix A (Statutory Index) and § 2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security and Rural Investment Act of 2002 (the "Act"), Pub. L. 107–171. The first new offense provides a statutory maximum of one year of imprisonment for violating the Animal Health Protection Act (Subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or article for distribution or sale. The Act also provides a statutory maximum of ten years' imprisonment for a subsequent violation of either offense.

(2) Amends Appendix A and § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) in response to a new offense (19 U.S.C. 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment

assistance to qualifying agricultural commodity producers.

(3) Amends Appendix A, §§ 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The proposed amendment references 40 U.S.C. 5104(e)(1) to § 2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of one year. The amendment references 40 U.S.C. 14309(a) and (b) to § 2C1.3.

(4) Amends Appendix A and § 2H2.1 (Obstructing an Election or Registration) to provide a guideline reference for offenses under 18 U.S.C. 1015(f). Prior to this amendment, 18 U.S.C. 1015 was referenced to §§ 2B1.1, 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). However, 18 U.S.C. 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. Accordingly, the amendment references 18 U.S.C. 1015(f) to § 2H2.1 (Obstructing an Election or Registration).

(5) Amends Appendix A and § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) in response to a new offense (15 U.S.C. 3) created by section 14102 (the Antitrust Technical Corrections Act of 2002) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. The new offense provides a statutory maximum term of imprisonment of three years, and a maximum fine of $10,000,000 for a corporation, or $350,000 for an individual, for monopolizing, or attempting or conspiring to monopolize, any part of the trade or commerce in or between any states, or territories of the United States, or between any such states, or territories of the United States and any foreign nations.

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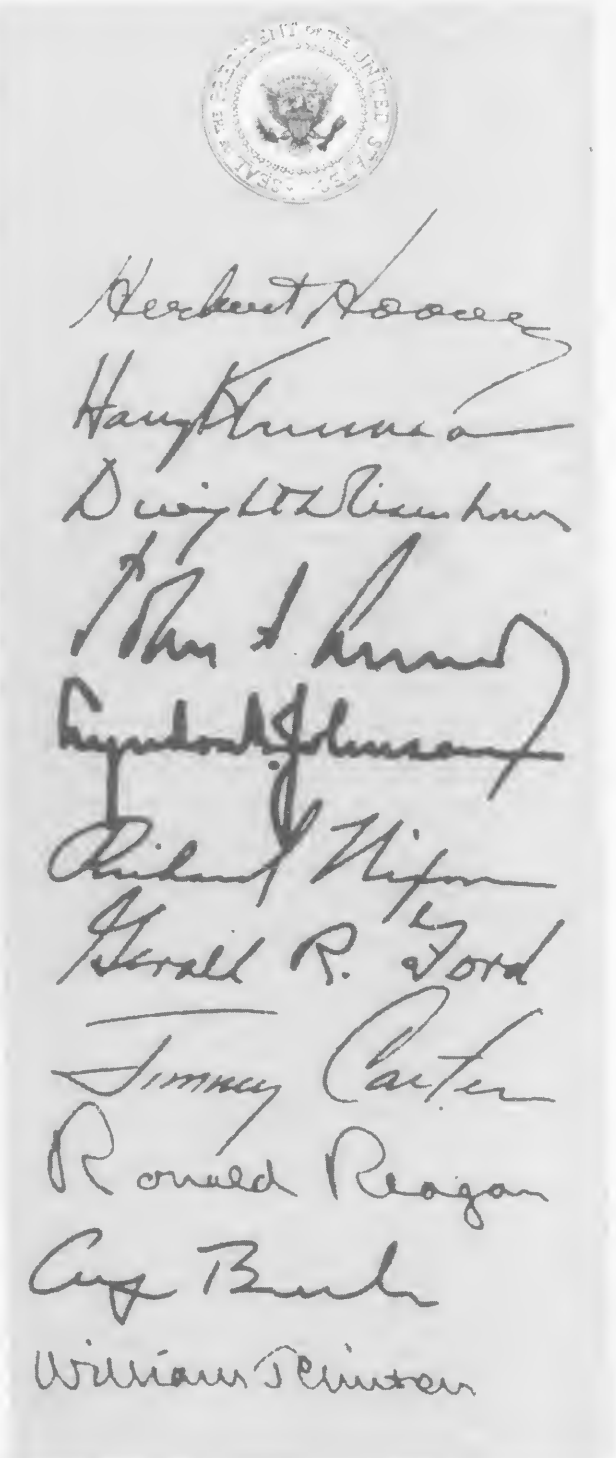

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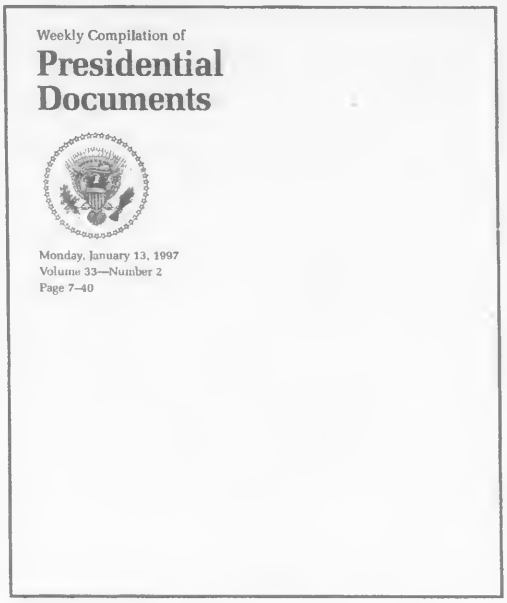

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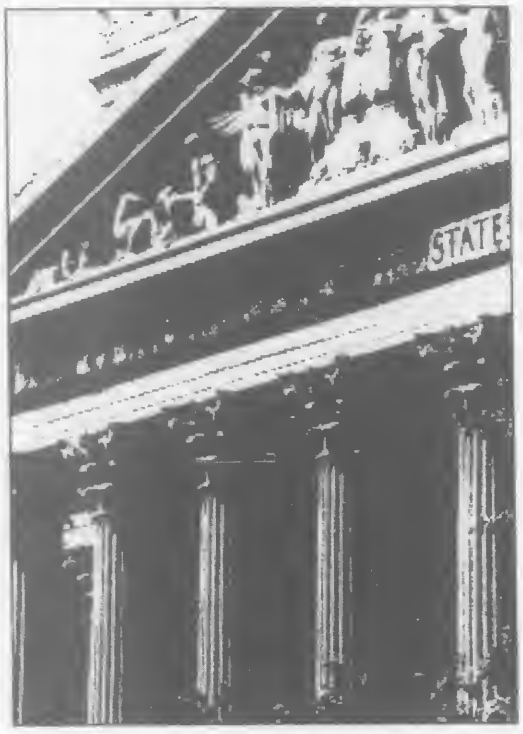

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